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and

The Editorial Staff of LexisNexis®

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Title 52. Waters of the State, Ports, and Watercraft

Title 53. Wills, Trusts, and Administration of Estates

Including Acts of the 2021 Session of the General Assembly of Georgia
and Annotations taken from the Georgia Reports
and the Georgia Appeals Reports

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THE STATE OF GEORGIA

OFFICE OF SECRETARY OF STATE

I, Brad Raffensperger, Secretary of State of the State of Georgia, do hereby certify that

the statutory portion of the Official Code of Georgia Annotated contained in this volume is a true and correct copy of such material as enacted by the General Assembly of Georgia; all as the same appear on file and record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 1st day of July, in the year of our Lord Two Thousand and Twenty-one and of the Independence of the United States of America the Two Hundred and Forty-Fifth.

Brad Raffensperger

Brad Raffensperger, Secretary of State

Preface

This volume cumulates and replaces the 2011 edition of Volume 40 of the Official Code of Georgia Annotated, as supplemented by the 2020 Cumulative Supplement. The 2011 Volume 40 and its 2020 Supplement may be recycled or, if so desired, retained for historical purposes. This volume contains all laws specifically codified in Titles 52 and 53 by the General Assembly through the 2021 Session. This volume also contains case annotations reflecting decisions posted to LexisNexis® through May 14, 2021. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LexisNexis® citations will be made.

Additionally, LexisNexis® has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; Mercer Law Review; Georgia State Bar Journal; American Law Reports; American Jurisprudence 2d; American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts; American Jurisprudence Trials; Corpus Juris Secundum; and Uniform Laws Annotated. Also included, where appropriate, are cross references to the Official Code of Georgia Annotated.

This volume retains amendment notes and effective date notes for Acts passed during the 2019, 2020, and 2021 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2019 Session of the General Assembly, the user should consult the Georgia Laws.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.

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Cross references. — Rivers, coastal waters, beaches, T. 12, C. 5.

Law reviews. — For article discussing the legislative changes in water law and the Environmental Protection Division in 1976 and 1977, see 29 Mercer L. Rev. 131 (1977). For article discussing recent legislative and judicial developments in zoning, planning and environmental law, see 31 Mercer L. Rev. 89 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 70 Am. Jur. 2d, Shipping, §§ 5, 6, 7, 178.

Am. Jur. Trials. — Preparing a Ship Collision Case for Trial, 17 Am. Jur. Trials 501.

C.J.S. — 94 C.J.S., Waters, §§ 1, 2, 297 et seq.

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CHAPTER 1

GENERAL PROVISIONS

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ARTICLE 1

PROTECTION OF TIDEWATERS

Law reviews. — For note on 1992 enactment of this article, see 9 Ga. St. U.L. Rev. 354 (1992).

52-1-1. Short title.

This article shall be known and may be cited as the "Protection of Tidewaters Act."

History. — Code 1981, § 52-1-1, enacted by Ga. L. 1992, p. 2317, § 1.

52-1-2. Legislative findings and declaration of policy; public trust doctrine for tidewaters.

The General Assembly finds and declares that the State of Georgia became the owner of the beds of all tidewaters within the jurisdiction of the State of Georgia as successor to the Crown of England and by the common law. The State of Georgia continues to hold title to the beds of all tidewaters within the state, except where title in a private party can be traced to a valid Crown or state grant which explicitly conveyed the beds of such tidewaters. The General Assembly further finds that the

State of Georgia, as sovereign, is trustee of the rights of the people of the state to use and enjoy all tidewaters which are capable of use for fishing, passage, navigation, commerce, and transportation, pursuant to the common law public trust doctrine. Therefore, the General Assembly declares that the protection of tidewaters for use by the state and its citizens has more than local significance, is of equal importance to all citizens of the state, is of state-wide concern, and, consequently, is properly a matter for regulation under the police powers of the state. The General Assembly further finds and declares that structures located upon tidewaters which are used as places of habitation, dwelling, sojournment, or residence interfere with the state's proprietary interest or the public trust, or both, and must be removed to ensure the rights of the state and the people of the State of Georgia to the use and enjoyment of such tidewaters. It is declared to be a policy of this state and the intent of this article to protect the tidewaters of the state by authorizing the commissioner of natural resources to remove or require removal of certain structures from such tidewaters in accordance with the procedures and within the timetable set forth in this article.

History. — Code 1981, § 52-1-2, enacted by Ga. L. 1992, p. 2317, § 1.

Law reviews. — For survey article on real property law, see 59 Mercer L. Rev. 371 (2007). For survey article on law of torts, see 59 Mercer L. Rev. 397 (2007).

JUDICIAL DECISIONS

Claim of private ownership not supported by illegible documents. — Illegible and indecipherable documents did not support a claim of ownership to certain tidal marshland, and, pursuant to O.C.G.A. § 52-1-2, a trial court correctly ruled that the marshland at issue was owned by the State of Georgia. Black v. Floyd, 280 Ga. 525, 630 S.E.2d 382 (2006).

52-1-3. Definitions.

As used in this article, the term:

(1) "Board" means the Board of Natural Resources.

(2) "Commissioner" means the commissioner of natural resources.

(3) "Structure" means any structure located upon any tidewaters of this state, whether such structure is floating upon such tidewaters and is made fast by the use of lines, cables, anchors, or pilings, or any combination thereof, or is built upon pilings embedded in the beds of such tidewaters when such structure is being or has been used or is capable of being used as a place of habitation, dwelling, sojournment, or residence for any length of time; is not being used or is not capable of being used as a means of transportation upon such tidewaters; and is not owned, occupied, or possessed pursuant to a permit issued by the commissioner pursuant to Code Section 52-1-10. Such structures may include, but are not limited to, vessels not being used in

navigation; provided, however, that structures do not include live-aboard vessels, as defined in Code Section 52-7-8.4. Structures shall also not include fishing camps, bait shops, restaurants, or other commercial establishments permitted under Part 4 of Article 4 of Chapter 5 of Title 12, the "Coastal Marshlands Protection Act of 1970," as amended, which do not discharge sewage into the waters of this state and are operated in conformance with the zoning ordinances, if any, of the municipality or county in which they are located.

(4) "Tidewaters" means the sea and all rivers and arms of the sea that are affected by the tide, where the tide rises and falls, which are capable of use for fishing, passage, navigation, commerce, or transportation, and which are located within the jurisdiction of the State of Georgia.

History. — Code 1981, § 52-1-3, enacted by Ga. L. 1992, p. 2317, § 1; Ga. L. 1993, p. 91, § 52; Ga. L. 2012, p. 1074, § 4/SB 319; Ga. L. 2019, p. 741, § 2/HB 201.

The 2019 amendment, effective January 1, 2020, in paragraph (3), substituted "live-aboard vessels, as defined in Code Section 52-7-8.4" for "live-aboards, as defined in Code Section 12-5-282" near the end of the next-to-last sentence, and substituted "this state" for "the state" in the middle of the last sentence.

52-1-4. Declaration of public nuisance.

The existence of a structure as defined in this article is declared to be a public nuisance and unlawful.

History. — Code 1981, § 52-1-4, enacted by Ga. L. 1992, p. 2317, § 1.

52-1-5. Order for removal of structures; service and posting of order.

Whenever the commissioner determines that any structure as defined in this article exists, the commissioner may issue an order directed "TO ALL PERSONS IN POSSESSION OR CLAIMING OWNERSHIP OF THIS STRUCTURE." The order shall describe the structure in reasonable detail, shall set forth the unlawful nature of the structure, and shall order that the structure be removed within a reasonable time after the order becomes final to be prescribed in such order. Any order issued by the commissioner under this article shall be signed by the commissioner. Any such order shall become final unless any person in possession of the structure or any person claiming ownership of or an interest in the structure requests in writing a hearing pursuant to Code Section 52-1-6. The order shall apprise the person or persons of their right to request a hearing and of the procedures necessary to obtain a hearing pursuant to Code Section 52-1-6. The order, in all cases, shall be served by initially publishing the

same once each week for two successive weeks in a newspaper printed and published in the county in which the structure is located or in a newspaper of general circulation in the county in which the structure is located. The order shall then be served by a peace officer upon any person of suitable age and discretion found in possession of the structure or, if no such person is found in possession of the structure, the peace officer shall securely post the order in a conspicuous place on the structure. Any order so posted must be protected from the weather by encasing same in a weatherproof, transparent material. The date of service shall be stated within the order. The return of the service signed by the peace officer and filed in the office of the commissioner, stating that a copy of such order was served either upon a person of suitable age and discretion in possession of the structure personally or that no such person was found in possession of the structure and that a copy of the order was posted in a conspicuous place on the structure in accordance with this Code section, shall be sufficient evidence as to the service of such person in possession; provided, however, that where the address of the person or persons claiming ownership of the structure is known, a copy of such order shall be mailed to such persons by certified mail or statutory overnight delivery as part of the service process during the period of time that the order is being published in the newspaper.

History. — Code 1981, § 52-1-5, enacted by Ga. L. 1992, p. 2317, § 1; Ga. L. 2000, p. 1589, § 3.

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the Act shall be applicable with respect to notices delivered on or after July 1, 2000.

52-1-6. Hearings and review.

Any person in possession of the structure or any person claiming ownership of or an interest in the structure which is the subject of an order issued pursuant to Code Section 52-1-5 or Code Section 52-1-10 shall, upon petition in writing within 30 days after service of such order, have a right to a hearing before an administrative law judge appointed by the board. Such petition must be filed with the administrative law judge and must be received by the administrative law judge within such 30 day period. The hearing before the administrative law judge shall be conducted in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," and the rules and regulations adopted by the board pursuant thereto. Unless waived by the commissioner, any person seeking a hearing has the burden of going forward with evidence regarding possession or ownership of or an interest in the structure, and the administrative law judge shall take evidence and hear arguments on this issue and thereafter make a ruling on this issue before continuing with the hearing. Any decision of the administrative law judge shall constitute the final decision of the board, and any party to the hearing, including the commissioner, shall have the right of judicial

review thereof in accordance with Chapter 13 of Title 50. The hearing and review procedure provided for the petitioner in this Code section is to the exclusion of all other means of hearing or review.

History. — Code 1981, § 52-1-6, enacted by Ga. L. 1992, p. 2317, § 1.

52-1-7. Seizure and removal of structures; notice; sale or disposal.

Whenever any order issued by the commissioner pursuant to Code Section 52-1-5 becomes final or whenever any order adverse to the owner or possessor of a structure issued by the administrative law judge pursuant to Code Section 52-1-6 becomes final by being unappealed or affirmed upon appeal, the structure shall be deemed contraband. Upon the structure's becoming contraband, the commissioner or his duly authorized agents shall seize and remove said structure and may sell or dispose of such structure in such manner as the commissioner may direct; provided, however, that prior to such seizure the commissioner shall securely post a notice in a conspicuous place on the structure and, if the address of any person or persons claiming ownership of or any person or persons in possession of the structure is known, the commissioner shall mail a copy of such notice to such person or persons by certified mail or statutory overnight delivery informing such person or persons claiming ownership of or in possession of the structure that such structure is considered contraband as a matter of law and that unless the structure is removed within 30 days of the date of the notice, the commissioner, through his duly appointed agents, shall seize and remove said structure and may sell or dispose of such structure in such manner as the commissioner may direct. Any such notice so posted must be protected from the weather by encasing same in a weatherproof, transparent material. In the event the commissioner sells the structure or the materials of such structure, he may credit and retain the proceeds of such sale against the cost of the removal and disposal of the structure and any remaining balance shall be deposited in the state treasury to the credit of the general fund.

History. — Code 1981, § 52-1-7, enacted by Ga. L. 1992, p. 2317, § 1; Ga. L. 2000, p. 1589, § 3.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1992, "structure's" was substituted for "structure" in the second sentence.

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the Act shall be applicable with respect to notices delivered on or after July 1, 2000.

52-1-8. Remedies not exclusive.

Except as otherwise provided for in this article, any remedy provided for in this article shall be in addition to any other remedy available to the state, any littoral proprietor within this state, or any other citizen of this state.

History. — Code 1981, § 52-1-8, enacted by Ga. L. 1992, p. 2317, § 1.

52-1-9. Allowance of time for finding new residence.

In the event the commissioner determines that the seizure and removal of a structure shall result in the removal of a person or persons from a permanent residence, the commissioner may, at the end of the 30 day period set forth in Code Section 52-1-7, allow a reasonable period of time for the structure inhabitants to find a new residence prior to the removal of the structure.

History. — Code 1981, § 52-1-9, enacted by Ga. L. 1992, p. 2317, § 1.

52-1-10. Issuance of permit; term; revocation.

(a) The commissioner may, after July 1, 1992, issue a permit for a maximum term of five years for the location, usage, and possession of a structure which existed on February 1, 1992, upon tidewaters of the state; provided, however, that no permit shall be issued for any structure which does not conform to and meet the requirements of rules and regulations promulgated by the board establishing minimum standards of sanitation, safety, and construction. No permit shall be issued for a term ending after June 30, 1997.

(b) No permit issued by the commissioner pursuant to subsection (a) of this Code section shall be renewable and a permit may be revoked by the commissioner at any time during its term for failure to continue to meet the requirements of the board's rules.

History. — Code 1981, § 52-1-10, enacted by Ga. L. 1992, p. 2317, § 1.

ARTICLE 2

RIGHT OF PASSAGE

Law reviews. — For note on 1992 enactment of this article, see 9 Ga. St. U.L. Rev. 354 (1992).

52-1-30. Short title.

This article shall be known and may be cited as the "Right of Passage Act."

History. — Code 1981, § 52-1-30, enacted by Ga. L. 1992, p. 2317, § 1.

52-1-31. Legislative findings and declaration of policy.

The General Assembly finds and declares that by the common law the citizens of this state have an inherent right to use as highways all navigable streams and rivers which are capable of transporting boats loaded with freight in the regular course of trade either for the whole or part of the year and that this right of use extends to the entire surface of the stream or river from bank to bank. The General Assembly further finds that the common law regarding such right of use has not been modified by statute nor is it incompatible with the federal or state constitutions. Therefore, the General Assembly declares that ensuring the right of use by all the citizens of this state of navigable streams and rivers which are capable of transporting boats loaded with freight in the regular course of trade either for the whole or part of the year as highways has more than local significance, is of equal importance to all citizens of the state, is of state-wide concern, and, consequently, is properly a matter for regulation under the police powers of the state. The General Assembly further finds and declares that structures located upon navigable streams and rivers which are used as places of habitation, dwelling, sojournment, or residence interfere with the citizens' right to use the entire surface of such streams and rivers which are capable of transporting boats loaded with freight in the regular course of trade either for the whole or part of the year from bank to bank as highways and must be removed to ensure the rights of the citizens of this state to such usage. It is declared to be a policy of this state and the intent of this article to ensure such rights of the citizens of this state by authorizing the commissioner of natural resources to remove or require removal of certain structures from such streams and rivers which are capable of transporting boats loaded with freight in the regular course of trade either for the whole or part of the year in accordance with the procedures and within the timetable set forth in this article.

History. — Code 1981, § 52-1-31, enacted by Ga. L. 1992, p. 2317, § 1.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1992, "constitutions" was substituted for "Constitutions" in the second sentence.

52-1-32. Definitions.

As used in this article, the term:

(1) "Board" means the Board of Natural Resources.

(2) "Commissioner" means the commissioner of natural resources.

(3) "Navigable stream or river" means a stream or river which is capable of transporting boats loaded with freight in the regular course of trade either for the whole or a part of the year.

(4) "Structure" means any structure located upon any navigable stream or river of this state, whether such structure is floating upon such navigable stream or river and is made fast by the use of lines, cables, anchors, or pilings, or any combination thereof, or is built upon pilings embedded in the beds of such navigable stream or river when such structure is being, has been, or is capable of being used as a place of habitation, dwelling, sojournment, or residence for any length of time; is not being used or is not capable of being used as a means of transportation upon such navigable stream or river; and is not owned, occupied, or possessed pursuant to a permit issued by the commissioner pursuant to Code Section 52-1-39. Such structures may include, but are not limited to, vessels not being used in navigation; provided, however, that structures do not include live-aboard vessels, as defined in Code Section 52-7-8.4. Structures shall also not include fishing camps, bait shops, restaurants, or other commercial establishments permitted under Part 4 of Article 4 of Chapter 5 of Title 12, the "Coastal Marshlands Protection Act of 1970," as amended, which do not discharge sewage into the waters of this state and are operated in conformance with the zoning ordinances, if any, of the municipality or county in which they are located.

History. — Code 1981, § 52-1-32, enacted by Ga. L. 1992, p. 2317, § 1; Ga. L. 1993, p. 91, § 52; Ga. L. 2012, p. 1074, § 5/SB 319; Ga. L. 2019, p. 741, § 3/HB 201.

The 2019 amendment, effective January 1, 2020, in paragraph (4), substituted "live-aboard vessels, as defined in Code Section 52-7-8.4" for "live-aboards, as defined in Code Section 12-5-282" near the end of the next-to-last sentence, and substituted "this state" for "the state" in the middle of the last sentence.

52-1-33. Declaration of public nuisance.

The existence of a structure as defined in this article is declared to be a public nuisance and unlawful.

History. — Code 1981, § 52-1-33, enacted by Ga. L. 1992, p. 2317, § 1.

52-1-34. Order for removal of structures; service and posting of order.

Whenever the commissioner determines that any structure as defined in this article exists, the commissioner may issue an order directed "TO ALL PERSONS IN POSSESSION OR CLAIMING OWNERSHIP OF THIS STRUCTURE." The order shall describe the structure in reasonable detail, shall set forth the unlawful nature of the structure, and shall order that the structure be removed within a reasonable time after the order becomes final to be prescribed in such order. Any order issued by the commissioner under this article shall be signed by the commissioner. Any such order shall become final unless any person in possession of the structure or any person claiming ownership of or an interest in the structure requests in writing a hearing pursuant to Code Section 52-1-35. The order shall apprise the person or persons of their right to request a hearing and of the procedures necessary to obtain a hearing pursuant to Code Section 52-1-35. The order, in all cases, shall be served by initially publishing the same once each week for two successive weeks in a newspaper printed and published in the county in which the structure is located or in a newspaper of general circulation in the county in which the structure is located. The order shall then be served by a peace officer upon any person of suitable age and discretion found in possession of the structure or if no person is found in possession of the structure, the peace officer shall securely post the order in a conspicuous place on the structure. Any order so posted must be protected from the weather by encasing same in a weatherproof, transparent material. The date of service shall be stated within the order. The return of the service signed by the peace officer and filed in the office of the commissioner, stating that a copy of such order was served upon a person of suitable age and discretion in possession of the structure personally or that no such person was found in possession of the structure and that a copy of the order was posted in a conspicuous place on the structure in accordance with this Code section, shall be sufficient evidence as to the service of such person in possession; provided, however, that where the address of the person or persons claiming ownership of the structure is known, a copy of such order shall be mailed to such persons by certified mail or statutory overnight delivery as part of the service process during the period of time that the order is being published in the newspaper.

History. — Code 1981, § 52-1-34, enacted by Ga. L. 1992, p. 2317, § 1; Ga. L. 2000, p. 1589, § 3.

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the Act shall be applicable with respect to notices delivered on or after July 1, 2000.

52-1-35. Hearings and review.

Any person in possession of the structure or any person claiming ownership of or an interest in the structure which is the subject of an order issued pursuant to Code Section 52-1-34 or Code Section 52-1-39 shall, upon petition in writing within 30 days after service of such order, have a right to a hearing before an administrative law judge appointed by the board. Such petition must be filed with the administrative law judge and must be received by the administrative law judge within such 30 day period. The hearing before the administrative law judge shall be conducted in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," and the rules and regulations adopted by the board pursuant thereto. Unless waived by the commissioner, any person seeking a hearing has the burden of going forward with evidence regarding possession or ownership of or an interest in the structure, and the administrative law judge shall take evidence and hear arguments on this issue and thereafter make a ruling on this issue before continuing with the hearing. Any decision of the administrative law judge shall constitute the final decision of the board, and any party to the hearing, including the commissioner, shall have the right of judicial review thereof in accordance with Chapter 13 of Title 50. The hearing and review procedure provided for the petitioner in this Code section is to the exclusion of all other means of hearing or review.

History. — Code 1981, § 52-1-35, enacted by Ga. L. 1992, p. 2317, § 1.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1992, "Code Section 52-1-39" was substituted for "Code section 52-1-39" in the first sentence.

52-1-36. Seizure and removal of structures; notice; sale or disposal.

Whenever any order issued by the commissioner pursuant to Code Section 52-1-34 becomes final or whenever any order adverse to the owner or possessor of a structure issued by the administrative law judge pursuant to Code Section 52-1-35 becomes final by being unappealed or affirmed upon appeal, the structure shall be deemed contraband. Upon the structure's becoming contraband, the commissioner or his duly authorized agents shall seize and remove said structure and may sell or dispose of such structure in such manner as the commissioner may direct; provided, however, that prior to such seizure the commissioner shall securely post a notice in a conspicuous place on the structure and, if the address of any person or persons claiming ownership of or any person or persons in possession of the structure is known, the commissioner shall mail a copy of such notice to such person or persons by certified mail or statutory overnight delivery informing such person or persons claiming ownership of or in possession of the structure that such structure is considered contraband as a

matter of law and that unless the structure is removed within 30 days of the date of the notice, the commissioner, through his duly appointed agents, shall seize and remove said structure and may sell or dispose of such structure in such manner as the commissioner may direct. Any such notice so posted must be protected from the weather by encasing same in a weatherproof, transparent material. In the event the commissioner sells the structure or the materials of such structure, he may credit and retain the proceeds of such sale against the cost of the removal and disposal of the structure and any remaining balance shall be deposited in the state treasury to the credit of the general fund.

History. — Code 1981, § 52-1-36, enacted by Ga. L. 1992, p. 2317, § 1; Ga. L. 2000, p. 1589, § 3.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1992, "structure's" was substituted for "structure" in the second sentence.

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the Act shall be applicable with respect to notices delivered on or after July 1, 2000.

52-1-37. Remedies not exclusive.

Except as otherwise provided for in this article, any remedy provided for in this article shall be in addition to any other remedy available to the state, any riparian owner within this state, or any other citizen of this state. Further, nothing in this article shall be construed as limiting any right that the state or any citizen of this state has regarding the right of passage on any stream or river in this state whether or not it is navigable as "navigable stream or river" is defined in this article.

History. — Code 1981, § 52-1-37, enacted by Ga. L. 1992, p. 2317, § 1.

52-1-38. Allowance of time for finding new residence.

In the event the commissioner determines that the seizure and removal of a structure shall result in the removal of a person or persons from a permanent residence, the commissioner may, at the end of the 30 day period set forth in Code Section 52-1-36, allow a reasonable period of time for the structure inhabitants to find a new residence prior to the removal of the structure.

History. — Code 1981, § 52-1-38, enacted by Ga. L. 1992, p. 2317, § 1.

52-1-39. Issuance of permit; term; revocation.

(a) The commissioner may, after July 1, 1992, issue a permit for a maximum term of five years for the location, usage, and possession of a structure which existed on February 1, 1992, upon a navigable river or

navigable stream of the state; provided, however, that no permit shall be issued for any structure which does not conform to and meet the requirements of rules and regulations promulgated by the board establishing minimum standards of sanitation, safety, and construction. No permit shall be issued for a term ending after June 30, 1997.

(b) No permit issued by the commissioner pursuant to subsection (a) of this Code section shall be renewable and a permit may be revoked by the commissioner at any time during its term for failure to continue to meet the requirements of the board's rules.

History. — Code 1981, § 52-1-39, enacted by Ga. L. 1992, p. 2317, § 1.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1992, "issue" was substituted for "issued" in the first sentence of subsection (a).

CHAPTER 2

GEORGIA PORTS AUTHORITY

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Law reviews. — For article, "Public Authorities: Legislative Panacea?," see 5 J. of Pub. L. 387 (1956). For article noting the exclusion of public authorities from the Georgia Administrative Procedure Act, see 1 Ga. St. B.J. 269 (1965).

JUDICIAL DECISIONS

Jurisdiction of National Labor Relations Board. — As an "employer," the ports authority is not subject to the jurisdiction of the National Labor Relations Board. International Longshoremen's Ass'n v. Georgia Ports Auth., 217 Ga. 712, 124 S.E.2d 733, cert. denied, 370 U.S. 922, 82 S. Ct. 1561, 8 L. Ed. 2d 503 (1962).

Agreement with third party fixing terms of employment of port authority personnel. — Ports authority in the operation of the docks and warehouses at its Savannah terminals is without authority to enter into an agreement with any third party fixing the terms and conditions of the employment of personnel working for the authority. International Longshoremen's Ass'n v. Georgia Ports Auth., 217 Ga. 712, 124 S.E.2d 733, cert. denied, 370 U.S. 922, 82 S. Ct. 1561, 8 L. Ed. 2d 503 (1962).

OPINIONS OF THE ATTORNEY GENERAL

Georgia Ports Authority is an agency of the state, and hence is not an "employer" under the National Labor Relations Act which defines an employer as any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned government corporation, or any federal reserve bank, or any state or political subdivision thereof. 1954-56 Op. Att'y Gen. p. 636.

Zoning ordinances. — Real property of Georgia Ports Authority is not subject to local zoning ordinances of Glynn County. 1985 Op. Att'y Gen. No. U84-11.

Environmental ordinances. — Georgia Ports Authority was not bound by a county ordinance mandating certain environmental reporting requirements. 1996 Op. Att'y Gen. No. 96-4.

52-2-1. Short title.

This chapter may be cited as the "Georgia Ports Authority Act."

History. — Ga. L. 1945, p. 464, § 1.

JUDICIAL DECISIONS

Cited in State Ports Auth. v. Arnall, 201 Ga. 713, 41 S.E.2d 246 (1947).

52-2-2. Definitions.

As used in this chapter, the term:

(1) "Authority" means the Georgia Ports Authority created by Code Section 52-2-4.

(2) "Bonds" or "revenue bonds" means any bonds issued by the authority under this chapter, including refunding bonds.

(3) "Cost of the project" means the cost of acquisition and construction, the cost of all lands, properties, rights, easements, and franchises acquired, the cost of all machinery and equipment, financing charges, interest prior to and during construction or installation and for up to three years after completion of construction or installation, cost of engineering, architectural, and legal expenses and of plans and specifications and other expenses necessary or incident to determining the feasibility or practicability of the project, administrative expense, the costs of establishing and maintaining any necessary funds and reserve funds with respect to the financing or operation of any project, and such other expenses as may be necessary or incident to the financing herein authorized, including the fees and costs of trustees, paying agents, remarketing agents, and other fiscal agents, costs of bond insurance, letter of credit fees, reimbursement agreement fees, and other loan, credit enhancement, or guarantee fees and, to the completion of construction or installation of any project, the

placing of the same in operation, and the condemnation of property necessary for such construction, installation, and operation.

(4) "Harbor" includes any place natural or artificial in which vessels capable of moving articles of commerce on water may be loaded, unloaded, or accommodated.

(5) "Port" and "seaport" include any place natural or artificial in which seagoing vessels may be sheltered or loaded or unloaded.

(6) "Project" includes wharves, docks, ships, piers, quays, elevators, cranes, cargo handling equipment, computer hardware and software, technology, compresses, refrigeration storage plants, and warehouses and may include buildings and facilities or equipment and machinery to be used in the manufacturing, processing, assembling, storing, or handling of any cargo, agricultural or manufactured produce or products or produce and products of mining or industry, if the use and operation thereof, in the judgment of the authority, will result in the increased use of port facilities, the development of the system of state docks, or, in connection therewith, promote the agricultural, industrial, and natural resources of this state; provided, however, that no such building or facility shall be constructed by the authority unless the building or facility is located on or in the environs of property in which the authority has an interest. Any project may include other structures and any and all facilities needful for the convenient use of the same in the aid of commerce, including the dredging of harbors and approaches thereto and the construction of belt-line railroads, railroad sidings, roads, highways, bridges, causeways, and approaches, necessary or useful in connection therewith, and shipping facilities and transportation facilities incident thereto and useful or convenient for the use thereof, including terminal railroads, and also airports, seaplane bases, and air transportation terminals. There may be included as a part of any project any public utility facilities necessary or desirable to supply public utility services to other parts of such project or to the users of any of the facilities of the authority, which public utility facilities may include, without limitation, facilities for the supplying of electricity, gas, and water and for the collection and disposal of storm and sanitary sewage. There may be included as part of any project all appurtenances, equipment, and machinery of every kind and nature necessary or desirable for the full utilization of the project.

History. — Ga. L. 1945, p. 464, § 3; Ga. L. 1946, p. 60, § 2; Ga. L. 1949, p. 778, § 4; Ga. L. 1963, p. 342, § 1; Ga. L. 1964, p. 88, § 1; Ga. L. 2010, p. 897, § 1/HB 1060.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 25 Am. Jur. Pleading and Practice Forms, Wharves, § 1.

C.J.S. — 80 C.J.S., Shipping, § 4.

52-2-3. Projects which may be considered self-liquidating; lease or sale of manufacturing or processing facilities; inclusion in projects of leased facilities and facilities acquired for use as ports.

Any project shall be deemed self-liquidating if, in the judgment of the authority, the revenues and earnings of the authority or of the project or from the terminal or facilities of which the project shall become a part will be sufficient to pay the cost of constructing, maintaining, repairing, and operating the project and to pay the principal and interest of revenue bonds which may be issued for the cost of such project. Any buildings or facilities acquired by the authority under this chapter which are to be utilized in the manufacturing, processing, assembling, storing, or handling of any agricultural or manufactured produce or products or produce and products of mining or industry, which may be acquired by the authority for operation by a corporation, entity, or persons other than the authority, as distinguished from facilities acquired by the authority for operation by it as a port and allied facilities for the direct use of the public, shall be acquired and financed under this chapter only if, prior to the issuance of bonds therefor, the authority shall have entered into a lease or leases thereof or an agreement or agreements for the sale thereof pursuant to the terms of which the lessees or purchasers shall pay to the authority such rentals or installment purchase payments, or both, as upon the basis of determinations and findings to be made by the authority will be fully sufficient to pay principal of and interest on the bonds issued by the financing thereof, to build up and maintain any reserves deemed by the authority to be advisable in connection therewith, and to pay the cost of maintaining the buildings and facilities in good repair and of keeping them properly insured, unless the leases or agreements obligate the lessees or purchasers to pay for such insurance or maintenance. The authority is given full power and discretion to enter into any such agreements or leases as may in its judgment be desirable for the best interests of the authority. Any such agreement or lease may provide that any surplus capacity of the buildings or facilities which are the subject matter thereof may be utilized by and for the benefit of the general public, in which event, such surplus capacity may be maintained or operated, or both, by either the authority or by the lessee or purchaser under the lease or agreement, or in part by each, all as may be provided in the lease or agreement. Any project may include in part one or more buildings or facilities or combinations thereof to be leased

or sold as provided in this Code section and in part other facilities described in paragraph (6) of Code Section 52-2-2, the revenues of the whole being allocated and pledged to the financing of the project as a whole; and in such event, the requirements of this Code section applicable to buildings or facilities to be leased or sold shall be applicable only to the part of the project which consists of the buildings or facilities to be so leased or sold.

History. — Ga. L. 1945, p. 464, § 3; Ga. L. 1946, p. 60, § 2; Ga. L. 1963, p. 342, § 2; Ga. L. 2010, p. 897, § 2/HB 1060.

52-2-4. Creation of authority; status of authority as an instrumentality of state and a public corporation.

There is created a body corporate and politic, to be known as the Georgia Ports Authority, which shall be deemed to be an instrumentality of the State of Georgia and a public corporation; and by that name, style, and title the authority may contract and be contracted with, sue and be sued, implead and be impleaded, and complain and defend in all courts.

History. — Ga. L. 1945, p. 464, § 2; Ga. L. 1949, p. 778, § 1; Ga. L. 1955, p. 120, § 1; Ga. L. 1966, p. 457, § 2.

JUDICIAL DECISIONS

Waiver of immunity. — This state has waived immunity under U.S. Const., amend. 11 in establishing the Georgia Ports Authority. Hodges v. Tomberlin, 510 F. Supp. 1280 (S.D. Ga. 1980).

O.C.G.A. § 52-2-4 is not a venue provision authorizing suit against the Georgia Ports Authority in all courts of the state; it is merely a waiver of governmental immunity by which the Ports Authority consents to the filing of a suit in the proper forum. Marine Port Terms. v. Georgia Ports Auth., 180 Ga. App. 380, 348 S.E.2d 896 (1986).

The "sue and be sued" language in O.C.G.A. § 52-2-4 is insufficient to waive governmental immunity, and there is nothing in the law covering the Georgia Ports Authority that could be construed as providing that immunity is waived. Miller v. Georgia Ports Auth., 217 Ga. App. 876, 460 S.E.2d 100 (1995), aff'd, 266 Ga. 586, 470 S.E.2d 426 (1996).

Torts Claims Act, O.C.G.A. § 50-21-20 et seq., applies to the Georgia Ports Authority as sovereign immunity applies thereto. Miller v. Georgia Ports Auth., 217 Ga. App. 876, 460 S.E.2d 100 (1995), aff'd, 266 Ga. 586, 470 S.E.2d 426 (1996).

Punitive damages award void. — Award of punitive damages against the Georgia Ports Authority was against Georgia public policy and was impermissible as a matter of law and void. Georgia Ports Auth. v. Hutchinson, 209 Ga. App. 726, 434 S.E.2d 791 (1993).

OPINIONS OF THE ATTORNEY GENERAL

Exemption from requirements of Coastal Marshlands Protection Act. — Because the Georgia Ports Authority created by O.C.G.A. § 52-2-4 was, at time

of enactment of O.C.G.A. Pt. 4, Art. 4, Ch. 5, T. 12 (Coastal Marshlands Protection Act), empowered and charged with responsibility of development and improvement of rivers and seaports of this state, as a general matter, it is exempt from requirements of that part. 1981 Op. Att'y Gen. No. 81-85.

While the Georgia Ports Authority is generally exempt from provisions of O.C.G.A. Pt. 4, Art. 4, Ch. 5, T. 12, the Authority must obtain prior written approval of the Coastal Marshlands Protection Committee for any proposed alteration of marshlands adjacent to Colonels Island which were conveyed to the Georgia Ports Authority pursuant to Ga. L. 1973, p. 747. 1981 Op. Att'y Gen. No. 81-85.

52-2-5. Composition of authority; appointment, terms, and qualifications of members generally; filling of vacancies; election of chairperson, vice chairperson, and secretary-treasurer; quorum.

(a) The authority shall consist of 12 members to be appointed by the Governor from the state at large.

(b) The nine members of the authority in office immediately prior to May 1, 2000, shall serve out the remainder of the terms for which they were appointed, all of such terms expiring on June 30 of the year of expiration. In addition to said nine members, the Governor shall appoint three members for terms to expire June 30, 2004. The director of the Office of Planning and Budget or his or her designee as approved by the Governor shall serve as an ex officio member of the authority.

(c) Successors to the members referred to in subsection (b) of this Code section and future successors shall each be appointed for a term of four years, which term shall begin on the day following the expiration of the term of office of the member such person is appointed to succeed. Any member of the authority shall be eligible for reappointment. Any person appointed to fill a vacancy shall serve only for the remainder of the unexpired term.

(d) The authority shall elect one of its members as chairperson and another member as vice chairperson and shall also elect a secretary-treasurer who shall not necessarily be a member of the authority.

(e) Seven members of the authority shall constitute a quorum. No vacancy on the authority shall impair the right of a quorum to exercise all the rights and perform all the duties of the authority.

History. — Ga. L. 1945, p. 464, § 2; Ga. L. 1955, p. 120, § 1; Ga. L. 1966, p. 457, § 1; Ga. L. 1973, p. 945, § 1; Ga. L. 1992, p. 1014, § 1; Ga. L. 2000, p. 1588, § 1; Ga. L. 2001, p. 4, § 52.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2000, "May 1, 2000," was substituted for "the effective date of this Act" in the first sentence of subsection (b).

RESEARCH REFERENCES

C.J.S. — 80 C.J.S., Shipping, §§ 18, 19.

52-2-6. Compensation of members and reimbursement for expenses.

The members of the authority shall be compensated in the amount of $40.00 per day, plus actual expenses incurred, for each day's service spent in the performance of the duties of the authority. Such compensation shall be limited to 150 days for the chairman and 60 days for each of the other members of the authority during any one fiscal year.

History. — Ga. L. 1945, p. 464, § 2; Ga. L. 1955, p. 120, § 1; Ga. L. 1960, p. 150, § 1; Ga. L. 1966, p. 457, § 2; Ga. L. 1978, p. 1383, § 1.

Cross references. — Compensation of members of public agencies, § 45-7-6.

RESEARCH REFERENCES

C.J.S. — 80 C.J.S., Shipping, §§ 18, 19.

52-2-7. Making of rules and regulations; delegation of powers and duties; perpetual existence of authority.

The authority shall make necessary rules and regulations for its own government. The authority may delegate to one or more of its members or to its officials, agents, or employees such powers and duties as it may deem proper. The authority shall have perpetual existence.

History. — Ga. L. 1945, p. 464, § 2; Ga. L. 1949, p. 778, § 2; Ga. L. 1955, p. 120, § 1; Ga. L. 1966, p. 457, § 2.

RESEARCH REFERENCES

C.J.S. — 80 C.J.S., Shipping, §§ 18, 19.

52-2-8. Eligibility for membership.

No person shall be eligible for membership on the Georgia Ports Authority who shall also be at the time of appointment or who shall thereafter become a member of any local port authority of any city, town, county, or district.

History. — Ga. L. 1949, p. 778, § 2; Ga. L. 1955, p. 120, § 1; Ga. L. 1966, p. 457, § 2.

RESEARCH REFERENCES

C.J.S. — 80 C.J.S., Shipping, §§ 18, 19.

52-2-9. Powers of authority generally.

The authority shall have the following powers:

(1) To have a seal and alter the same at pleasure;

(2) To acquire, hold, and dispose of personal property for its corporate purposes;

(3) To acquire in its own name by purchase, on such terms and conditions and in such manner as it may deem proper, or by condemnation in accordance with and subject to any and all existing laws applicable to the condemnation of property for public use, real property or rights of easements therein or franchises necessary or convenient for its corporate purposes and to use the same so long as its corporate existence shall continue and to lease or make contracts with respect to the use of or to dispose of the same in any manner it deems to the best advantage of the authority. The authority shall be under no obligation to accept and pay for any property condemned under this chapter, except from the funds provided under the authority of this chapter. In any proceedings to condemn, such orders may be made by the court having jurisdiction of the suit, action, or proceeding as may be just to the authority and to the owners of the property to be condemned. No property shall be acquired under this chapter upon which any lien or other encumbrance exists unless at the time the property is so acquired a sufficient sum of money is deposited in trust to pay and redeem the lien or encumbrance in full; provided, however, that nothing in this paragraph shall prohibit the authority from acquiring property, real or personal, tangible or intangible, from the Brunswick Port Authority as otherwise authorized under this chapter and the laws of this state; and, if the authority deems it expedient to construct any project on lands the title to which then is in the State of Georgia, the Governor is authorized to convey, for and in behalf of the state, title to such lands to the authority upon payment to the Office of the State Treasurer for the credit of the general fund of the state treasury of the reasonable value of such lands, such value to be determined by three appraisers to be agreed upon by the Governor and the chairperson of the authority;

(4) To appoint and select officers, agents, and employees, including engineering, architectural, and construction experts and attorneys, and to fix their compensation;

(5) To make contracts and to execute all instruments necessary or convenient, including contracts for acquisition, construction, and

installation of projects and leases of projects or contracts with respect to the use of projects which it causes to be erected or acquired, and to make such contracts and leases with the state, state institutions, and departments and agencies of the state; rentals under leases with the state or any department, agency, or institution of the state shall be paid as provided in the lease contracts from funds appropriated for such purposes by the terms of the Constitution of this state or from any other funds lawfully available;

(6) To construct, erect, acquire, own, repair, remodel, maintain, add to, extend, improve, equip, operate, and manage projects, as defined in paragraph (6) of Code Section 52-2-2, to be located on property owned by the authority, the cost of any such project to be paid from the proceeds of revenue bonds or other obligations of the authority or from such proceeds and any grant from the United States of America or any agency or instrumentality thereof;

(7) To accept loans and grants, either or both, of money or materials or property of any kind from the United States of America or any agency or instrumentality thereof upon such terms and conditions as the United States of America or such agency or instrumentality may impose and to comply with such terms and conditions; including but not limited to the power to provide indemnification on behalf of the authority or any other agency or instrumentality of the state if such other agency or instrumentality be an equal participant with the authority as a nonfederal sponsor of a congressionally authorized civil works project for the benefit of the United States of America or any agency or instrumentality thereof, which power has existed since the creation of the authority;

(8) To borrow money for any of its corporate purposes and to issue negotiable revenue bonds payable from earnings of such projects and to provide for the payment of the same and for the rights of the holders thereof;

(9) To exercise any power usually possessed by private corporations performing similar functions which is not in conflict with the Constitution and laws of this state;

(10) To do all things necessary or convenient to carry out the powers expressly given in this chapter;

(11) To act as agent for the United States of America or any agency, department, corporation, or instrumentality thereof in any matter coming within the purposes or powers of the authority;

(12) To adopt, alter, or repeal its own bylaws, rules, and regulations governing the manner in which its business may be transacted and in which the power granted to it may be enjoyed, as the authority may deem necessary or expedient in facilitating its business;

(13) To do any and all other acts and things in this chapter authorized or required to be done, whether or not included in the general powers mentioned in this Code section;

(14) To receive gifts, donations, or contributions from any person, firm, or corporation;

(15) To contract with any municipality or county for the leasing, operation, or management of real or personal property in or adjacent to any seaport of this state;

(16) To develop and improve the harbors or seaports of this state for the handling of waterborne commerce from and to any part of this state and other states and foreign countries;

(17) To acquire, construct, equip, maintain, develop, and improve said harbors or seaports and their port facilities;

(18) To foster and stimulate the shipment of freight and commerce through such ports, whether originating within or without this state, including the investigation and handling of matters pertaining to all transportation rates and rate structures affecting the same;

(19) To own, lease, and operate tug boats, locomotives, and any and every kind of character of motive power and conveyances or appliances necessary or proper to carry passengers, goods, wares, merchandise, or articles of commerce in, on, or around its projects;

(20) To hold, use, administer, and expend such sum or sums as may hereafter be appropriated by authority of the General Assembly for any of the purposes of the authority;

(21) To do any other things necessary or proper to foster or encourage the commerce, domestic or foreign, of the state, of the United States of America, or of the several sister states; and

(22) To appoint and select employees designated as security guards who shall have a limited power to make arrests for certain offenses committed on any property under the jurisdiction of the Georgia Ports Authority.

History. — Ga. L. 1945, p. 464, § 4; Ga. L. 1963, p. 342, § 3; Ga. L. 1976, p. 1640, § 1; Ga. L. 1982, p. 3, § 52; Ga. L. 1988, p. 254, § 1; Ga. L. 1993, p. 1402, § 18; Ga. L. 2010, p. 863, § 2/SB 296; Ga. L. 2010, p. 897, § 3/HB 1060; Ga. L. 2015, p. 1, § 2/SB 5; Ga. L. 2016, p. 864, § 52/HB 737.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2011, a semicolon was substituted for a period at the end of paragraph (5).

Editor's notes. — Ga. L. 2015, p. 1, § 1/SB 5, not codified by the General Assembly, provides: "This Act is enacted pursuant to Article III, Section VI, Paragraph II(a)(3) of the Constitution of Georgia."

OPINIONS OF THE ATTORNEY GENERAL

Ports authority may contract with other entities with respect to the use of its real property or rights of easements therein or franchises, in any manner it deems to the best advantage of the authority, and consistent with the purpose for which the authority was created. 1948-49 Op. Att'y Gen. p. 419.

Sale of timber authorized. — Cooperative agreement between the Georgia Forestry Commission and the Georgia Ports Authority would be sufficient to authorize the sale of timber located on property under the direct control of the Georgia Ports Authority. 1963-65 Op. Att'y Gen. p. 694.

RESEARCH REFERENCES

ALR. — Custom as to loading, unloading, or stowage of cargo as standard of care in action for personal injury or death of seaman or longshoreman, 85 A.L.R.2d 1196.

52-2-10. Applicability of traffic laws; enforcement by peace officers; traffic citations; issuance of bench warrant upon failure of offender to appear; enforcement of dock related city ordinances; venue.

(a)(1) The motor vehicle traffic laws for this state shall apply to all roads within the jurisdiction of the Georgia Ports Authority; provided, however, that the authority may determine and declare reasonable, safe, and lawful speed limits on all roads within its jurisdiction.

(2) Those regular employees of the Georgia Ports Authority designated as peace officers shall have the power to arrest for traffic offenses committed on any property under the jurisdiction of the Georgia Ports Authority.

(3) Such arrest may be effected by issuance of a citation, provided the offense is committed in the presence of the arresting peace officer.

(4) A citation issued by a peace officer shall enumerate the specific charges against the offender and the date on which the offender is to appear and answer the charges.

(5) If the offender fails to appear as specified in the citation, the judge having jurisdiction of the offense may issue a warrant ordering the apprehension of such person and commanding that he or she be brought before the court to answer the charges contained in the citation and the charge of his or her failure to appear as required. The person shall be allowed to make a reasonable bond to appear on a given date before the court.

(6) Peace officers shall be subject to Chapter 13 of Title 40, relating to uniform traffic citation and complaint forms.

(b) Peace officers of the Georgia Ports Authority may arrest for violations of dock related city ordinances where applicable.

(c) All powers of arrest granted in this Code section shall exist only on property under the jurisdiction of the Georgia Ports Authority or while in hot pursuit of one whom the peace officer observed commit an offense within the jurisdiction of the authority as provided in subsections (a) and (b) of this Code section.

(d) All offenders apprehended for offenses committed within the jurisdiction of the Georgia Ports Authority shall be tried by the appropriate city, county, or state tribunal.

(e) All peace officers of the Georgia Ports Authority shall be subject to the requirements of Chapter 8 of Title 35, the "Georgia Peace Officer Standards and Training Act."

(f) While in the performance of their duties, peace officers of the Georgia Ports Authority shall have the same powers of arrest and the same powers to enforce law and order as the sheriff of the county and the chief of police of the county or municipality in this state wherein any such peace officer is performing his or her duty. While in the performance of their duties, any such peace officers shall be authorized to exercise such powers and duties as are authorized by law for members of the Uniform Division of the Department of Public Safety. Such peace officers shall be subject to the requirements of Chapter 8 of Title 35, the "Georgia Peace Officer Standards and Training Act," and are specifically required to complete the training required for peace officers by that chapter.

(g) While in the performance of their duties, peace officers of the Georgia Ports Authority shall have the right to issue citations to vehicles parked in areas not specifically designated for the parking of vehicles while on the properties of the Georgia Ports Authority's terminals. The issuance of any such parking citation shall require the person who parked said vehicle to respond by the payment of a fine in the amount of $25.00 or by appearing in the court which handles misdemeanor traffic offenses for the county in which the terminal is located, in which event the amount of the fine shall be fixed at the discretion of the judge of said court, but in no event shall the fine exceed $25.00. In addition to the right to issue parking citations, peace officers of the Georgia Ports Authority shall have the right to remove improperly parked cars or vehicles in accordance with the provisions of Code Section 44-1-13.

History. — Ga. L. 1976, p. 1640, § 2; Ga. L. 1980, p. 503, § 1; Ga. L. 1982, p. 3, § 52; Ga. L. 1992, p. 6, § 52; Ga. L. 1994, p. 879, § 1; Ga. L. 1995, p. 10, § 52; Ga. L. 2010, p. 1141, § 1/HB 958.

Cross references. — Exercise of power

of arrest generally, T. 17, C. 4. Rules of the road, T. 40, C. 6.

Editor's notes. — Ga. L. 2010, p. 1141, § 2/HB 958, not codified by the General Assembly, provides, in part: "this Act shall not apply to persons hired by the Georgia Ports Authority for security purposes on March 18, 1991, or August 8, 1997. The provisions of Code Section 52-2-10 of the Official Code of Georgia Annotated in effect at the time that this Act is adopted shall continue to apply to such persons."

52-2-11. Power of authority to borrow money, to execute evidences of indebtedness, and to secure such indebtedness; sale and other disposition of property; utilization of proceeds of sale.

The Georgia Ports Authority shall have and may exercise the following powers:

(1) The authority may borrow money for its corporate purposes and may execute and deliver long-term and short-term notes, commercial paper, bond anticipation notes, and other obligations or evidences of indebtedness therefor and may secure such indebtedness in such manner as the authority may provide by its resolution authorizing the indebtedness to be incurred, provided that the authority shall not pledge to the payment of the indebtedness revenue pledged to the payment of any other indebtedness then outstanding or encumber property in violation of the terms of any existing contract, agreement, or trust indenture securing existing indebtedness.

(2) The authority may from time to time sell or otherwise dispose of surplus personal property and may sell or otherwise dispose of land and any improvements thereon acquired by the authority pursuant to law and which the authority may determine is not required for port or warehouse operations or for the future expansion and improvement of the state system of docks, including property which is suitable for industrial development. Any such property may be sold, leased, or otherwise disposed of upon such terms and conditions as may be provided by resolution of the authority. The proceeds of any such sale shall be used by the authority for the purposes provided by law. However, any sale of land or leasing of same and mortgaging of same or conveying the same as security for a loan as provided under this Code section shall be first approved in writing by the Governor, the state auditor, and the Attorney General.

History. — Ga. L. 1958, p. 714, § 1; Ga. L. 1982, p. 3, § 52; Ga. L. 2010, p. 897, § 4/HB 1060.

52-2-12. Funds for acquisition of land and construction of port facilities.

The Governor may make available to the Georgia Ports Authority for the purpose of acquiring necessary lands, including improvements thereon, as well as for constructing buildings, terminals, and other port facilities, any funds appropriated for the construction of port facilities. Any land so acquired shall be conveyed to the Georgia Ports Authority.

History. — Ga. L. 1958, p. 714, § 2.

52-2-13. Approval and consent of State Properties Commission for acquisition of real property by authority.

Notwithstanding any other provisions of this chapter, the authority shall not purchase any real property without the approval and consent of the State Properties Commission.

History. — Ga. L. 1958, p. 714, § 2A.
Cross references. — Acquisition of real property by state agencies generally, § 50-16-30 et seq.

52-2-14. Conveyance of Medical Depot site to authority; power to sell conveyed surplus lands and improvements; power to borrow and to issue revenue anticipation certificates.

The Governor of this state is authorized to convey, for and in behalf of the state, title to lands and improvements known as the Medical Depot site in Chatham County, Georgia, adjacent to the Savannah River. For a more particular description, reference is made to the deed conveying the site from the State of Georgia to the Georgia Ports Authority upon payment of such nominal sum to the Office of the State Treasurer as may be agreed upon by the Governor and the authority. The authority shall have the power to sell any portions of land or improvements, or both, thus conveyed as are not required for port or warehouse operations or for the future expansion or improvement of the operation of a system of state docks, provided that any moneys received incident to such sales shall be utilized by the authority for the further expansion, construction, and improvement of the existing facilities located at the Medical Depot site in Chatham County on the Savannah River. The authority is empowered to borrow money on the existing facilities as described in this Code section and to issue revenue anticipation certificates to be retired from the revenue derived from the described facilities. All such sums, whether borrowed or secured through the sale of revenue anticipation certificates, shall be used for the exclusive purpose of developing a system of state docks at the site of the Medical Depot described in this Code section or for the purchase

of necessary and essential equipment to be located thereon, or both, and for any and all purposes deemed necessary, essential, and expedient for the purpose of developing the site as a part of a system of state docks.

History. — Ga. L. 1949, p. 778, § 4; Ga. L. 1982, p. 3, § 52; Ga. L. 1993, p. 1402, § 18; Ga. L. 2010, p. 863, § 2/SB 296.

52-2-15. Revenue bonds — Issuance; payment of principal and interest from special fund; dating of bonds; determination of rate of interest; time of maturity; redemption before maturity.

The authority shall have the power and is authorized at one time or from time to time to provide by resolution for the issuance of negotiable revenue bonds of the authority for the purpose of paying all or any part of the cost as defined in this chapter of any one or more projects. The principal and interest of such revenue bonds shall be payable solely from the special fund provided in this chapter for such payment. The bonds of each issue shall be dated, shall bear interest at the lowest rate obtainable by negotiation or, if the authority deems it necessary, by the taking of competitive bids, payable as determined by the authority at time of issue, shall mature at such time or times as the authority may determine at the time of issue, shall be payable in such medium of payment as to both principal and interest as may be determined by the authority, and may be made redeemable before maturity, at the option of the authority, at such price or prices and under such terms and conditions as may be fixed by the authority in the resolution providing for the issuance of the bonds.

History. — Ga. L. 1945, p. 464, § 5; Ga. L. 1949, p. 778, § 3; Ga. L. 1963, p. 342, § 4; Ga. L. 1974, p. 589, § 1.

Cross references. — Revenue bonds generally, § 36-82-60 et seq.

52-2-16. Revenue bonds — Form of bonds; denominations; place of payment of principal and interest.

The authority shall determine the form of the bonds, including any interest coupons to be attached thereto, and shall fix the denomination or denominations of the bonds and the place or places for payment of principal and interest thereof, which may be at any bank or trust company within or outside the state.

History. — Ga. L. 1945, p. 464, § 5.

52-2-17. Revenue bonds — Signatures; seal.

In case any officer whose signature appears on any bonds or whose facsimile signature appears on any coupons ceases to be such officer before the delivery of the bonds, such signature shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until the delivery. All such bonds shall be signed by the chairman of the authority and the official seal of the authority shall be affixed thereto and attested by the secretary-treasurer of the authority and any coupons attached thereto shall bear the facsimile signature of the chairman of the authority. Any coupon may bear the facsimile signature of such person and any bond may be signed, sealed, and attested on behalf of the authority by such persons as at the actual time of the execution of such bonds shall be duly authorized or hold the proper office, although at the date of the bond such persons may not have been so authorized or shall not have held such office.

History. — Ga. L. 1945, p. 464, § 5.

52-2-18. Revenue bonds — Status of bonds as negotiable instruments; tax exemption for bonds and for income therefrom.

All revenue bonds issued under this chapter shall have and are declared to have all the qualities and incidents of negotiable instruments under the negotiable instruments laws of the state. Such bonds and the income therefrom shall be exempt from all taxation within the state.

History. — Ga. L. 1945, p. 464, § 5.

52-2-19. Revenue bonds — Issuance in coupon, registered, or book-entry form.

The bonds may be issued in coupon, registered, or book-entry form, as the authority may determine, and provision may be made for the registration of any coupon bond as to principal alone and also as to both principal and interest.

History. — Ga. L. 1945, p. 464, § 5; Ga. L. 2010, p. 897, § 5/HB 1060.

52-2-20. Revenue bonds — Determination of price; use and manner of disbursement of proceeds; procedure where proceeds are less than or greater than cost of projects.

The authority may sell such bonds in such manner and for such price as it may determine to be for the best interests of the authority. The proceeds of the bonds shall be used solely for the payment of the costs of the project or projects and shall be disbursed upon requisition or order of the chairman of the authority under such restrictions, if any, as the resolution authorizing the issuance of the bonds or the trust indenture hereinafter mentioned in this chapter may provide. If the proceeds of the bonds, by error of calculation or otherwise, shall be less than the cost of the project or projects, unless otherwise provided in the resolution authorizing the issuance of the bonds or in the trust indenture, additional bonds may in like manner be issued to provide the amount of the deficit, which, unless otherwise provided in the resolution authorizing the issuance of the bonds or the trust indenture, shall be deemed to be of the same issue and shall be entitled to payment from the same fund without preference or priority of the bonds first issued for the same purpose. If the proceeds of the bonds of any issue shall exceed the amount required for the purpose for which the bonds are issued, the surplus shall be paid into the fund hereinafter provided for the payment of principal and interest of such bonds.

History. — Ga. L. 1945, p. 464, § 5; Ga. L. 1974, p. 589, § 1.

52-2-21. Revenue bonds — Issuance of interim receipts, interim certificates, and temporary bonds; replacement of mutilated, destroyed, or lost bonds.

Prior to the preparation of definitive bonds, the authority may, under like restrictions, issue interim receipts, interim certificates, or temporary bonds, with or without coupons exchangeable for definitive bonds upon the issuance of the latter. The authority may also provide for the replacement of any bond which shall become mutilated or be destroyed or lost.

History. — Ga. L. 1945, p. 464, § 5.

52-2-22. Revenue bonds — Conditions precedent to issuance; application of bonds of a single issue to payment of one or more projects; effective date of resolutions providing for issuance; passage of resolutions.

Such revenue bonds may be issued without any other proceedings or the happening of any other conditions or things than those proceedings,

conditions, and things which are specified or required by this chapter. In the discretion of the authority, revenue bonds in a single issue may be issued for the purpose of paying the costs of any one or more projects. Any resolution providing for the issuance of revenue bonds under this chapter shall become effective immediately upon its passage and need not be published or posted and any such resolution may be passed at any regular or special or adjourned meeting of the authority by a majority of its members.

History. — Ga. L. 1945, p. 464, § 5.

52-2-23. Revenue bonds — Aid by Georgia State Financing and Investment Commission.

Whenever the authority determines to issue its bonds or other obligations, it shall obtain the approval of the Georgia State Financing and Investment Commission and otherwise comply with the provisions of Article 2 of Chapter 17 of Title 50, the "Georgia State Financing and Investment Commission Act."

History. — Ga. L. 1967, p. 874, § 1; Ga. L. 2010, p. 897, § 6/HB 1060.

52-2-24. Revenue bonds — Status of bonds as a debt of state or a pledge of faith and credit of state; issuance as obligating state to levy tax or make appropriation; obligation to pay principal and interest on bonds; recitals on face of bonds.

Revenue bonds issued under this chapter shall not be deemed to constitute a debt of the State of Georgia or a pledge of the faith and credit of the state, but such bonds shall be payable solely from the fund provided in this chapter therefor from earnings. The issuance of such revenue bonds shall not directly or indirectly or contingently obligate the state to levy or to pledge any form of taxation whatever therefor from earnings; and the issuance of such revenue bonds shall not directly or indirectly or contingently obligate the state to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment. Neither the state nor the authority shall be obligated to pay the principal of or the interest on such revenue bonds except from earnings of the project or projects for which they shall be issued. All such revenue bonds shall contain recitals on their face covering the foregoing provisions of this Code section.

History. — Ga. L. 1945, p. 464, § 6.

JUDICIAL DECISIONS

Cited in State Ports Auth. v. Arnall, 201 Ga. 713, 41 S.E.2d 246 (1947).

52-2-25. Revenue bonds — Securing of bonds by trust indenture.

In the discretion of the authority, any issue of such revenue bonds may be secured by a trust indenture by and between the authority and a corporate trustee, which may be any trust company or bank having the powers of a trust company within or outside of the state. Such trust indenture may pledge or assign revenues and earnings to be received. Either the resolution providing for the issuance of revenue bonds or the trust indenture may contain such provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable and proper and not in violation of law, including covenants setting forth the duties of the authority in relation to the acquisition of property, the construction of the project, the maintenance, operation, repair, and insurance of the project, and the custody, safeguarding, and application of all moneys; may also provide that any project shall be constructed and paid for under the supervision and approval of consulting engineers or architects employed or designated by the authority and satisfactory to the original purchasers of the bonds issued therefor; may also require that the security given by contractors and by any depositary of the proceeds of the bonds or revenues or other moneys be satisfactory to the purchasers; and may also contain provisions concerning the conditions, if any, upon which additional revenue bonds may be issued. It shall be lawful for any bank or trust company incorporated under the laws of this state to act as such depositary and to furnish such indemnifying bonds or pledge such securities as may be required by the authority. The indenture may set forth the rights and remedies of the bondholders and of the trustee and may restrict the individual right of action of bondholders as is customary in trust indentures securing bonds and debentures of corporations. In addition to the foregoing, the trust indenture may contain such other provisions as the authority may deem reasonable and proper for the security of the bondholders. All expenses incurred in carrying out the trust indenture may be treated as a part of the cost of maintenance, operation, and repair of the project or projects affected by the indenture.

History. — Ga. L. 1945, p. 464, § 8.

52-2-26. Revenue bonds — Remedies of bondholders and trustee.

Any holder of revenue bonds issued under this chapter or any of the coupons appertaining thereto and the trustee under the trust indenture, if any, except to the extent the rights given in this chapter may be restricted by resolution passed before the issuance of the bonds or by the trust indenture, may, either at law or in equity, by suit, action, mandamus, or other proceedings, protect and enforce any and all rights granted under the laws of this state, granted under this chapter, or granted under such resolution or trust indenture, and may enforce and compel performance of all duties required by this chapter or by such resolution or trust indenture to be performed by the authority, or any officer thereof, including the fixing, charging, and collecting of revenues and other charges for the use of the project or projects; but no holder of any such bond shall have the right to compel any exercise of the taxing power of the state to pay any such bond or the interest thereon or to enforce the payment thereof against any property of the state nor shall any such bond constitute a charge, lien, or encumbrance, legal or equitable, upon any property of the state. Any provision of this chapter or any other law to the contrary notwithstanding, any such bondholder or trustee shall have the right by appropriate legal or equitable proceedings (including, without being limited to, mandamus) to enforce compliance by the appropriate public officials with Article VII, Section IV of the Constitution of the State of Georgia and permission is given for the institution of any such proceedings to compel the payment of lease obligations.

History. — Ga. L. 1945, p. 464, § 11; Ga. L. 1963, p. 342, § 5; Ga. L. 1983, p. 3, § 67; Ga. L. 1984, p. 22, § 52.

JUDICIAL DECISIONS

Cited in State Ports Auth. v. Arnall, 201 Ga. 713, 41 S.E.2d 246 (1947).

52-2-27. Revenue bonds — Protection of rights of bondholders.

While any of the bonds issued by the authority remain outstanding, the powers, duties, or existence of the authority or of its officers, employees, or agents shall not be diminished or impaired in any manner that will affect adversely the interest and rights of the holders of such bonds; and no other entity, department, agency, or authority will be created which will compete with the authority to such an extent as to affect adversely the interests and rights of the holders of the bonds nor will the state itself so compete with the authority. This chapter shall be for the benefit of the state, the authority, and the holders of any such

bonds and, upon the issuance of bonds under this chapter, shall constitute a contract with the holders of the bonds.

History. — Ga. L. 1945, p. 464, § 17.

52-2-28. Revenue bonds — Revenue refunding bonds.

The authority is authorized to provide by resolution for the issuance of revenue refunding bonds of the authority for the purpose of refunding any revenue bonds issued under this chapter and then outstanding, together with accrued interest thereon. The issuance of such revenue refunding bonds, the maturities and all other details thereof, the rights of the holders thereof, and the duties of the authority in respect to the same shall be governed by the foregoing provisions of this chapter insofar as the same may be applicable.

History. — Ga. L. 1945, p. 464, § 13.

52-2-29. Revenue bonds — Status of bonds as legal investments and as securities for deposits.

(a) The bonds authorized in this chapter are made securities in which:

(1) All public officers and bodies of this state;

(2) All municipalities and all municipal subdivisions;

(3) All insurance companies and associations and other persons carrying on an insurance business;

(4) All banks, bankers, trust companies, savings banks, and savings associations, including savings and loan associations, building and loan associations, investment companies, and other persons carrying on a banking business;

(5) All administrators, guardians, executors, trustees, and other fiduciaries; and

(6) All other persons whatsoever who are authorized to invest in bonds or other obligations of the state

may properly and legally invest funds, including capital in their control or belonging to them.

(b) The bonds authorized in this chapter are also made securities which may be deposited with and shall be received by all public officers and bodies of this state and all municipalities and municipal subdivisions for any purpose for which the deposit of the bonds or other obligations of this state is authorized.

History. — Ga. L. 1945, p. 464, § 14; Ga. L. 1982, p. 3, § 52.

Law reviews. — For note discussing and comparing the prudent man rule and the legal list rule in trustee investment, see 15 Mercer L. Rev. 530 (1964).

RESEARCH REFERENCES

ALR. — Rights and liabilities of municipality as to interest earned on improvement assessments or other special funds collected or held by it, 143 A.L.R. 1341.

52-2-30. Revenue bonds — Confirmation and validation of bonds; venue of actions to confirm and validate bonds or to enforce rights under chapter.

Bonds of the authority shall be confirmed and validated in accordance with the procedure of Chapter 82 of Title 36, the "Revenue Bond Law." Any such action and any action to protect or enforce any rights under this chapter and any suit or action against the authority shall be brought in the Superior Court of Chatham County, which shall have exclusive original jurisdiction of such actions; provided, however, the venue of an action for a tort shall be brought in the county wherein committed if the authority has a facility located therein, otherwise Chatham County.

History. — Ga. L. 1945, p. 464, § 16; Ga. L. 1963, p. 342, § 6; Ga. L. 1986, p. 164, § 1.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1986, a comma was inserted following "provided" in the second sentence.

Editor's notes. — Ga. L. 1986, p. 164, § 2, not codified by the General Assembly, provided: "This Act shall become effective upon its approval by the Governor [approved March 18, 1986] or upon its becoming law without such approval and shall be applicable to any suit or action filed on or after such date. The provisions of this Act shall not affect any suit or action filed prior to the effective date of this Act in the Superior Court of Fulton County."

JUDICIAL DECISIONS

Venue in tort actions. — Suit for property damage, i.e. civil injury, involving cargo damaged in a marine port terminal, was not brought to enforce any rights of the Marine Port Terminals "under this chapter"; hence, venue was determined by the usual constitutional provisions in Ga. Const. 1983, Art. VI, Sec. II or by statutory provisions. Marine Port Terms. v. Georgia Ports Auth., 180 Ga. App. 380, 348 S.E.2d 896 (1986) (decided under law existing prior to March 1986 amendment specifically providing for venue in tort actions against the authority).

Cited in M.A.R.T.A. v. McCain, 135 Ga. App. 460, 218 S.E.2d 122 (1975).

52-2-31. Power of authority to fix, revise, and collect charges; factors governing determination of amount of rentals and other charges; creation, use, and disposition of sinking fund; cancellation of purchased or redeemed bonds.

(a) The authority is authorized to fix and to revise from time to time fees, rentals, and other charges for the use of each project and for the services and facilities furnished by the same and to charge and collect the same and to lease and to make contracts with any person, firm, or corporation with respect to the use of any project or part thereof. Such rentals and other charges shall be so fixed and adjusted in respect of the aggregate thereof from the project or projects for which a single issue of revenue bonds is issued or from the authority or the terminal or facilities of which the project or projects are a part, so as to provide a fund sufficient with other revenues of the project or projects, if any, to pay:

(1) The cost of new construction of projects;

(2) The cost of maintaining, repairing, and operating the project or projects, including reserves for extraordinary repairs and insurance and other reserves required by the resolution or trust indenture, unless such cost shall be otherwise provided for; and

(3) The principal of the revenue bonds and the interest thereon as the same shall become due.

(b) The revenues and earnings derived from the projects for which a single issue of bonds is issued or from the authority or the terminal or facilities of which the project or projects are a part, except the part of such revenues and earnings as may be required to pay the cost of maintaining, repairing, and operating the project or projects or the terminal or facilities of which the project or projects are a part, and to provide such reserves therefor as may be provided for in the resolution authorizing the issuance of the revenue bonds or in the trust indenture, shall be set aside at such regular intervals as may be provided in the resolution or the trust indenture in a sinking fund which is pledged to, and charged with the payment of:

(1) The interest upon the revenue bonds as the interest falls due;

(2) The principal of the bonds as the same falls due;

(3) The necessary charges of paying agents for paying principal and interest; and

(4) Any premium upon bonds retired by call or purchase as hereinabove provided.

The use and disposition of such sinking fund shall be subject to such regulations as may be provided in the resolution authorizing the issuance of the revenue bonds or in the trust indenture, but, except as may otherwise be provided in the resolution or trust indenture, the sinking fund shall be a fund for the benefit of all revenue bonds without distinction or priority of one over another. Subject to the provisions of the resolution authorizing the issuance of the revenue bonds or the trust indenture, any moneys in such sinking fund in excess of an amount equal to one year's interest on all revenue bonds then outstanding may be applied to the purchase or redemption of bonds. All revenue bonds so purchased or redeemed shall forthwith be canceled and shall not again be issued.

History. — Ga. L. 1945, p. 464, § 10;
Ga. L. 2010, p. 897, § 7/HB 1060.

52-2-32. Status of contracted-for rentals as obligations of state; payment of rentals; power of authority to enforce lessees' duty to perform covenants and obligations; assignment of rentals due.

(a) The rentals contracted to be paid by the state or any department, agency, or institution of the state to the authority under leases entered upon pursuant to this chapter shall constitute obligations of the state for the payment of which the good faith of the state is pledged. Such rentals shall be paid as provided in the lease contracts from funds appropriated for such purposes by the terms of the Constitution of Georgia. It shall be the duty of the state or any department, agency, or institution thereof to see to the punctual payment of all such rentals.

(b) In the event of any failure or refusal on the part of lessees punctually to perform any covenant or obligation contained in any lease entered upon pursuant to this chapter, the authority may enforce performance by any legal or equitable process against lessees; and consent is given for the institution of any such action.

(c) The authority shall be permitted to assign any rental due it by the lessees to a trustee or paying agent as may be required by the terms of any trust indenture entered into by the authority.

History. — Ga. L. 1964, p. 88, § 2.

52-2-33. Duty of authority to prescribe rules and regulations for operation of projects; duty of authority to impose and collect rentals and other charges for use of facilities of projects.

It shall be the duty of the authority to prescribe rules and regulations for the operation of each project constructed under this chapter, including rules and regulations to ensure maximum use of each such project, and to impose rentals and other charges for the use of the facilities furnished by or related to the use of such project and to collect the same from all persons, firms, or corporations using the same.

History. — Ga. L. 1945, p. 464, § 10; Ga. L. 2010, p. 897, § 8/HB 1060.

52-2-34. Acceptance of grants from federal agencies and of contributions of money and property from other sources.

The authority, in addition to the moneys which may be received from the sale of revenue bonds and from the collection of revenues and earnings derived under this chapter, shall have authority to accept from any federal agency grants for or in aid of the construction of any project or for the payment of bonds and to receive and accept contributions from any source of either money or property or other things of value, to be held, used, and applied only for the purposes for which such grants or contributions may be made.

History. — Ga. L. 1945, p. 464, § 12.

52-2-35. Requirement as to competitive bidding for contracts for new construction.

The authority shall have the right to do all new construction under an agency or construction management form of contract without the necessity of taking competitive bids.

History. — Ga. L. 1945, p. 464, § 9.

RESEARCH REFERENCES

ALR. — Requirement that public contract be awarded on competitive bidding as applicable to contract for public utility, 80 A.L.R.3d 979.

52-2-36. Status of moneys received under chapter as trust funds; provision by authority for payment of moneys to designated trustee; investment of moneys; sale of investments and reinvestment.

(a) All moneys received pursuant to the authority of this chapter, whether as proceeds from the sale of revenue bonds, as grants or other contributions, or as revenues and earnings, shall be deemed to be trust funds to be held and applied solely as provided in this chapter. The authority shall, in the resolution providing for the issuance of revenue bonds or in the trust indenture, provide for the payment of the proceeds of the sale of the bonds and the earnings and revenues to be received to any officer who or any agency, bank, or trust company which shall act as trustee of such funds and shall hold and apply the funds to the purposes of this chapter, subject to such regulations as this chapter and the resolution or trust indenture may provide.

(b) Subject to such restriction as provided by resolution passed before the issuance of its bonds or by the trust indenture securing the bonds, the authority may invest any moneys received by it pursuant to authority of this chapter in obligations which are eligible as security for the investment of trust funds; and the authority may, by resolution, provide for the sale of any such investment and for the reinvestment of the proceeds thereof.

History. — Ga. L. 1945, p. 464, § 7; Ga. L. 1946, p. 60, § 3; Ga. L. 2010, p. 897, § 9/HB 1060.

52-2-37. Creation of authority and carrying out of authority's corporate purpose as constituting a public purpose; covenant with bondholders as to tax-exempt status of authority's property.

It is found, determined, and declared that the creation of the authority and the carrying out of its corporate purpose is in all respects for the benefit of the people of this state and is a public purpose and that the authority will be performing an essential governmental function in the exercise of the power conferred upon it by this chapter; and this state covenants with the holders of the bonds that the authority shall be required to pay no taxes or assessments upon any of the property acquired by it or under its jurisdiction, control, possession, or supervision or upon its activities in the operation or maintenance of the facilities erected, maintained, or acquired by it or any fees, rentals, or other charges for the use of such facilities or other income received by the authority and that the bonds of the authority, their transfer, and the income therefrom shall at all times be exempt from taxation within the state. The exemption from taxation provided for in this Code section

shall include an exemption from sales and use tax on tangible personal property purchased by the authority for use exclusively by the authority.

History. — Ga. L. 1945, p. 464, § 15; Ga. L. 1970, p. 629, § 1; Ga. L. 2007, p. 309, § 15/HB 219.

JUDICIAL DECISIONS

Cited in State Ports Auth. v. Arnall, 201 Ga. 713, 41 S.E.2d 246 (1947); International Longshoremen's Ass'n v. Georgia Port Auth., 217 Ga. 712, 124 S.E.2d 733 (1962).

OPINIONS OF THE ATTORNEY GENERAL

Georgia Ports Authority is subject to the sales and use tax. 1969 Op. Att'y Gen. No. 69-324 (rendered prior to 2007 amendment).

RESEARCH REFERENCES

ALR. — Bond or warrant of governmental subdivision as subject of taxation or exemption, 44 A.L.R. 510.

52-2-38. Construction of chapter.

This chapter, being necessary for the welfare of the state and its inhabitants, shall be liberally construed to effect the purposes hereof.

History. — Ga. L. 1945, p. 464, § 18.

52-2-39. Supplemental nature of chapter.

This chapter shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws; it shall not be regarded as in derogation of any powers now existing.

History. — Ga. L. 1945, p. 464, § 20.

CHAPTER 3

INTRACOASTAL WATERWAY

Sec.
52-3-1. Purpose of chapter.
52-3-2 and 52-3-3. [Repealed].
52-3-4. Cooperation with federal government; acquisition of property and rights.
52-3-5. Exercise of power of eminent domain.
52-3-6. Seal; election of officers [Repealed].
52-3-7. Right of Department of Transportation to receive and use gifts and donations of money and property.
52-3-8. Procedure in cases where property required for right of way or spoil disposal areas has been leased for cultivation and gathering of oysters.
52-3-9. Claims for damages to oysters.
52-3-10. Power of Governor to assign assistant attorney general to assist commission [Repealed].
52-3-11. Right of Department of Transportation to enter lands in order to locate rights of way.
52-3-12. Effect of chapter on state's jurisdiction over lands affected by chapter; effect on service of process on such lands.

Editor's notes. — Ga. L. 1981, p. 1017, § 1, effective April 9, 1981, provides for the transfer of the functions of the Georgia Intracoastal Waterway Commission to the Department of Transportation.

52-3-1. Purpose of chapter.

It is the intent and purpose of this chapter to provide for the construction and maintenance by the United States government of the intracoastal waterway and its salt-water tributaries, hereinafter referred to as the intracoastal waterway, from the state boundary line in the Savannah River to the state boundary line in Cumberland Sound, as authorized by the Congress of the United States by the River and Harbor Act approved June 20, 1938, authorizing the construction of the intracoastal waterway to a depth of 12 feet from the Savannah River, Georgia, to Cumberland Sound, Georgia, in accordance with the project described in House Document No. 618, Seventy-fifth Congress, third session, and subject to the conditions set forth in said document, and by the River and Harbor Act approved August 26, 1937, authorizing the construction of a protected route as part of the intracoastal waterway, around St. Andrew Sound, Georgia, to a depth of seven feet in accordance with the project described in Senate Committee Print, Seventy-fourth Congress, first session, and subject to the conditions set forth in that document. The Governor and the Secretary of State are authorized to issue to the United States of America a grant or grants of a perpetual right and easement to enter upon, cut away, and remove any and all of the land, including submerged lands, composing a part of the channel rights of way, anchorage areas, and turning basins as may

be required at any time for construction and maintenance of the intracoastal waterway and to maintain the portions excavated, thereby created as a part of the navigable waters of the United States. The Governor and the Secretary of State are authorized to issue to the United States of America a further perpetual right and easement to enter upon, occupy, and use any portion of the land, including submerged land, composing a part of the spoil disposal area not so cut away and converted into public navigable waters described in this Code section, for the deposit of dredged material and for such other purposes as may be needed in the construction, maintenance, and improvement of the intracoastal waterway, insofar as such lands, including submerged lands, are subject to grant by the State of Georgia. The grant is to be issued upon a certificate showing the location and description of the rights of way and spoil disposal areas furnished to the Governor by the secretary of the army or by any authorized officer of the Corps of Engineers of the United States Army or by any other authorized official exercising control over the construction or maintenance of the projects.

History. — Ga. L. 1939, p. 331, § 1.

52-3-2 and 52-3-3.

Reserved. Repealed by Ga. L. 1981, p. 1017, § 2, effective April 9, 1981.

Editor's notes. — These Code sections were based on Ga. L. 1939, p. 331, § 2.

Ga. L. 2011, p. 752, § 53/HB 142, reserved the designation of these Code sections, effective May 13, 2011.

52-3-4. Cooperation with federal government; acquisition of property and rights.

The Department of Transportation shall work in cooperation with the officers and departments of the United States government in acquiring rights of way, spoil disposal areas, and other necessary property and rights for the intracoastal waterway and may in its own name acquire, by purchase, gift, or condemnation, property and rights to such lands as are necessary for such purpose.

History. — Ga. L. 1939, p. 331, § 2; Ga. L. 1981, p. 1017, § 1.

52-3-5. Exercise of power of eminent domain.

If for any reason the Department of Transportation is unable to secure any such property or rights required by the United States government for the construction and maintenance of the intracoastal waterway from the Savannah River to Cumberland Sound by voluntary

agreement with the owner or owners thereof on terms and conditions satisfactory to it, the department is vested with the power to condemn the same and in so doing to employ the way, means, method, and procedure of Chapter 2 of Title 22 and Article 6 of Chapter 3 of Title 22, relating to the acquisition of property by condemnation on the part of the State of Georgia and of the United States; and in all instances any general and specific benefits to the owner or owners of such property or lands shall be offset against any damages to such property or lands. When the easement or property is thus acquired, a deed shall be executed conveying it to the United States. All easements granted under the authority of this Code section shall be approved by the State Transportation Board and shall be executed by the commissioner of transportation.

History. — Ga. L. 1939, p. 331, § 2; Ga. L. 1981, p. 1017, § 1.

RESEARCH REFERENCES

ALR. — Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 A.L.R.4th 840.

52-3-6. Seal; election of officers.

Reserved. Repealed by Ga. L. 1981, p. 1017, § 2, effective April 9, 1981.

Editor's notes. — This Code section was based on Ga. L. 1939, p. 331, § 2.
Ga. L. 2011, p. 752, § 53/HB 142, reserved the designation of this Code section, effective May 13, 2011.

52-3-7. Right of Department of Transportation to receive and use gifts and donations of money and property.

The Department of Transportation may receive gifts and donations of money or property from individuals, firms, corporations, and political subdivisions and may use the same in defraying expenses of the department and the costs of acquiring the property and rights necessary for the construction, maintenance, and improvement of the intracoastal waterway.

History. — Ga. L. 1939, p. 331, § 3; Ga. L. 1981, p. 1017, § 1.

52-3-8. Procedure in cases where property required for right of way or spoil disposal areas has been leased for cultivation and gathering of oysters.

If any of the lands or property, the use of which is required for right of way and spoil disposal areas, shall have been leased by the Department of Natural Resources to any individual, firm, or corporation for the cultivation and gathering of oysters, the department is authorized and directed to substitute for such leased areas lying within the rights of way and spoil disposal areas other equal areas lying outside the rights of way and spoil disposal areas which are also suitable for the cultivation and gathering of oysters.

History. — Ga. L. 1939, p. 331, § 4.
Cross references. — Lease of oyster and clam beds by Department of Natural Resources generally, § 27-4-198.

52-3-9. Claims for damages to oysters.

Any person, firm, or corporation or their heirs, executors, administrators, successors, or assigns who may be compensated for damages to oysters during construction of the intracoastal waterway shall be estopped from making further claims for damage to oysters in or upon the same area on account of dredging operations during maintenance of the intracoastal waterway.

History. — Ga. L. 1939, p. 331, § 5.

52-3-10. Power of Governor to assign assistant attorney general to assist commission.

Reserved. Repealed by Ga. L. 1981, p. 1017, § 2, effective April 9, 1981.

Editor's notes. — This Code section was based on Ga. L. 1939, p. 331, § 6.
Ga. L. 2011, p. 752, § 53/HB 142, reserved the designation of this Code section, effective May 13, 2011.

52-3-11. Right of Department of Transportation to enter lands in order to locate rights of way.

For the purpose of determining the lands, easements, and property necessary for the uses set out in this chapter, the Department of Transportation, the United States government, or the agents of either shall have the right to enter upon any lands along the general line of the rights of way for the purpose of locating definitely the specific lines of the rights of way and the land required for such purposes; and there shall be no claim against the State of Georgia or the United States for such acts as may be done in making such surveys.

History. — Ga. L. 1939, p. 331, § 7; Ga. L. 1981, p. 1017, § 1.

52-3-12. Effect of chapter on state's jurisdiction over lands affected by chapter; effect on service of process on such lands.

Neither this chapter, nor any part thereof, nor any grant or deed made under the authority hereof shall operate to divest the State of Georgia of jurisdiction over any lands; and all civil and criminal process issued under the authority of any laws of this state may be executed in or on any part of the lands or premises devoted to the use of the intracoastal waterway or to any use incidental thereto, to the same effect as if this chapter had not been enacted and as if the grant or deed had not been executed.

History. — Ga. L. 1939, p. 331, § 8.

CHAPTER 4

CANAL COMPANIES

Sec.		Sec.	
52-4-1.	Filing of petition for incorporation; contents of petition; filing fee.	52-4-8.	Powers and duties of companies generally.
52-4-2.	Issuance of certificate of incorporation.	52-4-9.	Right of corporation to increase or decrease capital stock.
52-4-3.	Maintenance by Secretary of State of files and books regarding canal companies.	52-4-10.	Power of companies to enlarge works and appliances of canals and branch canals and to deepen and widen canals.
52-4-4.	Time of commencement of corporate existence; duration of corporate existence.	52-4-11.	Furnishing of canal water by canal companies; charges for use of water.
52-4-5.	Petitioners as constituting first board of directors; election of officers; prescription of rules and bylaws; opening books of subscription for capital stock.	52-4-12.	Toll rates for use of canals.
		52-4-13.	Encroachment of canals upon public roads; construction and maintenance of bridges.
52-4-6.	Publication of notice upon subscription for all of capital stock and payment of 10 percent thereof; authorization for commencing transaction of business; personal liability of directors and stockholders.	52-4-14.	Mortgage, sale, or lease of canal, other properties, corporate rights, and franchises.
		52-4-15.	Disagreements as to compensation for taking of lands, tenements, or riparian rights pursuant to chapter.
52-4-7.	Location of principal office.	52-4-16.	Taxes applicable to canal companies.

Cross references. — Corporations generally, Ga. Const. 1983, Art. III, Sec. VI, Para. V and T. 14, C. 4.

52-4-1. Filing of petition for incorporation; contents of petition; filing fee.

Any number of persons, not less than five, desiring to be incorporated as a company for the purpose of constructing, operating, and maintaining a canal, may file with the Secretary of State a petition setting out the names and domicile of the petitioners, that they desire to be incorporated as a canal company, the name under which they desire to be incorporated, the route as nearly as possible of the proposed canal, the headquarters of the corporation, the amount of the capital stock, and the number of shares into which divided and pay to the Secretary of State the fee provided for in Code Section 14-4-183.

History. — Ga. L. 1893, p. 81, § 1; Civil Code 1895, § 1986; Civil Code 1910, § 2367; Code 1933, § 17-101.

Cross references. — Grant of corporate powers generally, Ga. Const. 1983, Art. III, Sec. VI, Para. V. Fee for incorporation of canal company, § 14-4-183. Corporate powers to canal companies granted by Secretary of State, § 14-5-2.

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Canals, §§ 4, 12. 18A Am. Jur. 2d, Corporations, § 156 et seq.

C.J.S. — 12A C.J.S., Canals, § 4.

52-4-2. Issuance of certificate of incorporation.

When the petition for incorporation has been made and filed and the fee paid, as provided in Code Section 52-4-1, the Secretary of State shall issue to the petitioners a certificate as follows:

"Georgia. To whom it may concern — Greetings:

_____ having filed their petition in the terms of the law, praying to be incorporated as a canal company, they and their associates and successors are hereby declared to be a body corporate for the period of 30 years, under the name of _____, with power to construct, maintain, and operate a canal in and through _____, with such powers, privileges, and liabilities as may now or hereafter be prescribed by law.

Witness my official hand and seal of state, this _____ day of _____, _____."

History. — Ga. L. 1893, p. 81, § 1; Civil Code 1895, § 1987; Civil Code 1910, § 2368; Code 1933, § 17-102; Ga. L. 1999, p. 81, § 52.

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, § 78 et seq. 18A Am. Jur. 2d, Corporations, §§ 171, 173.

C.J.S. — 18 C.J.S., Corporations, § 47 et seq.

52-4-3. Maintenance by Secretary of State of files and books regarding canal companies.

The Secretary of State shall keep on file all petitions for incorporation and transcripts from minutes provided for in this chapter and shall also keep a book in which shall be entered by him the name of the company, date of incorporation, amount of capital stock, location of principal office, and any increase or decrease of capital stock.

History. — Ga. L. 1893, p. 81, § 12; Civil Code 1895, § 1998; Civil Code 1910, § 2379; Code 1933, § 17-103.

Cross references. — Reports of corporation, § 14-4-180.

52-4-4. Time of commencement of corporate existence; duration of corporate existence.

Upon the issuance of the certificate, the persons therein named, their associates, and their successors shall be and become a body corporate for the period provided for in Code Section 14-4-62.

History. — Ga. L. 1893, p. 81, § 2; Civil Code 1895, § 1988; Civil Code 1910, § 2369; Code 1933, § 17-104.

RESEARCH REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d, Corporations, §§ 171, 173, 207, 208, 218.

C.J.S. — 18 C.J.S., Corporations, § 63 et seq.

52-4-5. Petitioners as constituting first board of directors; election of officers; prescription of rules and bylaws; opening books of subscription for capital stock.

The petitioners shall constitute the first board of directors; they shall organize by electing one of their number president and such other officers as may be necessary, prescribe rules and bylaws, and open books of subscription for the capital stock.

History. — Ga. L. 1893, p. 81, § 2; Civil Code 1895, § 1988; Civil Code 1910, § 2369; Code 1933, § 17-104.

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 9, 38, 39, 46, 47, 51, 52, 62, 63, 65, 66, 69, 82, 86. 18A Am. Jur. 2d, Corporations, § 931.

C.J.S. — 18 C.J.S., Corporations, §§ 82, 91, 93 et seq., 110, 225, 256, 260, 329. 19 C.J.S., Corporations, § 796 et seq.

52-4-6. Publication of notice upon subscription for all of capital stock and payment of 10 percent thereof; authorization for commencing transaction of business; personal liability of directors and stockholders.

When all the capital stock has been subscribed for and 10 percent thereof paid in, notice of that fact shall be published three times in the public newspaper in which the sheriff's sales are advertised in the county in which is situated the principal office of the corporation. When this has been done, the corporation is authorized to begin the transac-

tion of business, but not before. The directors and stockholders of the corporation shall be personally liable for all obligations incurred prior to a compliance with the requirements provided in this Code section.

History. — Ga. L. 1893, p. 81, § 2; Civil Code 1895, § 1988; Civil Code 1910, § 2369; Code 1933, § 17-104.

Cross references. — Organization of corporation before capital stock subscribed for, § 14-4-63.

RESEARCH REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d, Corporations, §§ 171, 173, 207, 208, 218.

C.J.S. — 18 C.J.S., Corporations, § 63 et seq.

52-4-7. Location of principal office.

The principal office of all companies incorporated as provided in this chapter shall always be in this state.

History. — Ga. L. 1893, p. 81, § 11; Civil Code 1895, § 1997; Civil Code 1910, § 2378; Code 1933, § 17-105.

RESEARCH REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d, Corporations, §§ 257, 336, 349. 18B Am. Jur. 2d, Corporations, §§ 796. 19 Am. Jur. 2d, Corporations, §§ 1867, 1869 et seq., 1874, 1878, 1880 et seq., 1890 et seq.

C.J.S. — 18 C.J.S., Corporations, § 43 et seq.

52-4-8. Powers and duties of companies generally.

All companies incorporated under this chapter shall have power to bring or be the subject of actions; make contracts; lease, purchase, hold, and sell such property, real and personal, as may be necessary for the purposes of the corporation; and construct and maintain a canal and branch canals, dams, races, weirs, aqueducts, reservoirs, towpaths, and all other appliances necessary to divert, take, or use the waters of any stream or body of water. However, the canal companies shall not, by building any dam in or across or by diverting water from any navigable stream, destroy or obstruct the navigation of such stream. Such fishways shall be placed in any dams at the time of the construction of the dam as the commissioner of natural resources shall direct. Fishways shall be kept in good order and repair by the canal company, and the company shall notify the commissioner of natural resources of the proposed construction of any dam. Further, the canal companies shall pay reasonable compensation to such landholders as may have riparian rights in any stream or body of water taken, diverted, or obstructed for such taking, diversion, or obstruction or for any damage

done them. The canal companies may also enter upon, take, and appropriate any lands and tenements necessary and appropriate for the purposes of the corporation upon first paying reasonable compensation therefor. No company incorporated as provided in this chapter shall have power to construct or use any canal within the corporate limits of any incorporated municipality without first obtaining the consent of the proper corporate authorities of such municipality.

History. — Ga. L. 1893, p. 81, § 3; Civil Code 1895, § 1989; Civil Code 1910, § 2370; Code 1933, § 17-106.

Cross references. — Additional powers possessed by corporations organized under this chapter, §§ 14-4-60 and 14-4-61.

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Canals, §§ 7, 12, 13, 16, 17, 19. 18 Am. Jur. 2d, Corporations, §§ 27, 33 et seq. 18A Am. Jur. 2d, Corporations, §§ 168, 169, 884, 885. 18B Am. Jur. 2d, Corporations, § 1715 et seq.

C.J.S. — 12A C.J.S., Canals, §§ 17 et seq., 23, 24, 41. 19 C.J.S., Corporations, § 651 et seq.

ALR. — Liability of one who diverts stream into new channel for overflow, 12 A.L.R. 187.

Relative riparian or littoral rights respecting the removal of water from a natural, private, nonnavigable lake, 54 A.L.R.2d 1450.

52-4-9. Right of corporation to increase or decrease capital stock.

All companies incorporated under this chapter may increase or decrease their capital stock in the manner provided in Code Sections 14-4-120 and 14-4-121.

History. — Ga. L. 1893, p. 81, § 10; Civil Code 1895, § 1996; Civil Code 1910, § 2377; Code 1933, § 17-107.

Cross references. — Change in capital stock of corporations, §§ 14-4-120 and 14-4-121.

RESEARCH REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d, Corporations, § 177.

C.J.S. — 18 C.J.S., Corporations, § 242 et seq.

52-4-10. Power of companies to enlarge works and appliances of canals and branch canals and to deepen and widen canals.

Any company incorporated under this chapter is authorized to enlarge any of the works or appliances of a canal or branch canals and enlarge a canal anywhere along the line of the same by deepening and widening it, making basins, dams, reservoirs, or otherwise. Any such company is also authorized to construct and build branch canals to and

from a canal from any and all points, with the same privileges and rights as are granted in constructing the main canal and other works, and to construct any dams, races, waste-weirs, weirs, towpaths, and other structures to improve and make available a canal or canals under the limitations already set out in this chapter.

History. — Ga. L. 1893, p. 81, § 5; Civil Code 1895, § 1991; Civil Code 1910, § 2372; Code 1933, § 17-108.

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Canals, §§ 4, 13, 17, 18.

C.J.S. — 12A C.J.S., Canals, §§ 11, 17, 19, 44 et seq.

52-4-11. Furnishing of canal water by canal companies; charges for use of water.

Any canal company incorporated as provided in this chapter is authorized to allow water to be drawn from its canal for the purpose of propelling machinery, irrigating lands, furnishing water for drinking or fighting fire, or any other purpose that the board of directors may deem proper at any points along the line of the canal and charge for the use of the water.

History. — Ga. L. 1893, p. 81, § 6; Civil Code 1895, § 1992; Civil Code 1910, § 2373; Code 1933, § 17-109.

RESEARCH REFERENCES

C.J.S. — 12A C.J.S., Canals, § 50.

ALR. — Right of water district or company to charge for fire service, 37 A.L.R. 1511.

52-4-12. Toll rates for use of canals.

All companies incorporated as provided in this chapter may permit all goods, lumber, rafts of every description, vessels of every kind, and all other things that can be transported to be conveyed through their canals and may collect such tolls as they may deem proper therefor.

History. — Ga. L. 1893, p. 81, § 7; Civil Code 1895, § 1993; Civil Code 1910, § 2374; Code 1933, § 17-110.

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Canals, §§ 17, 18.

C.J.S. — 12A C.J.S., Canals, § 44 et seq.

52-4-13. Encroachment of canals upon public roads; construction and maintenance of bridges.

Whenever any canal or backwaters of any company incorporated as provided in this chapter shall encroach upon or cross any public road, the company shall restore the road to a condition suitable for use by the public, by bridges or otherwise. All bridges constructed under this Code section shall be built and maintained in good order at the expense of the canal company.

History. — Ga. L. 1893, p. 81, § 8; Civil Code 1895, § 1994; Civil Code 1910, § 2375; Code 1933, § 17-111.

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Canals, § 22.

C.J.S. — 12A C.J.S., Canals, § 12.

52-4-14. Mortgage, sale, or lease of canal, other properties, corporate rights, and franchises.

Companies incorporated under this chapter may mortgage, sell, or lease their canal and other properties, corporate rights, and franchises to any person or corporation to obtain money to purchase, construct, or maintain their works and franchises.

History. — Ga. L. 1893, p. 81, § 9; Civil Code 1895, § 1995; Civil Code 1910, § 2376; Code 1933, § 17-112.

RESEARCH REFERENCES

C.J.S. — 12A C.J.S., Canals, §§ 59, 63

52-4-15. Disagreements as to compensation for taking of lands, tenements, or riparian rights pursuant to chapter.

When any person or corporation shall feel aggrieved or damaged by any appropriation to the use of the company of any of his or their lands, tenements, or riparian rights and cannot agree with the company as to the amount of damage, the amount shall be ascertained as provided in Title 22.

History. — Ga. L. 1893, p. 81, § 4; Civil Code 1895, § 1990; Civil Code 1910, § 2371; Code 1933, § 17-113.

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Canals, §§ 5, 6, 11, 22.

C.J.S. — 12A C.J.S., Canals, §§ 8, 27 et seq.

52-4-16. Taxes applicable to canal companies.

The corporations named in this chapter shall be subject to state, county, and municipal taxation.

History. — Ga. L. 1893, p. 81, § 13; Civil Code 1895, § 1999; Civil Code 1910, § 2380; Code 1933, § 17-114.

RESEARCH REFERENCES

C.J.S. — 84 C.J.S., Taxation, §§ 4, 34, 109, 197 et seq., 411.

CHAPTER 5

NAVIGATION COMPANIES

Sec.
52-5-1. Granting of corporate powers and privileges by Secretary of State.
52-5-2. Filing of petition for incorporation; contents of petition; attachment of affidavit of incorporators; endorsement, recordation, and filing of petitions by Secretary of State.
52-5-3. Issuance of certificate of incorporation generally.
52-5-4. Time of commencement of corporate existence; payment of fee for issuance of certificate.
52-5-5. Duty of Secretary of State to assure company's compliance with chapter prior to issuance of certificate; certificate as constituting evidence of corporation's existence and compliance with chapter.
52-5-6. Organization of company; quorum; election of first board of directors; qualifications of directors; election and appointment of officers and agents; annual election of, and filling of vacancies on, board of directors.
52-5-7. Opening books of subscription for capital stock; restriction on increase of capital stock.
52-5-8. Manner of payment for stock; auction sale of stock upon default by subscriber; giving delinquent subscriber notice of auction sale.
52-5-9. Stock as constituting personal property; determination of manner of transfer of stock.
52-5-10. Procedure for increase of capital stock.
52-5-11. Powers of companies generally.
52-5-12. Adoption of chapter by companies incorporated prior to April 1, 1969, and by persons otherwise owning or operating a navigation business.

Cross references. — Corporations generally, Ga. Const. 1983, Art. III, Sec. VI, Para. V and T. 14, C. 4.

52-5-1. Granting of corporate powers and privileges by Secretary of State.

All corporate powers and privileges to navigation companies shall be issued and granted by the Secretary of State upon the terms, liabilities, and restrictions and subject to all the provisions of this chapter and the Constitution of Georgia.

History. — Ga. L. 1894, p. 71, § 1; Civil Code 1895, § 2147; Civil Code 1910, § 2565; Code 1933, § 17-201.

Cross references. — Grant of corporate powers generally, Ga. Const. 1983, Art. III, Sec. VI, Para. V. Corporate powers to navigation companies granted by Secretary of State, § 14-5-2. Corporate powers generally, § 14-4-60.

JUDICIAL DECISIONS

Cited in Southland S.S. Co. v. Dixon, 151 Ga. 216, 106 S.E. 111 (1921).

RESEARCH REFERENCES

Am. Jur. 2d. — 78 Am. Jur. 2d, Waters, §§ 69, 71, 72, 74, 80.

C.J.S. — 65 C.J.S., Navigable Waters, §§ 2, 11, 13.

52-5-2. Filing of petition for incorporation; contents of petition; attachment of affidavit of incorporators; endorsement, recordation, and filing of petitions by Secretary of State.

Any five or more natural persons may act as incorporators of a corporation to be organized under this chapter by filing a petition in writing, addressed to the Secretary of State, in which shall be stated the names and residences of each of the persons desiring to form the corporation, the name of the navigation company they desire to have incorporated, the amount of the proposed capital stock, the number of years it is to continue, the place where its principal office is to be located, a request to be incorporated under the laws of this state, and that they have given four weeks' notice of their intention to apply for the charter by publication of the petition in one of the newspapers in which the sheriff's advertisements are published for the county once a week for four weeks before filing the petition. There shall be annexed to the petition an affidavit, made by at least three of the persons forming the company, that the names subscribed are the genuine signatures of the persons named therein and that the facts stated in the petition are true to the best of their knowledge, information, and belief. The petition for incorporation, thus sworn to, shall be filed in the office of the Secretary of State, who shall endorse thereon the date of filing and record the same in a book to be kept by him for that purpose, which shall be open to the inspection of the public at all times during the office hours of the Secretary of State.

History. — Ga. L. 1894, p. 71, § 2; Civil Code 1895, § 2148; Civil Code 1910, § 2566; Code 1933, § 17-202.

JUDICIAL DECISIONS

Cited in Southland S.S. Co. v. Dixon, 151 Ga. 216, 106 S.E. 111 (1921).

RESEARCH REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d, Corporations, §§ 156 et seq., 164 et seq., 171, 173, 187, 189, 228.

C.J.S. — 18 C.J.S., Corporations, § 47 et seq.

52-5-3. Issuance of certificate of incorporation generally.

When the petition shall have been filed with the Secretary of State, he shall issue to the company, under the great seal of the state, the following form of certificate:

"To all to whom these presents may come — Greetings:

Whereas, in pursuance of an Act of the General Assembly of Georgia, approved December 6, 1894, and (naming the persons who signed the petition) having filed in the office of the Secretary of State a certain petition seeking the formation of a corporation to be known as (here insert corporate name), with a capital stock of $_____, for the purpose of owning, constructing, equipping, maintaining, and operating vessels, steamboats, and all other watercraft to be engaged in navigation, and having complied with the statutes in such cases made and provided; therefore, the State of Georgia hereby grants unto the above-named persons, their successors, and assigns full authority, by and under the said name of _____, to exercise the powers and privileges of a corporation for the purposes above-stated, subject to the Constitution of this state and all laws governing such navigation companies of force at the date of the granting of this certificate or that may hereafter become of force, either by constitutional or statute law.

In witness whereof, these presents have been signed by the Secretary of State, and to which is annexed the great seal of the State of Georgia, at Atlanta, Georgia, this ____ day of _____, _____."

History. — Ga. L. 1894, p. 71, § 3; Civil Code 1895, § 2149; Civil Code 1910, § 2567; Code 1933, § 17-203; Ga. L. 1983, p. 3, § 67; Ga. L. 1999, p. 81, § 52.

JUDICIAL DECISIONS

Cited in Southland S.S. Co. v. Dixon, 151 Ga. 216, 106 S.E. 111 (1921).

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 79 et seq. 18A Am. Jur. 2d, Corporations, §§ 171, 173.

C.J.S. — 18 C.J.S., Corporations, § 57.

52-5-4. Time of commencement of corporate existence; payment of fee for issuance of certificate.

When the Secretary of State issues a certificate of incorporation, the persons who signed the petition described in Code Section 52-5-2 and all persons who shall become stockholders in such company shall be a corporation by the name specified in the petition and certificate and shall possess the powers and privileges and be subject to the provisions contained in this chapter. Before the Secretary of State shall issue the certificate, the petitioners shall pay the fee prescribed in Code Section 14-4-183.

History. — Ga. L. 1894, p. 71, § 3; Civil Code 1895, § 2150; Civil Code 1910, § 2568; Code 1933, § 17-204.

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 180, 182, 195, 196.

C.J.S. — 18 C.J.S., Corporations, § 47 et seq.

52-5-5. Duty of Secretary of State to assure company's compliance with chapter prior to issuance of certificate; certificate as constituting evidence of corporation's existence and compliance with chapter.

Before the Secretary of State shall issue the certificate, he shall satisfy himself that all the requirements of Code Section 52-5-2 have been substantially complied with. Any certificate or duplicate thereof issued by the Secretary of State shall be conclusive evidence of the existence of such corporation in all the courts and places in this state and of a compliance with all the requirements of this chapter.

History. — Ga. L. 1894, p. 71, § 4; Civil Code 1895, § 2151; Civil Code 1910, § 2569; Code 1933, § 17-205.

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, § 1927.

C.J.S. — 18 C.J.S., Corporations, § 47 et seq.

52-5-6. Organization of company; quorum; election of first board of directors; qualifications of directors; election and appointment of officers and agents; annual election of, and filling of vacancies on, board of directors.

When the amount of capital stock has been subscribed, the persons named in the certificate of incorporation, or a majority of them, are

authorized to call a meeting of the stockholders for the purpose of organization, which meeting shall be held in the city or other place where the principal office of the company shall be located, and of which meeting notice shall have been given as provided in this chapter. At the meeting, at which a majority of stock subscribed shall constitute a quorum, there shall be elected a board of directors of not less than three to manage the affairs of the company, each share of stock to be entitled to one vote and a plurality of votes cast being necessary to elect. The persons so elected shall continue in office until relieved by their successors. No person shall be a director in the company unless he is a stockholder; and a majority of the directors must be citizens of this state. The board of directors shall select from their number a president, may elect one or more vice-presidents, and may appoint a secretary, a treasurer, and such other officers, agents, and servants as they may deem necessary. The regular election of directors shall be held annually at the principal office of the company. Vacancies occasioned by death, resignation, or otherwise shall be filled in such manner as shall be provided by the bylaws of the company.

History. — Ga. L. 1894, p. 71, § 5; Civil Code 1895, § 2153; Civil Code 1910, § 2571; Ga. L. 1913, p. 51, § 1; Code 1933, § 17-207; Ga. L. 1982, p. 3, § 52.

RESEARCH REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d, Corporations, § 830 et seq. 18B Am. Jur. 2d, Corporations, §§ 1183, 1186, 1193.

C.J.S. — 18 C.J.S., Corporations, § 442 et seq.

52-5-7. Opening books of subscription for capital stock; restriction on increase of capital stock.

When the certificate has been issued, the persons named therein, in case they shall not have subscribed for the entire capital stock, may open books of subscription to complete the subscription to the capital stock of the company, in such manner and for such amount per share as they may deem proper and expedient, and may receive the subscriptions until the entire capital stock is subscribed. In no case shall the capital stock be increased except as provided in this chapter.

History. — Ga. L. 1894, p. 71, § 4; Civil Code 1895, § 2152; Civil Code 1910, § 2570; Code 1933, § 17-206.

RESEARCH REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d, Corporations, §§ 187, 403, 480 et seq., 487, 488, 509 et seq., 527, 614 et seq.

C.J.S. — 18 C.J.S., Corporations, §§ 185 et seq., 242 et seq.

52-5-8. Manner of payment for stock; auction sale of stock upon default by subscriber; giving delinquent subscriber notice of auction sale.

The directors may require the subscribers to the capital stock to pay the amounts variously subscribed by them in such installments as they may deem proper. The directors may receive cash or property, real or personal, at the agreed value thereof in the payment of such installments. If any subscriber shall neglect to pay any installments as required by resolution of the board of directors, the directors may direct an action to be brought against him forthwith for the amount of the call. Alternatively, after 30 days' notice to the stockholder, the board of directors may, in its discretion, cause his stock to be sold at auction to the highest bidder for cash. Any deficiency in the sum thus realized necessary to make the amount of the call shall be made good by the delinquent. Any surplus over the amount of the call and the expenses of the sale shall be paid over to him. A certificate of stock shall be issued to the purchaser and he shall stand in the same relation to the company as the delinquent would have, had he not so made default. Such sale shall be in the city or other place where the principal office of the company is located, at such time and place as the directors may prescribe. If for any reason it is not practicable to serve the delinquent stockholder with notice of the sale, personally or by mail, or if he is a nonresident of this state, then notice may be given him of the sale by publication in the newspaper in which sheriff's advertisements are published in the county of its principal office, once a week for four weeks prior to the date of the sale.

History. — Ga. L. 1894, p. 71, § 6; Civil Code 1895, § 2154; Civil Code 1910, § 2572; Code 1933, § 17-209; Ga. L. 1995, p. 10, § 52.

RESEARCH REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d, Corporations, §§ 413 et seq., 417 et seq., 421 et seq., 480 et seq., 491, 494, 495, 564 et seq.

C.J.S. — 18A C.J.S., Corporations, §§ 212 et seq., 234 et seq.

52-5-9. Stock as constituting personal property; determination of manner of transfer of stock.

The stock in the company shall be deemed personal property and shall be transferable in such manner as may be prescribed by the bylaws of the company.

History. — Ga. L. 1894, p. 71, § 7; Civil Code 1895, § 2155; Civil Code 1910, § 2573; Code 1933, § 17-210.

Cross references. — Consideration of stocks as personalty, § 44-1-3.

RESEARCH REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d, Corporations, § 355 et seq.

52-5-10. Procedure for increase of capital stock.

(a) A company desiring to have its capital stock increased shall:

(1) File in the office of the Secretary of State a petition signed with the corporate name, stating:

(A) The name and character of the corporation;

(B) The date of its original charter and all amendments thereto; and

(C) That it desires to amend the company's charter to increase its capital stock;

(2) File, along with the petition called for in paragraph (1) of this subsection:

(A) A certified abstract from the minutes of the board of directors showing that the application for the proposed increase in capital stock has been authorized by the vote of a majority of the stockholders of the entire capital stock entitled, by the terms of the corporation's charter, to vote at an annual or special meeting called for that purpose, by a resolution of the board of directors; and

(B) An affidavit showing that notice of such meeting was mailed to each stockholder or, in case of death, to the stockholder's legal representatives or heirs at law, addressed to the stockholder's last known residence, at least ten days prior to the day of the meeting.

(b) The affidavit called for in subparagraph (a)(2)(B) of this Code section shall be made and signed in due form of law by the president or secretary of the company and shall show that the ten days' notice has been published once a week for four weeks in the newspaper in which is published the sheriff's sales of the county in which the principal office

of the corporation desiring to increase its capital stock is located. The stock may be voted in person or by written proxy.

History. — Ga. L. 1894, p. 71, § 7; Civil Code 1895, § 2156; Civil Code 1910, § 2574; Code 1933, § 17-211.
Cross references. — Certificate issued by the Secretary of State upon his approval of the corporation's petition to increase its capital stock, § 14-4-121.

RESEARCH REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d, Corporations, § 384 et seq.
C.J.S. — 18 C.J.S., Corporations, § 242 et seq.

52-5-11. Powers of companies generally.

The company shall have the following powers:

(1) To acquire, purchase, hold, and operate all such real and personal property as may be necessary or convenient for the maintenance and operation of its business and to accomplish the purposes of its organization;

(2) To convey persons, vessels, and other property by the use of steam, sail, or other means and to receive compensation therefor; and to do all other things incident to a general navigation business, including the right to tow, assist, and rescue vessels;

(3) To erect and maintain convenient buildings, wharves, docks, fixtures, and machinery for the accommodation and use of its passengers, freight, and other business;

(4) To regulate the time and manner in which passengers, vessels, and other property shall be transported and the compensation to be paid therefor, subject to any existing law upon the subject; and

(5) To borrow such sum or sums of money, at such rates of interest and upon such terms, as the company or its directors may agree upon and to execute trust deeds or mortgages, or both, if in their judgment the occasion may require it, for securing the payment thereof.

History. — Ga. L. 1894, p. 71, § 8; Civil Code 1895, § 2157; Civil Code 1910, § 2575; Code 1933, § 17-212.
Cross references. — Powers of corporations generally, §§ 14-4-60 and 14-4-61.

JUDICIAL DECISIONS

Cited in Southland S.S. Co. v. Dixon, 151 Ga. 216, 106 S.E. 111 (1921).

OPINIONS OF THE ATTORNEY GENERAL

Although assisting vessels is incidental to a navigation business, it is not a navigation business. 1969 Op. Att'y Gen. No. 69-97.

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 27, 33 et seq. 18A Am. Jur. 2d, Corporations, §§ 168, 169. 18B Am. Jur. 2d, Corporations, §§ 1715 et seq., 1719 et seq., 1794, 1825, 1826. 78 Am. Jur. 2d, Waters, § 122 et seq.

Am. Jur. Pleading and Practice Forms. — 25 Am. Jur. Pleading and Practice Forms, Wharves, § 2.

C.J.S. — 19 C.J.S., Corporations, § 791 et seq. 65 C.J.S., Navigable Waters, §§ 11, 13, 35, 39, 40, 41, 93.

52-5-12. Adoption of chapter by companies incorporated prior to April 1, 1969, and by persons otherwise owning or operating a navigation business.

(a) Any navigation company incorporated prior to April 1, 1969, whether by the General Assembly or otherwise, may amend its charter by adopting the provisions of this chapter, by filing with the Secretary of State a petition signed with the corporate name, stating the name and character of the corporation, the date of the original Act of incorporation, and all amendments thereto. The company shall state in the petition that it desires to amend its charter by having granted to it the corporate powers and privileges granted to other navigation companies by this chapter. The company shall also file along with the petition a certified abstract from the minutes of the corporation, showing that the application for amendment has been authorized by resolution which has been duly adopted by the affirmative vote of the holders of a majority of the shares entitled to vote thereon of the corporation at a meeting held for the purpose of passing upon the resolution duly certified by the president and secretary of the corporation.

(b) When a navigation company amends its charter by following the procedures specified in subsection (a) of this Code section, it may retain its original organization and the same amount of capital stock and other rights and privileges provided for in the original charter, except the right of exemption from taxation, which may not be in conflict with this chapter or any other law of this state relating to the powers and privileges of navigation corporations; and such amendments shall be without prejudice to any of the prior rights or contracts of the corporation.

(c) This chapter may also be adopted by any person owning or operating a navigation business, without prejudice to such organization as may already have existed and without prejudice to his existing contracts and obligations. Whenever any person desires to adopt the

provisions of this chapter as provided in this subsection, he shall file a petition with the Secretary of State setting forth with particularity in what manner it is desired to adopt this chapter. When such petition is filed, the Secretary of State shall issue to the person, under the great seal of the state, a certificate setting forth that this person is a body corporate with all the powers, duties, and liabilities of this chapter. Before the certificate shall be issued, the petitioner shall pay to the Secretary of State the fee provided in Code Section 14-4-183.

History. — Ga. L. 1894, p. 71, § 9; Civil Code 1895, § 2158; Civil Code 1910, § 2576; Code 1933, § 17-213.

Cross references. — Petition for amendment of charter and the certificate issued upon approval of charter amendment or adoption of this chapter, §§ 14-4-100 and 14-4-101. Fee for amendment of charter, § 14-4-183.

CHAPTER 6

PILOTS AND PILOTAGE

Article 1

Board of Pilotage Commissioners

Sec.

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52-6-49. Liabilities and penalties for failure to take pilot or pay pilotage fees.

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52-6-51. Right of pilot boat to one-third of inward and outward pilotage fee.

52-6-52. Liability for detaining pilots on vessels.

52-6-53. Compulsory retirement of pilots.

Sec.
52-6-54. Acting as pilot without license; interfering with or disturbing licensed pilot.

Administrative rules and regulations. — Board of Pilotage Commissioners, Official Compilation of the Rules and Regulations of the State of Georgia, T. 494.

ARTICLE 1

BOARD OF PILOTAGE COMMISSIONERS

52-6-1. Composition of board; terms of commissioners.

The corporate authorities of Savannah, Darien, Brunswick, and St. Marys shall each have power to appoint a Board of Pilotage Commissioners (hereinafter referred to as the commissioners), consisting of seven commissioners, each appointed for a term of seven years. Terms of the commissioners shall be staggered with one term expiring each year.

History. — Laws 1799, Cobb's 1851 Digest, p. 33; Code 1863, § 1453; Code 1868, § 1510; Code 1873, § 1504; Code 1882, § 1504; Ga. L. 1894, p. 41, §§ 1, 2; Civil Code 1895, § 1651; Civil Code 1910, § 1897; Code 1933, § 80-101; Ga. L. 1945, p. 279, § 2; Ga. L. 1997, p. 143, § 52.

52-6-2. Filling of vacancies on board.

Vacancies occurring for any reason before the expiration of a term shall be filled by appointment by the corporate authorities for the unexpired term.

History. — Ga. L. 1894, p. 41, § 2; Civil Code 1895, § 1652; Civil Code 1910, § 1898; Ga. L. 1914, p. 57, § 1; Code 1933, § 80-102; Ga. L. 1945, p. 279, § 2.

52-6-3. Qualifications of commissioners.

Only ship agents, exporters, merchants, or other persons who are not pilots and who are engaged in or are familiar with marine shipping and with the requirements of their respective ports shall be appointed commissioners of pilotage.

History. — Ga. L. 1894, p. 41, § 2; Civil Code 1895, § 1652; Civil Code 1910, § 1898; Ga. L. 1914, p. 57, § 1; Code 1933, § 80-102; Ga. L. 1945, p. 279, § 2.

52-6-4. Areas for which commissioners appointed.

The commissioners to be appointed by the corporate authorities of Savannah shall be appointed for the Tybee Bar and the Savannah River and the several bars and inlets north of Sapelo Bar. Commissioners to be appointed by the corporate authorities of Darien shall be appointed for Sapelo Bar and the Altamaha River and the several bars and inlets south of Sapelo Bar as far as St. Simon's Bar. Commissioners to be appointed by the corporate authorities of Brunswick shall be appointed for St. Simon's Bar, Turtle River, St. Andrew's Bar, and the several bars and inlets north of and including the Great Satilla River. Commissioners to be appointed by the corporate authorities of St. Marys shall be appointed for St. Marys Bar and all bars and inlets between St. Marys Bar and St. Andrew's Bar.

History. — Laws 1799, Cobb's 1851 Digest, p. 33; Code 1863, § 1453; Code 1868, § 1510; Code 1873, § 1504; Code 1882, § 1504; Ga. L. 1894, p. 41, § 2; Civil Code 1895, § 1651; Civil Code 1910, § 1897; Code 1933, § 80-101; Ga. L. 1945, p. 279, § 3; Ga. L. 1997, p. 143, § 52.

52-6-5. Appointment of master pilot; duties of master pilot generally.

The commissioners of pilotage may appoint one of the active pilots to be the master pilot, to have charge of the pilots, and, as representative of the commissioners, to see that its rules and regulations are complied with.

History. — Ga. L. 1945, p. 279, § 7.

Administrative rules and regulations. — Pilot and apprentice age limitations, Official Compilation of the Rules and Regulations of the State of Georgia, Board of Pilotage Commissioners, Saint Simons and Saint Andrews Bars, Government of Bar and Harbor Pilotage, Sec. 494-1-1-.08.

52-6-6. Right of commissioners to bring an action to recover forfeitures.

The commissioners are authorized, in their own names or in that of their chairman as such, to bring an action for and recover, to their own use and the improvement of navigation, any forfeiture accruing under this chapter which is not otherwise specifically appropriated.

History. — Orig. Code 1863, § 1490; Code 1868, § 1547; Code 1873, § 1541; Code 1882, § 1541; Civil Code 1895, § 1689; Civil Code 1910, § 1935; Code 1933, § 80-209; Ga. L. 1945, p. 279, § 27; Ga. L. 1982, p. 3, § 52.

52-6-7. Manner of application of fines and forfeitures.

All fines and forfeitures collected by the commissioners, or so much thereof as may be necessary, shall be applied toward the payment of the expenses of the board.

History. — Laws 1799, Cobb's 1851 Digest, p. 37; Code 1863, § 1483; Code 1868, § 1540; Code 1873, § 1534; Code 1882, § 1534; Civil Code 1895, § 1682; Civil Code 1910, § 1928; Code 1933, § 80-208; Ga. L. 1945, p. 279, § 25.

52-6-8. Keeping of records by board; designation of chairperson of board; keeping list of pilots whose licenses have been revoked; access of public to records.

The commissioners shall preserve in a neatly bound book a record of all their acts and of all the rules and regulations adopted by them for the direction and government of pilots. The commissioners shall designate one of their number as chairperson and cause a record thereof to be made. The commissioners shall also preserve upon their records a list of the names of all persons appointed pilots by them, as well as a list of the names of those whose licenses have been suspended or revoked or who have been retired. All persons interested shall have access to and be permitted to have duplicates of such records.

History. — Orig. Code 1863, §§ 1473, 1474; Code 1868, §§ 1530, 1531; Code 1873, §§ 1524, 1525; Code 1882, §§ 1524, 1525; Civil Code 1895, §§ 1672, 1673; Civil Code 1910, §§ 1918, 1919; Code 1933, §§ 80-112, 80-113; Ga. L. 1945, p. 279, §§ 22, 23; Ga. L. 2011, p. 99, § 96/HB 24.

Cross references. — Inspection of public records generally, § 50-18-70 et seq.

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

52-6-9. Salary or fees of secretary.

The secretary of the commissioners shall have such salary or fees as the commissioners may determine, which salary or fees shall be paid out of fines and forfeitures or such other fund as shall be under the control of the commissioners.

History. — Orig. Code 1863, § 1474; Code 1868, § 1531; Code 1873, § 1525; Code 1882, § 1525; Civil Code 1895, § 1673; Civil Code 1910, § 1919; Code 1933, § 80-113; Ga. L. 1945, p. 279, § 23.

52-6-10. Determination of location of office of commissioners; location of books, papers, and records of commissioners.

The office of the commissioners must be kept in some suitable place of which the public shall have notice; and their books, papers, and records may be kept in such office or in the office of any court of record in the county.

History. — Orig. Code 1863, § 1475; Code 1868, § 1532; Code 1873, § 1526; Code 1882, § 1526; Civil Code 1895, § 1674; Civil Code 1910, § 1920; Code 1933, § 80-103; Ga. L. 1945, p. 279, § 24.

52-6-11. Rules and regulations; reciprocal pilotage in port of St. Marys and tributaries of St. Marys River.

(a) The commissioners shall prescribe rules and regulations for the government of pilots and the fees which may be charged for their services and shall, from time to time, revise and grade pilotage fees when, in their judgment, it is necessary to do so. All rules and regulations consistent with this chapter existing as of January 1, 1995, and all fees prescribed by the commissioners as of January 1, 1995, shall remain in effect until changed as provided in this chapter.

(b) The Board of Pilotage Commissioners for the City of St. Marys, having jurisdiction over areas which include boundary waters, shall be separately empowered to agree, in form, with the Florida State Board of Pilot Commissioners to establish authority for reciprocal pilotage in the port of St. Marys and the tributaries of the St. Marys River.

History. — Ga. L. 1886, p. 38, § 3; Civil Code 1895, § 1655; Ga. L. 1901, p. 31, § 1; Civil Code 1910, § 1901; Ga. L. 1915, p. 16, § 1; Code 1933, § 80-111; Ga. L. 1945, p. 279, § 8; Ga. L. 1989, p. 451, § 1; Ga. L. 1995, p. 846, § 1.

Administrative rules and regulations. — Pilot and apprentice age limitations, Official Compilation of the Rules and Regulations of the State of Georgia, Board of Pilotage Commissioners, Saint Simons and Saint Andrews Bar, Government of Bar and Harbor Pilotage, Sec. 494-1-1-.08.

ARTICLE 2

PILOTS GENERALLY

Cross references. — Duty of pilots to report unlawful discharge of stone, gravel, or ballast into bays and harbors, § 52-8-2.

52-6-30. Qualifications for pilot's license.

The commissioners at each of the ports of this state are entitled to license during good behavior such citizens of the United States who are

of good character as they shall think fit to act as pilots in piloting vessels underway in the waters of the several ports and rivers for which they shall be licensed. Any pilot who is licensed as of January 1, 1995, shall continue to act under such license until said license is revoked or the pilot is suspended or is retired as provided in this chapter.

History. — Ga. L. 1886, p. 38, § 1; Civil Code 1895, § 1653; Ga. L. 1896, p. 85, § 1; Ga. L. 1901, p. 30, § 1; Civil Code 1910, § 1899; Ga. L. 1921, p. 103, § 1; Code 1933, § 80-104; Ga. L. 1945, p. 279, § 4; Ga. L. 1980, p. 1355, § 1; Ga. L. 1995, p. 846, § 2.

JUDICIAL DECISIONS

Licensed pilots could not be parties in application. — On application to commissioners for license as pilot, pilots already licensed could not be made parties to the proceeding, oppose the grant of a license and carry the judgment granting the license to superior court by certiorari, as if it were a judgment of a court in a case in which the pilots were interested. The commissioners should not hear them otherwise than as witnesses in respect to the competency of the applicant or committees to examine the applicant. Healey v. Dean, 68 Ga. 514 (1882).

Actions by licensed pilots prohibited. — Each licensed pilot has a right to hold the pilot's license and receive the pilot's fees for services which the pilot may render; but the pilot has no right, either alone or with others, to claim the entire business of the port, and to prevent the issuing of a license to another pilot, in the discretion of the commissioners. Wright v. Commissioners of Pilotage, 69 Ga. 247 (1882).

Contract limiting number of pilots at port illegal and void. — Contract between the commissioners of a port and the licensed pilots thereof, whereby the former agreed to limit the number of pilots for that port for a period of three years to ten, that being the number already licensed, was illegal and void. It is the duty of commissioners to supply the port with a sufficient number of pilots, and the commissioners cannot contract to restrict the number, without regard to what might be necessary for the business of the port. Wright v. Commissioners of Pilotage, 69 Ga. 247 (1882).

Effect of two years service in deck boat on application for pilot license. — When applicant for a license to act as pilot has served two full years in a decked boat, there is not a necessity for the mayor or chief officer of the port to determine that an emergency exists before a license can be issued to the applicant. Healey v. Dean, 68 Ga. 514 (1882).

52-6-31. Number of pilots.

The number of licensed pilots shall not exceed 21 for the port of Savannah, three for the port of Doboy and Darien, eight for the port of Brunswick, two for the Great Satilla River, and two for the port of St. Marys.

History. — Ga. L. 1886, p. 38, § 1; Civil Code 1895, § 1653; Ga. L. 1896, p. 85, § 1; Ga. L. 1901, p. 30, § 1; Civil Code 1910, § 1899; Ga. L. 1921, p. 103, § 1; Code 1933, § 80-104; Ga. L. 1945, p. 279, § 4; Ga. L. 1980, p. 1355, § 1; Ga. L. 1995, p. 846, § 3; Ga. L. 1997, p. 143, § 52; Ga. L. 2007, p. 105, § 1/HB 132.

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Actions by licensed pilots prohibited. — Each licensed pilot has a right to hold the pilot's license and receive the pilot's fees for services which the pilot may render; but the pilot has no right, either alone or with others, to claim the entire business of the port, and to prevent issuing of a license to another pilot, in the discretion of the commissioners. Wright v. Commissioners of Pilotage, 69 Ga. 247 (1882).

Contract limiting number of pilots at port illegal and void. — Contract between commissioners of a port and licensed pilots thereof, whereby the former agreed to limit the number of pilots for that port for a period of three years to ten, that being the number already licensed, was illegal and void. It is the duty of commissioners to supply the port with a sufficient number of pilots, and the commissioner's cannot contract to restrict the number, without regard to what might be necessary for the business of the port. Wright v. Commissioners of Pilotage, 69 Ga. 247 (1882).

52-6-32. Restrictions as to persons who may receive fees, gratuities, or rewards for conducting or piloting vessels.

No person other than a duly licensed pilot shall be entitled to receive any fee, gratuity, or reward for piloting any vessels underway in the waters of any of the ports, rivers, or harbors for which pilots may be licensed under the terms of this chapter. Nothing in this Code section shall be construed as prohibiting payments being made to docking pilots for services rendered in accordance with subsection (c) of Code Section 52-6-45.

History. — Ga. L. 1886, p. 38, § 1; Civil Code 1895, § 1653; Ga. L. 1896, p. 85, § 1; Ga. L. 1901, p. 30, § 1; Civil Code 1910, § 1899; Ga. L. 1921, p. 103, § 1; Code 1933, § 80-306; Ga. L. 1945, p. 279, § 4; Ga. L. 1980, p. 1355, § 1; Ga. L. 1995, p. 846, § 4.

52-6-33. Form of license; oath of pilot.

The license to a pilot must be in the form of a certificate of appointment, which must be signed by a majority of the commissioners or by their chairperson by their direction; and each pilot, on receiving a license, shall take and subscribe an oath in the following form:

> "I, A.B., appointed pilot for the port and harbor of _____, do swear that I will faithfully, according to the best of my ability, perform the duties of a pilot in and for the port and harbor of _____, and will at all times — wind, weather, and health permitting — use my best efforts to go on board every vessel I shall see and conceive to be bound for, coming into, going out of, or underway within said port or harbor, unless I am well assured there is some other licensed pilot on board the same; that I will, at all times, make the best dispatch in my power to convey any vessel committed to my charge coming into, going out of, or underway within said port or harbor; and will at all times well and truly observe, fulfill, and

follow, to the best of my skill and judgment, all such orders and directions as I may receive from the commissioners in all matters and things relating to the duty of a pilot."

History. — Laws 1799, Cobb's 1851 Digest, p. 34; Code 1863, § 1455; Code 1868, § 1512; Code 1873, § 1506; Code 1882, § 1506; Civil Code 1895, § 1661; Civil Code 1910, § 1907; Code 1933, § 80-107; Ga. L. 1945, p. 279, § 5; Ga. L. 1995, p. 846, § 5.

52-6-34. Pilots' bonds — Generally.

Every pilot licensed as provided for in this chapter shall, before receiving his license, make and deliver to the commissioners a bond, payable to the chairman of the board and his successors in office, in the penal sum of $2,000.00, with security to be approved by the commissioners and with the condition faithfully to perform his duties as pilot. The bond shall be renewable at the discretion of the commissioners with such security or additional security as they may require.

History. — Laws 1799, Cobb's 1851 Digest, p. 34; Code 1863, § 1456; Code 1868, § 1513; Code 1873, § 1507; Code 1882, § 1507; Civil Code 1895, § 1662; Civil Code 1910, § 1908; Ga. L. 1921, p. 105, § 1; Code 1933, § 80-108; Ga. L. 1945, p. 279, § 6.

RESEARCH REFERENCES

ALR. — Validity of statute or ordinance which requires liability or indemnity insurance or bond as condition of license for conducting business or profession, 120 A.L.R. 950.

52-6-35. Pilots' bonds — Continuation of existing bonds; venue of actions on bonds; parties to actions.

All bonds given pursuant to prior law and in effect on March 8, 1945, are continued in full force and effect. Actions on bonds provided for in Code Section 52-6-34 may be brought in any court having jurisdiction thereof, without any order for that purpose, by any person or vessel endangered or endamaged by the misconduct, carelessness, or neglect of the pilot.

History. — Laws 1799, Cobb's 1851 Digest, p. 34; Code 1863, § 1456; Code 1868, § 1513; Code 1873, § 1507; Code 1882, § 1507; Civil Code 1895, § 1662; Civil Code 1910, § 1908; Ga. L. 1921, p. 105, § 1; Code 1933, § 80-108; Ga. L. 1945, p. 279, § 6.

RESEARCH REFERENCES

ALR. — Validity of statute or ordinance which requires liability or indemnity insurance or bond as condition of license for conducting business or profession, 120 A.L.R. 950.

52-6-36. Revocation of license for conducting or piloting vessel arrested under court process.

Any pilot who shall, with knowledge of the arrest of any vessel under process from any court of record, conduct or pilot the vessel out of the port or harbor where the arrest is made while the vessel is in charge of any officer of any court of record shall forfeit his license and be forever disqualified from acting as pilot.

History. — Orig. Code 1863, § 1459; Code 1868, § 1516; Code 1873, § 1510; Code 1882, § 1510; Civil Code 1895, § 1663; Civil Code 1910, § 1909; Code 1933, § 80-109; Ga. L. 1945, p. 279, § 12.

Cross references. — Hearings regarding revocation or suspension of license for cause, § 52-6-38.

52-6-37. Authority of commissioners to suspend pilots, to revoke licenses, and to assess fines and penalties; grounds for suspension, revocation, fines, or other penalties.

The commissioners may suspend any pilot or deprive him of his license or assess against him such fines and other penalties as they may think best, upon evidence satisfactory to them of negligence, unskillfulness, inattention to duty, intemperance, addiction to the use of drugs, mental derangement, misconduct, or willful violation of any of their rules or regulations, subject to the right of the pilot to appeal as provided in Code Section 52-6-38.

History. — Ga. L. 1886, p. 38, § 2; Civil Code 1895, § 1654; Civil Code 1910, § 1900; Code 1933, § 80-110; Ga. L. 1945, p. 279, § 7.

52-6-38. Hearings before commissioners; enforcement of decrees and orders by execution or warrant of distress.

All matters concerning the assessment of fines or penalties against pilots or other persons, the suspension or revocation of pilot licenses, and any other matter relating to the use, business, or care of a pilot in any of the harbors shall be heard and determined by the commissioners, or a majority of them, appointed for the care of the pilotage where the violation, damage, or dispute may arise, upon reasonable notice to the pilot, pilots, or other persons concerned and an opportunity for the pilot, pilots, or other persons to be heard. The commissioners are authorized by their decree or order to decide and regulate every such matter, to assess fines and penalties, and to suspend or revoke licenses. They shall have the power to enforce the decree or order by execution or warrant

of distress, under their hands and seals or under the hands and seals of any three of them, directed to any sheriff or constable of the county where the execution issues and commanding the sale of the offender's goods, or so much of them as may be necessary to satisfy the execution or warrant. All sales thereunder shall be made in conformity with the laws of the state in relating to sheriffs' sales. The sheriff and constable shall be liable to be ruled before the judge of the superior court as in other cases for default in duly executing such process.

History. — Laws 1799, Cobb's 1851 Digest, p. 34; Code 1863, § 1472; Code 1868, § 1529; Code 1873, § 1523; Code 1882, § 1523; Civil Code 1895, § 1671; Civil Code 1910, § 1917; Code 1933, § 80-314; Ga. L. 1945, p. 279, § 15; Ga. L. 1995, p. 846, § 6.

52-6-39. Issuance of subpoenas.

When the attendance of any person shall be required as a witness before the commissioners in any matter or claim of which they shall have jurisdiction, it shall be the duty of their secretary, upon application, to issue subpoenas signed by him and directed to the persons whose attendance shall be required when such persons reside or shall be found in the county where such matters or claims may be pending. The summons shall express the cause and the party at whose action it is issued and shall be served as subpoenas of courts of record of this state are served at least 24 hours before the meeting of the commissioners to which it shall be returnable; but the subpoenas may be served by a messenger of the commissioners or by any sheriff or constable and the return of the messenger, sheriff, or constable shall be evidence of the service thereof.

History. — Laws 1832, Cobb's 1851 Digest, p. 45; Code 1863, § 1476; Code 1868, § 1533; Code 1873, § 1527; Code 1882, § 1527; Civil Code 1895, § 1675; Civil Code 1910, § 1921; Code 1933, § 80-201; Ga. L. 1945, p. 279, § 16.

52-6-40. Failure of witness to answer subpoena.

Any witness summoned pursuant to Code Section 52-6-39, whose testimony shall appear to be material and who shall fail to appear, may be attached by the commissioners. The attachment may be directed to a sheriff or constable and made returnable to the next superior court of the county; and the court may fine the witnesses in a sum not exceeding $100.00, unless a good excuse is made to the judge of the court. The witness shall also be liable to action at the action of the party injured by the nonattendance.

History. — Laws 1832, Cobb's 1851 Digest, p. 45; Code 1863, § 1477; Code 1868, § 1534; Code 1873, § 1528; Code 1882, § 1528; Civil Code 1895, § 1676; Civil Code 1910, § 1922; Code 1933, § 80-202; Ga. L. 1945, p. 279, § 17.

52-6-41. Taking of interrogatories and depositions from nonresidents and seamen.

When the person whose attendance is required as a witness is a nonresident of the county where the matter or claim is pending or is a seaman, his interrogatories or depositions may be taken and returned to the commissioners in the manner provided by law for taking and returning interrogatories and depositions in the courts of record of this state and may be put in evidence before the commissioners when the personal attendance of the witness cannot be secured. Reasonable notice of intention to take the interrogatories or depositions and of the time and place of the hearing must be given to all persons interested, or to their attorneys, or to the master, agent, or charterer of any vessel, where the vessel or her owners or cargo are interested.

History. — Laws 1832, Cobb's 1851 Digest, pp. 45, 46; Code 1863, §§ 1478, 1479; Code 1868, §§ 1535, 1536; Code 1873, §§ 1529, 1530; Code 1882, §§ 1529, 1530; Civil Code 1895, §§ 1677, 1678; Civil Code 1910, §§ 1923, 1924; Code 1933, §§ 80-203, 80-204; Ga. L. 1945, p. 279, § 18; Ga. L. 1982, p. 3, § 52.

Cross references. — Depositions, interrogatories, § 9-11-26 et seq.

52-6-42. Appeal to superior court — Generally.

In any case where a pilot is suspended or the pilot's license is revoked or where a fine exceeding $150.00 is imposed by the commissioners on a pilot or any other person, the pilot or other person concerned may petition the judge of the superior court of the county where the judgment or sentence of the commissioners was made, setting forth on oath the circumstances of the case. A copy of the petition shall be served upon the chairperson or secretary of the commissioners at least three days before the petition is presented and the commissioners shall be entitled to be heard as to whether there is sufficient ground for the allowance of an appeal. If the judge of the superior court should think there is sufficient ground for the allowance of an appeal, such judge shall issue an order directing an issue to be made between the appellant and the commissioners, which issue shall be tried by a jury at the next term of the superior court, unless good cause is shown for a continuance. If, at the trial, a verdict should be rendered in favor of the appellant, the judge of the superior court shall order that the fine be remitted, that the suspension be canceled, or that the license be restored. Either the appellant or the commissioners may move the court for a new trial and may appeal to the Court of Appeals from the court's order entered upon the motion, as is provided by law in cases of appeal from orders granting or refusing a new trial in common-law cases.

History. — Laws 1830, Cobb's 1851 Digest, p. 43; Code 1863, § 1481; Code 1868, § 1538; Code 1873, § 1532; Code 1882, § 1532; Civil Code 1895, § 1680;

Civil Code 1910, § 1926; Code 1933, § 80-206; Ga. L. 1945, p. 279, § 20; Ga. L. 1995, p. 846, § 7.

Cross references. — Appeals to superior court generally, T. 5, C. 3.

52-6-43. Appeal to superior court — Use of interrogatories and depositions.

In cases of appeal, testimony for use in the superior court may be taken and returned by interrogatories or depositions, under the circumstances and in the manner provided by law for the taking and returning of testimony in cases pending in the superior courts of this state.

History. — Laws 1830, Cobb's 1851 Digest, p. 43; Code 1863, § 1482; Code 1868, § 1539; Code 1873, § 1533; Code 1882, § 1533; Civil Code 1895, § 1681; Civil Code 1910, § 1927; Code 1933, § 80-207; Ga. L. 1945, p. 279, § 21.

Cross references. — Depositions, interrogatories, § 9-11-26 et seq.

52-6-44. Fees relating to hearings before commissioners.

The secretary's fees for each subpoena shall be 25¢ and for each attachment 50¢. For serving any subpoena and for executing and returning an attachment, a sheriff's or constable's fee shall be charged as otherwise provided by law. The commissioner or notary public before whom testimony is taken by deposition shall receive for his services and for reporting and transcribing the question or answers of the witness, or both, the fees allowed by law for similar services rendered in cases pending in courts of record of this state.

History. — Laws 1832, Cobb's 1851 Digest, p. 46; Code 1863, § 1480; Code 1868, § 1537; Code 1873, § 1531; Code 1882, § 1531; Civil Code 1895, § 1679; Civil Code 1910, § 1925; Code 1933, § 80-205; Ga. L. 1945, p. 279, § 19.

Cross references. — Fees of justices of the peace, § 15-10-80 et seq. Obligation of fee system for sheriffs, § 15-16-19. Fees of notaries public, § 45-17-11.

52-6-45. Vessels to be under direction and control of licensed pilots; exemptions; use of docking pilots.

(a) Except as otherwise provided in this Code section, every vessel shall be under the direction and control of a pilot licensed by this state when underway in the bays, rivers, harbors, and ports of this state and the approaches thereto.

(b) The requirement of subsection (a) of this Code section shall not apply to the following vessels:

(1) Vessels exempted by the laws of the United States;

(2) Vessels under 200 gross tons; and

(3) Vessels in distress or jeopardy, except that any such vessel shall take a state licensed pilot as soon as one arrives at the vessel.

(c) Nothing in this Code section shall be construed to prohibit a vessel from utilizing the services of a docking pilot in addition to the state licensed pilot required under this chapter during docking and undocking maneuvers with the assistance of one or more tugboats. The commissioners are authorized, consistent with all other requirements of this chapter, to establish by regulation or otherwise the duties, responsibilities, and fees of state licensed pilots when operating with a docking pilot aboard a vessel.

History. — Ga. L. 1886, p. 38, §§ 5, 6, 8; Civil Code 1895, §§ 1657, 1658, 1660; Civil Code 1910, §§ 1903, 1904, 1906; Code 1933, §§ 80-303, 80-304, 80-310; Ga. L. 1945, p. 279, § 9; Ga. L. 1986, p. 482, § 1; Ga. L. 1995, p. 846, § 8.

52-6-46. Pilotage fees — Fees for coastwise vessels.

Reserved. Repealed by Ga. L. 1995, p. 846, § 9, effective April 19, 1995.

Editor's notes. — This Code section was based on Ga. L. 1945, p. 279, § 9.

52-6-47. Pilotage fees — Time of payment; security for payment.

A pilot bringing a vessel into port or a pilot who has tendered his or her services outside the bar to a vessel which is required under this chapter to accept the services of a pilot shall be entitled to the payment of fees for inward, outward, and all other movements of the vessel within the waters of the port, subject to the commissioners' regulations, before the vessel leaves the port and may require the vessel to give adequate security therefor, to be approved by the commissioners, before the vessel leaves the port. If the payment is not made or the security is not given, no pilot shall be required to take the vessel out. The master, owner, or agent of any vessel which is in readiness to leave must, if possible, give notice of that fact to the commissioners at the port in question or to its authorized representative. The acceptance of security for pilotage fees shall in no way affect the lien specified in Code Section 52-6-49, given in case the fees are not paid.

History. — Orig. Code 1863, § 1464; Code 1868, § 1521; Code 1873, § 1515; Code 1882, § 1515; Ga. L. 1886, p. 38, § 7; Civil Code 1895, §§ 1659, 1666; Civil Code 1910, §§ 1905, 1912; Code 1933, §§ 80-305, 80-308; Ga. L. 1945, p. 279, § 12; Ga. L. 1995, p. 846, § 10.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1995, "commissioners'" was substituted for "Commissioners'" in the first sentence.

52-6-48. Pilotage fees — Requests or demands by pilots of fees different than those fixed by commissioners.

If any pilot shall ask or demand for his services greater or different fees than those specified in the rates of pilotage fixed by the commissioners, the commissioners shall, on due proof thereof, require him to pay the commissioners double the amount of the fees fixed by the commissioners.

History. — Ga. L. 1886, p. 38, § 7; Civil Code 1895, § 1659; Civil Code 1910, § 1905; Code 1933, § 80-305; Ga. L. 1945, p. 279, § 12.

52-6-49. Liabilities and penalties for failure to take pilot or pay pilotage fees.

(a) Any vessel that fails to take a pilot required under this chapter or that is operated in violation of any other requirement of this chapter or the regulations adopted by the commissioners under the authority of this chapter may be assessed a civil penalty by the commissioners in an amount not to exceed $25,000.00 per violation. Any vessel assessed such a penalty shall be liable in rem for the payment of the penalty amount.

(b) The owner, charterer, managing operator, master, or individual in charge of a vessel that fails to take a pilot required under this chapter or who violates any other requirement of this chapter or the regulations adopted by the commissioners under the authority of this chapter may be assessed a civil penalty by the commissioners in an amount not to exceed $25,000.00 per violation.

(c) Any owner, charterer, managing operator, master, or individual in charge of a vessel who knowingly and willfully refuses to take a pilot required under this chapter shall be guilty of a misdemeanor.

(d) Any vessel and the owner, charterer, managing operator, master, or individual in charge of the vessel that fails to take a pilot required under this chapter or that fails to pay the applicable pilotage fee when a pilot has been taken shall be liable to the first pilot who offered pilotage services, in the case of a vessel failing to take a required pilot, or to the pilot who performed the pilotage services, in the case of a vessel taking the pilot but failing to pay the pilotage fee, for the full amount of the applicable pilotage fee. The pilot is given a lien on the vessel and its tackle, apparel, and furniture for the collection of the fees.

(e) The liabilities and penalties provided for in this Code section are cumulative and are in addition to any rights or remedies available to a pilot or pilots, the commissioners, or to the state under any other law.

History. — Ga. L. 1886, p. 38, § 4; Civil Code 1895, § 1656; Civil Code 1910, § 1902; Code 1933, § 80-302; Ga. L. 1945, p. 279, § 10; Ga. L. 1995, p. 846, § 11.

52-6-50. Fees of pilots aiding vessel in distress.

Any pilot belonging to any port in this state meeting at sea with any vessel in distress, which is bound to another port within this state, shall, if capable and thereunto required, take charge of and pilot such vessel into such port and shall be paid $10.00 a day for every day he may be aboard such vessel at sea, without the bars, and over and above the usual rate of pilotage; and no other pilot shall interfere with him while he is willing to continue his services.

History. — Laws 1799, Cobb's 1851 Digest, p. 36; Code 1863, § 1470; Code 1868, § 1527; Code 1873, § 1521; Code 1882, § 1521; Civil Code 1895, § 1669; Civil Code 1910, § 1915; Code 1933, § 80-312; Ga. L. 1945, p. 279, § 11.

52-6-51. Right of pilot boat to one-third of inward and outward pilotage fee.

Any pilot boat which places a pilot on board a vessel for the purpose of conducting it into any of the rivers or harbors mentioned in this chapter shall be entitled to one-third of the inward pilotage fee and any pilot boat which takes a pilot off of a vessel shall be entitled to one-third of the outward pilotage fee.

History. — Orig. Code 1863, § 1468; Code 1868, § 1525; Code 1873, § 1519; Code 1882, § 1519; Civil Code 1895, § 1668; Civil Code 1910, § 1914; Code 1933, § 80-311; Ga. L. 1945, p. 279, § 13.

52-6-52. Liability for detaining pilots on vessels.

The owner, master, consignee, or charterer of any vessel who carries any pilot against his consent to any foreign or other port shall be liable to such pilot in an action on the case for the payment of his reasonable expenses and $10.00 a day during his necessary absence, provided the carrying away of the pilot is not owing to his own misconduct or negligence; and, if a pilot is detained on board, wind and weather permitting the vessel to go to sea, the owner, master, consignee, or charterer shall be liable to pay the pilot $10.00 a day for every day he is so detained.

History. — Orig. Code 1863, § 1467; Code 1868, § 1524; Code 1873, § 1518; Code 1882, § 1518; Civil Code 1895, § 1667; Civil Code 1910, § 1913; Code 1933, § 80-309; Ga. L. 1945, p. 279, § 14.

52-6-53. Compulsory retirement of pilots.

Pilots for their respective ports shall be honorably retired at age 65 and no pilot who has been so retired shall thereafter be entitled to act as a licensed pilot, provided that no pilot shall be compulsorily retired at age 65 unless there is in effect a pension system for pilots of the port at which he serves.

History. — Ga. L. 1945, p. 279, § 7.

Cross references. — Age discrimination in employment, § 34-1-2.

Administrative rules and regulations. — Pilot and apprentice age limitations, Official Compilation of the Rules and Regulations of the State of Georgia, Board of Pilotage Commissioners, Saint Simons and Saint Andrews Bar, Government of Bar and Harbor Pilotage, Sec. 494-1-1-.08.

Law reviews. — For article, "Age, Time, and Discrimination," see 53 Ga. L. Rev. 845 (2019).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Discrimination Under Age Discrimination in Employment Act, 10 POF2d 1.

Age as Bona Fide Occupational Qualification Under ADEA, 15 POF2d 481.

Proof of Discrimination Under Age Discrimination in Employment Act, 44 POF3d 79.

Contingent Worker's Protection Under Federal Anti-Discrimination Statutes, 57 POF3d 75.

ALR. — Mandatory retirement of public officer or employee based on age, 81 A.L.R.3d 811.

52-6-54. Acting as pilot without license; interfering with or disturbing licensed pilot.

(a) Any person who pilots or conducts any vessel underway in the waters of any of the bays, rivers, harbors, or ports of this state or the approaches thereto and who has no authority or license to act as a pilot or has had such authority or license suspended or revoked shall be guilty of a misdemeanor.

(b) Any person who interferes with or disturbs a licensed pilot in the performance of his duty shall be guilty of a misdemeanor.

(c) Notwithstanding any other provisions of this Code section, any person may assist a vessel in distress which has no pilot on board if such person delivers up the vessel to the first licensed pilot who comes on board and offers to conduct it.

History. — Ga. L. 1886, p. 38, § 1; Civil Code 1895, § 1653; Penal Code 1895, §§ 647, 648; Ga. L. 1896, p. 85, § 1; Ga. L. 1901, p. 30, § 1; Civil Code 1910, § 1899; Penal Code 1910, §§ 687, 688; Ga. L. 1921, p. 103, § 1; Code 1933, § 80-9901; Ga. L. 1945, p. 279, § 4; Ga. L. 1995, p. 846, § 12.

CHAPTER 7

REGISTRATION, OPERATION, AND SALE OF WATERCRAFT

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52-7-42. Information to be marked on capacity plate.
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52-7-43. Determination of maximum capacity.
52-7-44. Affixing of capacity plate by person other than vessel manufacturer; effect of such action on liability of manufacturer.
52-7-45. Information on capacity plate as constituting a warranty; nature of warranty.
52-7-46. Alternative compliance with article if affixing of capacity plate deemed impracticable or undesirable.
52-7-47. Exemption of watercraft by rules and regulations of Board of Natural Resources.
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Article 3

Abandoned Vessels

52-7-70. Definitions.
52-7-71. Removal and storage of vessels; procedure.
52-7-72. Authority of peace officer to cause removal of unattended vessels; notifications; duties.
52-7-72.1. Penalty for failing to remove unattended vessel.
52-7-73. Lien on vessel; foreclosure in courts competent to hear civil cases.
52-7-74. Procedure for foreclosure.
52-7-75. Public sale of vessel; disposition of excess proceeds.
52-7-76. Issuance of certificate of title.
52-7-77. Payment of balance remaining after satisfaction of liens, security interests, and debts.

Cross references. — Operation of boats on certain state park lakes, § 12-3-10. Liability of owner of watercraft for injury or damage caused by operation of watercraft, §§ 51-1-21, 51-1-22.

Law reviews. — For article, "Motorboat Collisions and the Family Purpose Doctrine," see 2 Ga. St. B.J. 473 (1966).

For note discussing the family purpose car doctrine as an extension of the principle of respondeat superior, see 3 Ga. St. B.J. 112 (1966).

JUDICIAL DECISIONS

Regulation of seaplanes. — Federal Energy Regulatory Commission did not have an implied power to authorize a power company to regulate seaplane operation on Lake Sinclair. Georgia Power Co. v. Baker, 591 F. Supp. 1569 (M.D. Ga. 1984), rev'd on other grounds, 830 F.2d 163 (11th Cir. 1987) (power company may regulate seaplanes under state water rights law).

RESEARCH REFERENCES

ALR. — Liability for marine collision as affected by failure to provide or use radar on vessel, 82 A.L.R.2d 764.

Applicability of seaworthiness doctrine to those other than crew members, longshoremen, and stevedores, 84 A.L.R.2d 620.

Liability for injury or death of nonparticipant caused by water skiing, 67 A.L.R.3d 1218.

ARTICLE 1

GENERAL PROVISIONS

Cross references. — Requirements pertaining to providing of marine toilets or other disposal units on boats operated on waters of state, § 12-5-23.

Law reviews. — For note on 1995 amendments of Code sections in this article, see 12 Ga. St. U.L. Rev. 372 (1995).

RESEARCH REFERENCES

ALR. — Liability in admiralty for collision between vessel and drawbridge structure, 134 A.L.R. Fed 537.

52-7-1. Short title.

This article shall be known and may be cited as the "Georgia Boat Safety Act."

History. — Ga. L. 1973, p. 1427, § 1.

JUDICIAL DECISIONS

Cited in Burmaster v. State, 233 Ga. 753, 213 S.E.2d 650 (1975).

52-7-2. Declaration of policy.

It is the policy of this state to promote safety for persons and property in and connected with the use, operation, and equipment of vessels and to promote the uniformity of laws relating thereto.

History. — Ga. L. 1973, p. 1427, § 2.

JUDICIAL DECISIONS

Cited in Fett v. Alderman, 117 Ga. App. 677, 161 S.E.2d 350 (1968).

52-7-3. Definitions.

As used in this article, the term:

(1) The term "alcohol concentration" means grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

(1.1) "Blind point" means that portion of any of the waters of this state in which there is a natural or man-made obstruction which prevents the operator of a vessel from seeing vessels approaching from the opposite side of the obstruction, thus creating a safety hazard which could result in a boating accident.

(2) "Board" means the Board of Natural Resources.

(3) "Boat livery" means a business which holds any vessel for renting, leasing, or chartering.

(4) "Commissioner" means the commissioner of natural resources.

(5) "Dealer" means any person engaged in the business of manufacturing vessels or selling new or used vessels at an established place of business.

(6) "Department" means the Department of Natural Resources.

(7) "Discharged" means, and shall include, spilled, leaked, pumped, poured, emitted, or dumped.

(7.1) "Hazardous area" means any area which the commissioner has designated as such because of conditions which create a threat to the safety and welfare of boaters who may operate in such area.

(8) "Holding tank" means any container which is designed to receive and hold sewage and other wastes discharged from a marine toilet and which is constructed and installed in such a manner that it can only be emptied by pumping out the contents of such holding tank.

(8.1) "Homemade vessel" means any vessel that is built by an individual for personal use from raw materials that does not require the assignment of a federal hull identification number by a manufacturer pursuant to federal law. A person furnishing raw materials under a contract may be considered the builder of a homemade vessel. Antique boats, boats reconstructed from existing boat hulls, and rebuilt or reconstructed vessels are not considered homemade vessels.

(8.2) "Hull identification number" or "HIN" means a number assigned to vessels by the manufacturer of the vessel or by the issuing authority of a state as required by the United States Coast Guard in accordance with federal law.

(9) "Idle speed" means a slow speed maintained by the operator of a mechanically propelled vessel reached by engaging the engine of the vessel into said speed by reducing the throttle to a minimum.

(9.1) "Issuing authority" means, as to this state, the Department of Natural Resources; and, as to other states, the state if it has a numbering system approved by the United States Coast Guard or the United States Coast Guard if the state that does not have an approved numbering system.

(10) "Marine toilet" includes any equipment for installation on board a vessel which is designed to receive, retain, treat, or discharge sewage and any process to treat such sewage. A marine toilet must be equipped with a holding tank which can be emptied only by pumping out.

(11) "Mechanically propelled vessel" means, for the purpose of determining fire extinguisher requirements, those vessels propelled by machinery using a volatile liquid for fuel.

(12) "Nonmotorized vessel" means any vessel other than a sailboat which has no motor attached in a manner to make it readily available for operation.

(13) "No wake" means that the wake or wash created by the movement of the vessel through the water is minimal.

(14) "Operate" means to navigate or otherwise use a vessel which is not at anchor or moored, including vessels which are being paddled, are drifting, or are being powered by machinery.

(15) "Operator" means the person who operates or has charge of the navigation or use of a vessel.

(16) "Owner" means a person, other than a lienholder, having the property in or title to a vessel. The term includes a person entitled to the use or possession of a vessel subject to an interest in another person reserved or created by agreement and securing payment or performance of an obligation but the term excludes a lessee under a lease not intended as security.

(17) "Person" means an individual, partnership, firm, corporation, association, or other legal entity.

(18) "Personal flotation device" means any lifesaving device classified and approved as Type I, Type II, Type III, Type IV, or Type V (Hybrid) by the United States Coast Guard.

(19) "Portable marine toilet" means any device which is movable or portable and is not permanently installed on a vessel and which is designed to receive and temporarily retain sewage.

(20) "Power boat" means any boat, vessel, or water-going craft which is propelled by mechanical rather than manual means whether or not such propulsion device forms an integral part of the structure thereof.

(21) "Protected fresh waters" means the waters of Lake Allatoona, Lake Blackshear, Clarks Hill Lake, Hartwell Lake, Lake Sidney Lanier, Lake Oconee, Lake Seminole, Lake Sinclair, Russell Lake, Walter F. George Reservoir, and West Point Lake.

(22) "Reportable boating accident" means an accident, collision, or other casualty involving a vessel subject to this article which results in loss of life, injury sufficient to cause incapacitation for at least 24 hours, or actual physical damage to property, including vessels, in excess of $2,000.00.

(22.1) "Sailboard" means any sailboat whose unsupported mast is connected by a swivel or a flexible universal joint to a hull similar to the hull of a surfboard.

(23) "Sewage" means human body wastes and the waste from toilets and other receptacles intended to receive or retain body wastes.

(24) "Undocumented vessel" means a vessel which is not required to have and does not have a valid marine document issued by the United States Coast Guard or federal agency successor thereto.

(25) "Vessel" means every description of watercraft, other than a seaplane on the water or a sailboard, used or capable of being used as a means of transportation on water and specifically includes, but is not limited to, inflatable rafts and homemade vessels; provided, however, Code Section 52-7-18, relating to rules of the road for boat traffic, shall be applicable to sailboards.

(26) "Waters of this state" means any waters within the territorial limits of this state and the marginal sea adjacent to this state and the high seas when navigated as a part of a journey or ride to or from the shore of this state. This definition shall not include privately owned ponds or lakes not open to the public.

History. — Ga. L. 1960, p. 235, § 2; Ga. L. 1968, p. 487, § 1; Ga. L. 1973, p. 1427, § 3; Ga. L. 1976, p. 1632, § 1; Ga. L. 1977, p. 1182, § 1; Ga. L. 1978, p. 1743, § 1; Ga. L. 1980, p. 738, § 1; Ga. L. 1987, p. 567, § 1; Ga. L. 1988, p. 410, § 1; Ga. L. 1988, p. 1343, § 2; Ga. L. 1989, p. 230, §§ 1, 2; Ga. L. 1990, p. 1218, § 2; Ga. L. 1992, p. 998, § 1; Ga. L. 1994, p. 680, § 1; Ga. L. 1995, p. 10, § 52; Ga. L. 1995, p. 236, § 1;

Ga. L. 2003, p. 481, § 1; Ga. L. 2006, p. 96, § 3/HB 1490; Ga. L. 2020, p. 827, § 2-3/HB 998.

The 2020 amendment, effective August 5, 2020, added new paragraph (1) and redesignated former paragraph (1) as paragraph (1.1).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1987, "lienholder" was substituted for "lien holder" in the first sentence of paragraph (16).

Pursuant to Code Section 28-9-5, in 1992, a comma was deleted following "marine toilet" in paragraph (8).

JUDICIAL DECISIONS

Word "use" is interpreted under O.C.G.A. § 52-7-3 to mean navigate, steer, or drive. Wallace v. Lessard, 248 Ga. 575, 285 S.E.2d 14 (1981).

"Waters of the state." — Georgia Boat Safety Act, O.C.G.A. § 52-7-1 et seq., applies to Lake Lanier as it lies within the boundaries of this state and is open to the public, notwithstanding that it is owned by the federal government. Buckalew v. State, 249 Ga. App. 134, 547 S.E.2d 355 (2001).

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, §§ 1, 19, 27.

ALR. — Validity, construction, and application of statutes prohibiting boating while intoxicated, boating while under the influence, or the like, 47 A.L.R.6th 107.

52-7-4. Requirement as to numbering of vessels; titling; requirements for hull damaged vessels.

(a) Every vessel using the waters of this state shall be numbered, except those vessels exempted by Code Section 52-7-6 and those vessels documented by the United States Coast Guard and licensed pursuant to Code Section 27-2-8. No person shall operate or give permission for the operation of any such vessel on the waters of this state unless the vessel is numbered in accordance with this article or in accordance with applicable federal law or in accordance with a federally approved numbering system of another state and unless:

(1) The certificate of number issued to the vessel is on board and in full force and effect; and

(2) The identifying number set forth in the certificate of number is properly displayed on each side of the forward half of the vessel; provided, however, that this requirement shall not apply to numbered vessels which are documented by the United States Coast Guard.

(b) Every vessel using the waters of this state shall be titled unless it is exempt from the numbering requirements of subsection (a) of this Code section or exempt under Code Section 52-7-7. No person shall operate or give permission for the operation of any such vessel on the waters of this state unless the vessel is titled in accordance with this article. Every outboard motor greater than 25 horsepower used to propel a titled vessel shall be included on the vessel title.

(c) Except as provided in subsection (e) of this Code section, at or before the time the owner of record transfers an ownership interest in a hull damaged vessel that is covered by a certificate of number created by the department, if the damage occurred while such person was an owner of the vessel and the person has notice of the damage at the time of the transfer, the owner shall:

(1) Deliver to the department an application for a new certificate of number that includes the title brand designation "Hull Damaged"; or

(2) Indicate on the certificate of title or on the bill of sale or other transfer document in the place designated for such purpose that the vessel is hull damaged and deliver the certificate or other transfer document to the transferee.

(d) Not later than 20 days after delivery to the department of the application under paragraph (1) of subsection (c) of this Code section or the delivery to the transferee of the certificate of title or bill of sale under paragraph (2) of subsection (c) of this Code section, the department shall create a new record that indicates that the vessel is branded "Hull Damaged."

(e) Before an insurer transfers an ownership interest in a hull damaged vessel that is covered by a certificate of number created by the department, the insurer shall deliver to the department an application for a new certificate that includes the title brand designation "Hull Damaged." Not later than 20 days after delivery of the application to the department, the department shall create a new record which indicates that the vessel is branded "Hull Damaged."

(f) An owner of record that fails to comply with subsection (c) of this Code section, a person that solicits or colludes in a failure by an owner of record to comply with subsection (c) of this Code section, or an insurer that fails to comply with subsection (e) of this Code section is subject to a civil penalty of $1,000.00.

(g) For the purposes of this Code section, the term "Hull Damaged" means compromised with respect to the integrity of a vessel's hull by a collision, allision, lightning strike, fire, explosion, running aground, or similar occurrence that creates a significant risk to the integrity of the vessel's hull.

History. — Ga. L. 1960, p. 235, § 5; Ga. L. 1973, p. 1427, § 4; Ga. L. 1987, p. 567, § 2; Ga. L. 1988, p. 410, § 2; Ga. L. 2019, p. 755, § 3/HB 314.

The 2019 amendment, effective July 1, 2020, designated the existing provisions of this Code section as subsection (a) and added subsections (b) through (g).

Editor's notes. — Ga. L. 2019, p. 755, § 1/HB 314, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Georgia Uniform Certificate of Title for Vessels Act.'"

Ga. L. 2019, p. 755, § 2/HB 314, not codified by the General Assembly, provides that: "The General Assembly finds that:

"(1) Titles for vessels in this state would deter and impede theft;

"(2) Titles for vessels in this state would facilitate the ownership, transfer, and financing of such vessels; and

"(3) Titling of vessels would create equity and fairness for the selling of vessels by dealers, brokers, agents, private parties, and manufacturers."

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, §§ 4, 22.

52-7-5. Numbering of vessels; requirements; fees.

(a) The owner of each vessel required to be numbered by this article shall file an application for a certificate of number with the department on forms containing such information required by the department. Upon receipt of the completed application and any other required information and documents, the department shall enter the application upon its records and issue to the applicant a certificate of number stating the number assigned to the vessel, the name and address of the owner, and such additional information as may be prescribed by the department. The department shall maintain electronic records of title and furnish a physical certificate of title to the owner or lienholder upon request.

(b)(1) The identification number assigned to all registered vessels, except those documented by the United States Coast Guard, shall be permanently painted on or attached to each side of the forward half of the vessel, and no other number may be displayed thereon. Numbers shall read from left to right, be in block characters, be of a color contrasting with the background, and be not less than three inches in height nor more than one inch apart. There shall be a hyphen or space between the prefix letters and numerals and between the numerals and the suffix letters. The hyphen or space shall be equal to the width of any letter except I.

(2) On vessels so configured that a number on the hull or superstructure would not be easily visible, the number shall be painted on or attached to a backing plate that is attached to the forward half of the vessel so that the number will be clearly visible under normal operating conditions.

(3) The numbers shall be maintained in a legible condition.

(4) Vessels owned by manufacturers or dealers and being used as demonstrators or for testing on state waters may use the dealer's tag supplied with his or her registration in lieu of a permanently attached number. Such vessels owned by manufacturers and dealers and only used as demonstrators or for testing using a dealer's tag shall not be required to be titled.

(c) Expiration decals shall be assigned by the department to all registered vessels. Such decals shall be displayed one on each side of the bow preceding the prefix letters and maintained in legible condition. There shall be a hyphen or space separating each decal and the prefix letters which shall be equal to the width of any letter except I.

(d) Applications shall be signed by the owner or owners of the vessel and shall be accompanied by the proper fee. Fees for numbering vessels for a registration period of three years shall be as follows:

(1) Vessels up to 16 feet in length	$25.00
(2) Vessels 16 to 26 feet in length	60.00
(3) Vessels 26 to 40 feet in length	130.00
(4) Vessels 40 feet in length or longer	200.00

After July 1, 2017, the General Assembly shall not increase the cost of any fee provided for in this subsection by more than 20 percent.

(e)(1) Registration for vessels shall expire on the last day of the month of the owner's birth in the last year of the registration period and shall thereafter be of no force or effect unless renewed pursuant to this article; provided, however, that the registration for vessels not owned by individuals shall expire on December 31 of the last year of the registration period. Certificates of number may be renewed by the owner in the same manner provided for in the initial securing of such certificates.

(2) Registrations may be renewed any time after October 1 prior to the year of expiration. If the certificate of number is allowed to expire, a renewal application may still be filed with the department so long as the applicant pays the registration fee prescribed in subsection (d) of this Code section along with a $10.00 late fee.

(3) Any application which, due to failure of the applicant to provide additional information required by the department, remains incomplete 60 days after initial receipt of such application shall expire, and a new application and registration or title fee shall be required.

(f) Should the ownership of a numbered or titled vessel change while a valid registration or title is in effect, the new owner shall file with the department a new application and pay the prescribed fee for a new registration or title. The number assigned upon transfer of ownership shall be identical to the previous number unless such number has been reassigned by the department during any expired registration or title period.

(g) In the event that an agency of the United States government shall have in force an overall system of identification (numbering) for vessels within the United States, the numbering system employed

pursuant to this article by the department shall be in conformity therewith. The provisions for titling employed pursuant to this article by the department shall be in conformity for approval by the United States Coast Guard under provisions of 46 U.S.C. Section 31322(d)(1).

(h) The department may issue any certificate of number, expiration decal, marine toilet certification, title, or other permit or accept applications for registration or titling provided for in this chapter directly or may authorize any person to act as agent for the issuing or collection and maintenance of information thereof. In the event that a person accepts such authorization to issue certificates of title or number, he or she may be allotted a block of numbers and certificates or provided direction and instruction therefor which, upon assignment and issue in conformity with this article and with any rules and regulations of the department, shall be valid as if assigned and issued directly by the department. Any person acting as agent for the department may charge a fee for his or her services in an amount approved by the department not to exceed $10.00 per transaction.

(i) All records of the department made or kept pursuant to this Code section shall be public records.

(j) The owner shall furnish the department notice of the transfer of all or of any part of his or her interest, other than the creation of a security interest, in a vessel numbered in this state pursuant to this Code section, the theft or recovery of the vessel, or the destruction or abandonment of the vessel within 15 days thereof, in a manner specified by the department.

(k) Any holder of a certificate of number or title shall notify the department in writing within 30 days if his or her address no longer conforms to the address appearing on the certificate or title and shall, as a part of such notification, furnish the department with his or her new address.

(l) No number other than the number validly assigned to a vessel shall be painted, attached, or otherwise displayed on either side of the forward half of the vessel.

(m)(1) A certificate of number or title once issued pursuant to this Code section shall be considered void upon the happening of any one of the following events:

(A) The owner transfers all his or her interest in said vessel to another person or involuntarily loses his or her interest through legal process;

(B) The vessel is destroyed or abandoned;

(C) It is discovered by the department that the application submitted by the owner contains false or fraudulent information;

(D) The fees for issuance are not paid by the applicant; or

(E) The state of principal use is changed.

(2) A void certificate or title shall be surrendered to the department within 15 days from the date that it becomes or is declared to be void.

(n) The number placed on the forward half of the vessel by the owner shall be removed by the owner if:

(1) The vessel is documented under the laws of the United States;

(2) The certificate of number or title becomes invalid because it is determined that a false or fraudulent statement was made in the application or the fees have not been paid; or

(3) The vessel is no longer used in this state.

(o) The board shall be authorized to establish, by rule or regulation, a procedure to refund fees collected pursuant to this chapter which were collected in error or overpayment or to which the department or state is otherwise not entitled.

History. — Ga. L. 1960, p. 235, §§ 6, 7; Ga. L. 1965, p. 251, § 1; Ga. L. 1968, p. 487, §§ 3-6; Ga. L. 1973, p. 1427, § 6; Ga. L. 1976, p. 1632, §§ 5-7; Ga. L. 1977, p. 1182, §§ 2, 3; Ga. L. 1980, p. 738, §§ 2-4; Ga. L. 1981, p. 147, §§ 1-3; Ga. L. 1982, p. 3, § 52; Ga. L. 1987, p. 567, §§ 3, 4; Ga. L. 1992, p. 6, § 52; Ga. L. 1992, p. 470, § 3; Ga. L. 1992, p. 998, § 2; Ga. L. 1993, p. 351, § 1; Ga. L. 1996, p. 1276, § 1; Ga. L. 2011, p. 558, § 5/SB 121; Ga. L. 2013, p. 892, § 1/HB 497; Ga. L. 2017, p. 27, § 19/HB 208; Ga. L. 2019, p. 755, § 4/HB 314.

The 2019 amendment, effective July 1, 2020, inserted "or title" in paragraph (e)(3), throughout subsections (f) and (k), and in paragraphs (m)(1), (m)(2), and (n)(2); in subsection (a), inserted "a certificate of" in the middle of the first sentence and added the third sentence; inserted "on" in the middle of the first sentence of paragraph (b)(1); in paragraph (b)(4), inserted "on state waters" in the middle of the first sentence and added the second sentence; inserted "or titled" near the beginning of subsection (f); added the second sentence in subsection (g); in subsection (h), in the first sentence, inserted "title," near the middle, inserted "or accept applications for registration or titling" in the middle, and inserted "or collection and maintenance of information" near the end, and, in the middle of the second sentence, inserted "title or" and inserted "or provided direction and instruction"; substituted "30" for "15" preceding "days" in the middle of subsection (k); and substituted "certificate of number or title" for "certificate or number" near the beginning of paragraph (n)(2).

Cross references. — Identification numbers and letters for commercial fishing boats, § 27-4-117. Identification numbers and letters on boats used for taking shrimp, § 27-4-133.

Editor's notes. — Ga. L. 1992, p. 470, §§ 4 and 5, not codified by the General Assembly, provide: "The General Assembly declares its intent to use the increases and changes in fees provided in this Act to fund the acquisition and management of lands and waters, by and through the Department of Natural Resources, for fish hatcheries; for wildlife restoration, propagation, protection, preservation, research,

or management; for public hunting, fishing, or trapping; and for related recreational areas. The General Assembly further recognizes the importance of wildlife related recreation and the need to provide greater opportunities for such recreation and public lands in the face of rapid woodland development and appropriation of existing wildlife habitat. The General Assembly further declares its intent to ensure that the funding provided by hunters and fishermen through the payment of these license fee increases and changes will fund the acquisition of fish and wildlife habitat and public recreational areas.

"This Act shall become effective on April 1, 1992, or as soon thereafter as it is approved by the Governor or becomes law without such approval; provided, however, that the fees which are increased in Sections 1 and 3 of this Act shall on March 31, 2012, be reduced to the level of such fees prior to the effective date of this Act."

Ga. L. 2009, p. 787, § 10/hb 326, eliminated the automatic reduction of rates provided by Ga. L. 1992, p. 470, § 5.

Ga. L. 2017, p. 27, § 20/HB 208, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to all offenses occurring on or after July 1, 2017.

Ga. L. 2019, p. 755, § 1/HB 314, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Georgia Uniform Certificate of Title for Vessels Act.'"

Ga. L. 2019, p. 755, § 2/HB 314, not codified by the General Assembly, provides that: "The General Assembly finds that:

"(1) Titles for vessels in this state would deter and impede theft;

"(2) Titles for vessels in this state would facilitate the ownership, transfer, and financing of such vessels; and

"(3) Titling of vessels would create equity and fairness for the selling of vessels by dealers, brokers, agents, private parties, and manufacturers."

JUDICIAL DECISIONS

When does change of ownership occur. — In a boat buyer's suit alleging negligence by defendants, a marina, a boat yard, and the seller of the boat, the seller's claim that the buyer was the owner of the boat at the time of the incident in question because the buyer had paid more than half of the purchase price was not supported by O.C.G.A. § 52-7-5(a) since the boat was registered in the seller's name at the time of the incident and § 52-7-5(a) did not speak to when ownership occurred. Muhs v. River Rats, Inc., 586 F. Supp. 2d 1364 (S.D. Ga. 2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, §§ 19, 21, 22.

52-7-6. Exemptions from numbering requirements.

A vessel shall not be required to be numbered under Code Sections 52-7-4 and 52-7-5 if it is:

(1) Not motor propelled; provided, however, that sailboats 12 feet or more in length shall require registration;

(2) Covered by a certificate of number in full force and effect which has been issued to it pursuant to federal law or a federally approved numbering system of another state, provided that such vessel shall

not be used on the waters of this state for a period in excess of 60 consecutive days;

(3) From a country other than the United States, provided that such vessel shall not be used on the waters of this state for a period in excess of 60 consecutive days;

(4) A vessel whose owner is the United States, a state, or a subdivision thereof, which vessel is used exclusively in the nonrecreation public service and which is clearly identifiable as such;

(5) A vessel's lifeboat if the boat is used solely for lifesaving purposes; this exemption does not include dinghies, tenders, speedboats, or other types of craft carried aboard vessels and used for other than lifesaving purposes;

(6) A vessel that is used exclusively for racing;

(7) A vessel belonging to a class of boats which has been exempted from numbering by the department after the department has found that:

(A) The numbering of vessels of such class will not materially aid in their identification;

(B) An agency of the federal government has a numbering system applicable to the class of vessel to which the vessel in question belongs; and

(C) The vessel would also be exempt from numbering if it were subject to the federal law;

(8) Operating temporarily by virtue of evidence that an application for a certificate of number has been submitted within the previous 60 days; or

(9) Used exclusively on privately owned ponds or lakes, except for those licensed by the Federal Energy Regulatory Commission.

History. — Ga. L. 1960, p. 235, § 5; Ga. L. 1973, p. 1427, § 5; Ga. L. 1981, p. 147, § 4; Ga. L. 1982, p. 3, § 52; Ga. L. 1987, p. 567, § 5; Ga. L. 2006, p. 96, § 4/HB 1490; Ga. L. 2013, p. 892, § 2/HB 497.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1988, the correct spelling of "exclusively" was substituted in paragraph (9).

OPINIONS OF THE ATTORNEY GENERAL

Servicemen must register their privately-owned boats. — The Soldiers' and Sailor's Civil Relief Act, 50 U.S.C. § 574, does not apply to Ga. L. 1960, p. 235, § 5 and servicemen, resident and nonresident, must register their privately-owned boats after 60 days. 1960-61 Op. Att'y Gen. p. 30.

Registration of boats is not required when the lake is privately owned and not open to the general public. 1960-61 Op. Att'y Gen. p. 30.

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, § 22.

52-7-7. Dealers' vessels.

(a) Any dealer may obtain certificates of number to be used only for the purpose of testing or demonstrating vessels owned by the dealer. The fee for the first certificate of number issued to any dealer for each vessel classification shall be the same fee as prescribed in subsection (d) of Code Section 52-7-5 and the dealer may then be issued additional certificates of number for testing and demonstrating purposes at a reduced fee as provided by the board. The amount of the reduced fee shall be determined by the board and shall be a reasonable approximation of the cost of producing and distributing the certificates of number and may be changed from time to time.

(b) Dealers shall be authorized to transfer certificates of number issued pursuant to this Code section from one vessel to another vessel in the same classification.

(c) Any dealer desiring certificates of number shall make application for them on standard vessel registration forms which shall be accompanied by an affidavit stating that the applicant is a vessel dealer or manufacturer.

(d) Numbers assigned by such certificates shall be temporarily placed on vessels within the certificate's class range whenever such vessels are being tested or demonstrated and must be plainly marked "DEALER." Such temporary placement of numbers shall be as the board shall provide by regulation.

History. — Ga. L. 1968, p. 487, § 7; Ga. L. 1973, p. 1427, § 7; Ga. L. 2013, p. 892, § 3/HB 497.

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, §§ 21, 22.

52-7-7.1. Hull identification numbers required; penalty for violations.

(a) No person shall operate on the waters of this state a vessel manufactured after November 1, 1972, unless the vessel displays an assigned hull identification number as required by the United States Coast Guard or by the issuing authority, except any of those vessels exempted by Code Section 52-7-7.6. The hull identification number

shall be carved, burned, stamped, embossed, or otherwise permanently affixed to the outboard side of the transom or the starboard side within two feet of the transom above the waterline in accordance with federal law or as directed by the issuing authority.

(b) No person shall operate on the waters of this state a vessel that was manufactured before November 1, 1972, for which an issuing authority has issued a hull identification number unless the hull identification number is clearly displayed on the hull of the vessel as described in subsection (a) of this Code section.

(c) No person shall destroy, remove, alter, cover, or deface the hull identification number, or any plate or decal bearing such number, of any vessel, except to make necessary repairs that require the removal of the HIN. Immediately upon completion of any repairs requiring the destruction, removal, alteration, covering, or defacing of a vessel's HIN, the person shall reaffix the hull identification number to the vessel in accordance with federal law or shall apply for a replacement hull identification number from the department.

(d) No person shall assign the same hull identification number to more than one vessel.

(e) Any person who willfully violates subsection (c) or (d) of this Code section with intent to misrepresent the identity of a vessel so as to convert or defraud shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not less than $500.00 nor more than $5,000.00, by imprisonment for not less than one nor more than five years, or by both such fine and imprisonment.

History. — Code 1981, § 52-7-7.1, enacted by Ga. L. 2006, p. 96, § 5/HB 1490.

52-7-7.2. Display of hull identification numbers on new vessels.

Each vessel manufactured or built after April 14, 2006, for sale in this state shall have a hull identification number displayed prior to sale or delivery for sale in accordance with federal law and this article. The hull identification number shall not be altered or replaced by the manufacturer or manufacturer's representative for the purpose of upgrading the model year of a vessel after being offered for sale or delivered to any dealer.

History. — Code 1981, § 52-7-7.2, enacted by Ga. L. 2006, p. 96, § 5/HB 1490.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2006, "April 14, 2006," was substituted for "the effective date of this Code section" in the first sentence.

52-7-7.3. Seizure of vessels without hull identification numbers; seizure of related property; inspections.

(a) If the hull identification number on a vessel required by Code Section 52-7-7.1 or 52-7-7.2 to have a hull identification number does not exist or has been altered, removed, destroyed, covered, or defaced or the real identity of the vessel cannot be determined, the vessel, and any items used while towing such vessel, may be seized as contraband by a law enforcement agency or the department and shall be subject to forfeiture in accordance with the procedures set forth in Chapter 16 of Title 9.

(b) A vessel described in subsection (a) of this Code section shall not be sold or operated on the waters of the state unless the department:

(1) Receives a request from a law enforcement agency providing adequate documentation for a replacement hull identification number; or

(2) Is directed by written order of a court of competent jurisdiction to issue to the vessel a replacement hull identification number.

(c) The failure to have the hull identification number clearly displayed in compliance with this article shall be probable cause for any law enforcement officer to make further inspection of the vessel in question to ascertain the true identity thereof.

(d) Prior to the vessel being sold or returned to the owner or otherwise disposed of, the department shall assign it a new hull identification number in accordance with federal law.

History. — Code 1981, § 52-7-7.3, enacted by Ga. L. 2006, p. 96, § 5/HB 1490; Ga. L. 2015, p. 693, § 3-30/HB 233.

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U. L. Rev. 1 (2015).

52-7-7.4. Property not subject to replevin; report by law enforcement agency of seizure of property; procedures.

Reserved. Repealed by Ga. L. 2015, p. 693, § 3-31/HB 233, effective July 1, 2015.

Editor's notes. — This Code section was based on Code 1981, § 52-7-7.4, enacted by Ga. L. 2006, p. 96, § 5/HB 1490.

Law reviews. — For article on the 2015 repeal of this Code section, see 32 Ga. St. U. L. Rev. 1 (2015).

52-7-7.5. Counterfeit hull identification numbers; penalty.

(a) It shall be unlawful for any person to knowingly possess, manufacture, sell or exchange, offer to sell or exchange, aid in the sale or exchange, supply in blank, authorize, direct, or give away any counterfeit HIN, any counterfeit manufacturer's vessel HIN plate or decal, or any manufacturer's vessel HIN plate decal which is assigned to a vessel to be used for the purpose of identification of a vessel other than the one to which it is assigned; or to conspire to do any of the foregoing. However, nothing in this subsection shall be applicable to any approved hull identification number plate or decal issued as a replacement by the manufacturer or an issuing authority.

(b) It shall be unlawful for any person to knowingly buy, sell, offer for sale, receive, dispose of, conceal, or have in his or her possession any vessel, outboard motor, or part thereof on which the HIN or any manufacturer's identification label of any kind has been altered, removed, destroyed, covered, or defaced or to knowingly maintain such vessel, outboard motor, or part thereof in any manner which conceals or misrepresents the true identity of the vessel, the outboard motor, or any part thereof.

(c) Any person who violates subsection (a) or (b) of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not less than $500.00 nor more than $5,000.00, by imprisonment for not less than one nor more than five years, or by both such fine and imprisonment.

History. — Code 1981, § 52-7-7.5, enacted by Ga. L. 2006, p. 96, § 5/HB 1490.

52-7-7.6. Exception to requirement for hull identification numbers.

A vessel shall not be required to have a hull identification number under Code Section 52-7-7.1 or 52-7-7.2 if it is:

(1) An innertube; or

(2) A vessel used exclusively for racing.

History. — Code 1981, § 52-7-7.6, enacted by Ga. L. 2006, p. 96, § 5/HB 1490.

52-7-8. Classification of vessels; required equipment.

(a) **Classification.** Vessels subject to the provisions of this article shall be divided into four classes as follows:

(1) Class A ..... Less than 16 feet in length

(2) Class 1 ..... 16 feet or over and less than 26 feet in length

(3) Class 2 ..... 26 feet or over and less than 40 feet in length

(4) Class 3 ..... 40 feet or more in length

(b) **Lights.** Every vessel in all weathers from sunset to sunrise shall carry and exhibit lights as provided by regulations of the board.

(c) **Whistle or horn.** Every vessel of Class 2 or 3 shall be provided with an efficient whistle or horn or other sound-producing mechanical appliance capable of producing signals required by the rules for the prevention of collision enacted by Congress.

(d) **Lifesaving devices.**

(1) Every vessel shall be equipped with and carry aboard, at all times, at least one Type I, II, III, or V (hybrid) personal flotation device for each person on board; provided, however, that Type V (hybrid) devices are acceptable only when worn and securely fastened. In addition to the individual personal flotation device, each vessel 16 feet or more in length, except for canoes and kayaks, must at all times be equipped with at least one Type IV (throwable) device.

(2) No person may use a vessel upon the waters of this state unless the personal flotation devices as required in paragraph (1) of this subsection are readily accessible to the occupants of the vessel, are in good and serviceable condition, are legibly marked with the United States Coast Guard approved number, and are of an appropriate size for the occupants of the vessel for whom they are intended; provided, however, that the provisions of this subsection shall not apply to racing sculls, racing shells, racing sweeps, or homemade or inflatable rafts, as defined in subsection (o) of Code Section 52-7-12, if such rafts are operated no more than 100 feet from shore on a lake, pond, or other nonflowing body of water.

(3) No person shall operate a moving vessel upon the waters of this state with a child under the age of 13 years on board such vessel unless such child is wearing an appropriately sized personal flotation device, as required by this subsection to be on board the vessel. This requirement shall not apply when the child is within a fully enclosed roofed cabin or other fully enclosed roofed compartment or structure on the vessel.

(e) **Fire extinguishers.**

(1) Every mechanically propelled Class A and Class 1 vessel, constructed so as to have enclosed areas which permit entrapment of gases or vapors, shall carry aboard one Type B-I United States Coast

Guard approved hand portable fire extinguisher unless there is a United States Coast Guard approved fixed fire-extinguishing system installed in the machinery space. When such a fixed fire-extinguishing system is installed in the machinery space, no hand portable fire extinguisher will be required.

(2) Every mechanically propelled Class 2 vessel, regardless of construction, shall carry aboard two Type B-I or one Type B-II United States Coast Guard approved hand portable fire extinguisher. When a United States Coast Guard approved fixed fire-extinguishing system is installed in the machinery space, one less Type B-I hand portable fire extinguisher is required.

(3) Every mechanically propelled Class 3 vessel, regardless of construction, shall carry aboard three Type B-I or one Type B-I and one Type B-II United States Coast Guard approved hand portable fire extinguisher. When a United States Coast Guard approved fixed fire-extinguishing system is installed in the machinery space, one less Type B-I hand portable fire extinguisher is required.

(4) The carriage of any dry stored pressure fire extinguishers not fitted with pressure gauges or indicating devices or any vaporizing liquid fire extinguishers containing carbon tetrachloride, chlorbomethane, or any other toxic vaporizing liquids is prohibited.

(5) The carriage of any United States Coast Guard approved hand portable fire extinguisher or any fixed fire extinguishing system which is not fully charged shall be prohibited.

(f) **Equipment exemptions in authorized races.** Subsections (c) and (e) of this Code section shall not apply to vessels while competing in any race conducted pursuant to Code Section 52-7-19 or, if such vessels are designed and intended solely for racing, while engaged in such navigation as is incidental to the tuning up of the boats and engines for the race.

(g) **Flame arrester for carburetor.** Every vessel shall have the carburetor or carburetors of every engine therein, except outboard motors using gasoline as fuel, equipped with an efficient United States Coast Guard approved flame arrester, backfire trap, or other similar device.

(h) **Ventilation.** Every such vessel, except open boats, using as fuel any liquid of a volatile nature, shall be provided with means for properly and efficiently ventilating the bilges of the engine and fuel tank compartments so as to remove any explosive or flammable gases.

(i) **Rules and regulations.** No person shall operate or give permission for the operation of a vessel which is not equipped as required by

this article or the rules and regulations of the department made pursuant thereto.

(j) **Sale of personal flotation devices.** It shall be unlawful for any person to sell or offer for sale within this state any personal flotation device which is not United States Coast Guard approved unless such device is clearly marked as follows: "Notice: This personal flotation device is not United States Coast Guard approved."

(k) **Definition.** As used in this Code section, the term "personal flotation device" shall not include flotation devices such as plastic toys, rafts, and other devices used for recreational purposes in or around swimming pools, lakes, or beaches when such devices are easily recognizable as not being designed or intended for use as lifesaving devices.

(l) **Penalty.** Any person who violates this Code section shall be guilty of a misdemeanor.

History. — Ga. L. 1968, p. 487, § 10; Ga. L. 1973, p. 1427, § 8; Ga. L. 1975, p. 773, § 1; Ga. L. 1976, p. 1632, §§ 2, 3; Ga. L. 1977, p. 1182, §§ 4-6; Ga. L. 1978, p. 1743, § 2; Ga. L. 1982, p. 3, § 52; Ga. L. 1984, p. 1203, § 1; Ga. L. 1985, p. 149, § 52; Ga. L. 1987, p. 567, § 6; Ga. L. 1992, p. 2075, § 1; Ga. L. 1994, p. 680, § 2; Ga. L. 1996, p. 326, § 1; Ga. L. 1996, p. 1273, § 1; Ga. L. 2001, p. 1000, § 1; Ga. L. 2003, p. 481, § 2; Ga. L. 2012, p. 775, § 52/HB 942; Ga. L. 2013, p. 92, § 4/SB 136; Ga. L. 2014, p. 866, § 52/SB 340; Ga. L. 2016, p. 223, § 1/HB 172.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2011, the former last two sentences of subsection (j) were redesignated as subsections (k) and (l), respectively.

Editor's notes. — Ga. L. 1996, p. 326, § 2, provides that the 1996 amendment by that Act shall be automatically repealed on August 25, 1996.

Ga. L. 2013, p. 92, § 14/SB 136, not codified by the General Assembly, provides, in part, that the amendment of this Code section by that Act shall apply to all offenses occurring on and after May 15, 2013; provided, however, that for purposes of determining the number of prior convictions or pleas of nolo contendere pursuant to the felony provisions of paragraph (4) of subsection (m) of Code Section 52-7-12, only those offenses for which a conviction or a plea of nolo contendere is obtained on or after May 15, 2013, shall be considered.

U.S. Code. — For federal provisions concerning inland navigational rules, see 33 U.S.C. § 2073.

JUDICIAL DECISIONS

Purpose of section. — Purpose of paragraph (d)(2) of Ga. L. 1968, p. 487, § 10 is clearly to protect any boat passenger who might suddenly have need of a life preserver, regardless of whether he or she enters the water voluntarily or involuntarily. Alexander v. Harnick, 142 Ga. App. 816, 237 S.E.2d 221 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, §§ 10 et seq., 18.

ALR. — Liability under Jones Act or unseaworthiness doctrine for failure to furnish individual safety equipment or to require its use, 91 A.L.R.2d 1019.

52-7-8.1. Discharge of sewage from vessels on lakes; use of vessels with marine toilets on protected fresh waters; certificate and recordation requirements.

(a)(1) The General Assembly finds that because of the increasing number of vessels having marine toilets which are operated or moored on Allatoona Lake, Lake Blackshear, Clarks Hill Lake, Hartwell Lake, Lake Sidney Lanier, Lake Oconee, Lake Seminole, Lake Sinclair, Russell Lake, Walter F. George Reservoir, Lake Blue Ridge, and West Point Lake, it is necessary for the protection of the public health, safety, and welfare to prohibit the discharge of sewage from such vessels into the waters of such lakes.

(2) Because of the findings stated in paragraph (1) of this subsection, it is declared to be the intent of the General Assembly to protect and enhance the quality of the waters of such lakes by requiring greater environmental protection than is provided pursuant to Section 312 of the Federal Water Pollution Control Act, as amended, such that any discharge of sewage from a vessel into the waters of such lakes shall be prohibited.

(b) Except as otherwise provided in the federal Clean Water Act of 1977, P.L. 95-217, as now or hereafter amended, it shall be unlawful for any person to operate or float a vessel, whether moored or not, on protected fresh waters, from which sewage is discharged into such protected fresh waters.

(c) Except as otherwise provided in the federal Clean Water Act of 1977, P.L. 95-217, as now or hereafter amended, it shall be unlawful to operate or float any vessel on protected fresh waters which has located within or on such vessel a marine toilet, unless such marine toilet is designed and operated to prevent the discharge of sewage, treated or untreated, into protected fresh waters and is equipped with a holding tank, as the term is defined in Code Section 52-7-3, which is constructed and installed in such a manner that it can be emptied only by pumping out.

(d) It shall be unlawful to pump out any sewage from a holding tank except into a pump-out facility approved by the department. It shall also be unlawful to discharge or dispose of the wastes from a portable marine toilet into protected fresh waters except into a pump-out facility approved by the department or into a permanent toilet or sewer system located on dry land.

(e) Except as otherwise provided in the federal Clean Water Act of 1977, P.L. 95-217, as now or hereafter amended, it shall be unlawful for any person to operate or float a vessel having a marine toilet, whether moored or not, on protected fresh waters, unless it has a certificate

issued by the department affixed thereto immediately adjacent to its registration number. No certificate may be issued unless a marine toilet and holding tank, as the terms are defined in Code Section 52-7-3, have been properly installed on the vessel.

(f) Applications shall be signed by the owner or owners of the vessel and shall be accompanied by a fee of $5.00. A certificate issued under this Code section shall continue in full force and effect, and shall not require renewal; provided, however, that the certificate shall become invalid if it is determined that a false or fraudulent statement was made in the application. Notwithstanding any other provision of law, the department is authorized to retain all funds generated by the operation of its program to require certificates for marine toilets under this Code section for use in the operation of that program. Any such funds not expended for this purpose in the fiscal year in which they are generated shall be deposited in the state treasury, provided that nothing in this Code section shall be construed so as to allow the department to retain any funds required by the Constitution of the State of Georgia to be paid into the state treasury; provided, further, that the department shall comply with all provisions of Part 1 of Article 4 of Chapter 12 of Title 45, the "Budget Act," except Code Section 45-12-92, prior to expending any such miscellaneous funds.

(g)(1) This Code section shall apply on and after July 1, 1988, for all vessels on the waters of Lake Sidney Lanier, whether or not they are registered. Each owner of a vessel registered prior to July 1, 1988, shall declare the existence of any marine toilet on the vessel and shall apply for a certificate for the marine toilet at the first date of renewal of the vessel's registration after July 1, 1988, if said vessel is to be operated or floated on such waters. For vessels registered after July 1, 1988, which will be operated or floated on such waters, each vessel owner shall declare the existence of any marine toilet and apply for a certificate for the marine toilet at the same time application is made to register a vessel. Regardless of any other provisions of this title to the contrary, any vessel which has a marine toilet and which is to be operated or floated on such waters must be registered and must obtain a certificate pursuant to this Code section.

(2) Except as provided by paragraph (1) of this subsection, this Code section shall apply on and after July 1, 1991, for all vessels on protected fresh waters, whether or not they are registered. Each owner of a vessel registered prior to July 1, 1991, shall declare the existence of any marine toilet on the vessel and shall apply for a certificate for the marine toilet at the first date of renewal of the vessel's registration after July 1, 1991, if said vessel is to be operated or floated on protected fresh waters. For vessels registered after July 1, 1991, which will be operated or floated on protected fresh waters,

each vessel owner shall declare the existence of any marine toilet and apply for a certificate for the marine toilet at the same time application is made to register a vessel. Regardless of any other provisions of this title to the contrary, any vessel which has a marine toilet and which is to be operated or floated on protected fresh waters must be registered and must obtain a certificate pursuant to this Code section.

(h) Any person owning a vessel with a marine toilet, who does not obtain a certificate for such toilet as provided in subsection (g) of this Code section, if such vessel is operated or floated on protected fresh waters, and any person who falsifies information about the existence of a marine toilet or holding tank in an application for a certificate, shall be guilty of a misdemeanor and shall be subject to the penalties associated with misdemeanors.

(i) Persons operating or floating vessels with marine toilets and subject to the requirements of this Code section shall create and maintain for at least one year after creation records which indicate the name and location of pump-out facilities used and the dates of such use. Persons who own or operate pump-out facilities shall also create and maintain for at least one year after creation records which indicate the name and vessel registration number, the date of pump-out, and verification of pump-out.

(j) In the event any provision of this Code section is found to be in conflict with the federal Clean Water Act of 1977, P.L. 95-217, as now or hereafter amended, such federal act shall control.

History. — Code 1981, § 52-7-8.1, enacted by Ga. L. 1988, p. 1343, § 3; Ga. L. 1989, p. 656, § 1; Ga. L. 1990, p. 1218, §§ 3-5; Ga. L. 1992, p. 6, § 52; Ga. L. 1993, p. 459, § 2.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1988, in subsection (e), commas were inserted following "marine toilet" in the first sentence and "holding tank" and "Code Section 52-7-3" in the second sentence; "of the State" was added following "Constitution" in subsection (f); and a comma was deleted following "creation" in the first and second sentences of subsection (i).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting not required for violation of Code section. — Violation of O.C.G.A. § 52-8-7.1 is not, at this time, designated as an offense for which those charged with a violation are to be fingerprinted. 1990 Op. Att'y Gen. No. 90-22.

52-7-8.2. Restrictions on operation of personal watercraft.

(a) As used in this Code section, the term:

(1) "Accompanied by" means in the physical presence within the vessel of a person who is not under the influence of alcohol, toxic

vapors, or drugs to a degree which would constitute a violation of Code Section 52-7-12 were such person operating the vessel.

(2) "Personal watercraft" means a Class A vessel which:

(A) Has an outboard motor or which has an inboard motor which uses an internal combustion engine powering a water jet pump as its primary source of motive propulsion;

(B) Is designed with the concept that the operator and passenger ride on the outside surfaces of such vessel as opposed to riding inside such vessel; and

(C) Has the probability that the operator and passenger may, in the normal course of use, fall overboard.

Such term includes, without limitation, any vessel where the operator and passenger ride on the outside surfaces of the vessel, even if the primary source of motive propulsion is a propeller, and any vessel commonly known as a "jet ski."

(b) No person shall operate or give permission to operate personal watercraft on the waters of this state unless each person aboard such personal watercraft is wearing a United States Coast Guard approved personal flotation device, Type I, Type II, Type III, or Type V. Each such personal flotation device must be properly fastened, in good and serviceable condition, and the proper size for the person wearing it.

(c) Reserved.

(d) No person shall operate a personal watercraft on the waters of this state after sunset or before sunrise unless such person is engaged in the enforcement of the laws of this state or this nation.

(e) No person shall operate a personal watercraft on the waters of this state unless such personal watercraft is equipped with a self-circling device or a lanyard-type engine cutoff switch.

(f) No person shall operate on the waters of this state a personal watercraft which has been equipped by the manufacturer with a lanyard-type engine cutoff switch unless the lanyard and the switch are operational and unless the lanyard is attached to the operator, the operator's clothing, or a personal flotation device worn by the operator.

(g) No person shall operate on the waters of this state a personal watercraft which has been equipped by the manufacturer with a self-circling device if the self-circling device or the engine throttle has been altered in any way that would prohibit the self-circling device from operating in its intended manner.

(h) It shall be unlawful for any person who owns a personal watercraft or who has charge over or control of a personal watercraft to

authorize or knowingly to permit such personal watercraft to be operated in violation of this Code section or of Code Section 52-7-8.3.

(i) The provisions of this Code section shall not apply to vessels engaged in any activity authorized under Code Section 52-7-19.

(j) No person shall operate a personal watercraft on the waters of this state at a speed greater than idle speed within 100 feet of any moored or anchored vessel, any vessel adrift, or any wharf, dock, pier, piling, bridge structure or abutment, person in the water, or shoreline adjacent to a full-time or part-time residence, public park, public beach, public swimming area, marina, restaurant, or other public use area.

(k) It shall be unlawful for any person to operate a personal watercraft on the waters of this state while towing a person or persons on water skis, aquaplanes, surfboards, tubes, or any similar device; provided, however, that the provisions of this subsection shall not apply to any personal watercraft designed by the manufacturer to carry three or more persons, provided that such personal watercraft has on board a competent observer in addition to the operator at any time that a person is being towed.

(l) No person under the age of 16 years shall operate a personal watercraft on the waters of this state; provided, however, that a person 12 through 15 years of age may operate a personal watercraft if he or she is accompanied by an adult 18 years of age or older or he or she has successfully completed a boating education course approved by the department. The department may conduct or provide boating education courses to the public.

(m) It shall be unlawful for any person to cause or knowingly permit such person's child or ward who is less than 12 years of age or the child or ward of another over whom such person has a permanent or temporary responsibility of supervision if such child or ward is less than 12 years of age to operate a personal watercraft.

(n) It shall be unlawful for any person to cause or knowingly permit such person's child or ward who is age 12 through 15 years or the child or ward of another over whom such person has a permanent or temporary responsibility of supervision if such child or ward is age 12 through 15 years to operate a personal watercraft other than in compliance with the provisions of subsection (l) of this Code section.

History. — Code 1981, § 52-7-8.2, enacted by Ga. L. 1992, p. 2075, § 2; Ga. L. 1994, p. 680, §§ 3, 4; Ga. L. 1995, p. 10, § 52; Ga. L. 1998, p. 679, § 1; Ga. L. 2013, p. 92, § 5/SB 136.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1992, "vessel" was substituted for "Vessel" in paragraph (a)(1).

Pursuant to Code Section 28-9-5, in 1998, "sunrise unless" was substituted for "sunrise; unless," in subsection (d).

Editor's notes. — Ga. L. 2013, p. 92, § 1/SB 136, not codified by the General

Assembly, provides, in part, that Sections 5, 6, and 11 of this Act shall be known and may be cited as the "Kile Glover Boat Education Law".

Ga. L. 2013, p. 92, § 14/SB 136, not codified by the General Assembly, provides, in part, that the amendment of this Code section by that Act shall apply to all offenses occurring on and after May 15, 2013; provided, however, that for purposes of determining the number of prior convictions or pleas of nolo contendere pursuant to the felony provisions of paragraph (4) of subsection (m) of Code Section 52-7-12, only those offenses for which a conviction or a plea of nolo contendere is obtained on or after May 15, 2013, shall be considered.

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state statutes and local ordinances governing personal watercraft use, 118 A.L.R.5th 347.

52-7-8.3. Operation of watercraft; identification; operation by minors.

(a) A person 16 years of age or older may operate any vessel or personal watercraft on any of the waters of this state if such person has met the applicable requirements of Code Section 52-7-22, and such person has in such vessel proper identification.

(b) A person 12 through 15 years of age may operate a personal watercraft or Class A vessel on any of the waters of this state in compliance with the provisions of this article if such person:

(1) Is accompanied by an adult 18 years of age or older who is authorized to operate such vessel under the provisions of subsection (a) of this Code section; or

(2) Has completed a boating education course approved by the department.

(c) No person between 12 through 15 years of age may operate a Class 1, Class 2, or Class 3 vessel.

(d) No person under the age of 12 years shall operate any Class 1, 2, or 3 vessel or any personal watercraft on any of the waters of this state, and no such person shall operate any Class A vessel utilizing mechanical means of propulsion exceeding 30 horsepower. Such person may operate a Class A vessel, other than a personal watercraft, utilizing mechanical means of propulsion not exceeding 30 horsepower only where such person is accompanied by an adult 18 years of age or older who is authorized to operate such vessel under the provisions of subsection (a) of this Code section.

(e) No person having ownership or control of a vessel shall permit another person to operate such vessel in violation of this Code section.

(f) No person shall rent, lease, or let for hire any vessel ten horsepower or more to any person under 16 years of age. On and after

July 1, 2014, a person 16 years of age or older may rent or lease any vessel ten horsepower or more if such person has completed a boating education course approved by the department. This subsection shall not apply to any person licensed by the United States Coast Guard as a master of a vessel or a nonresident who has in his or her possession proof that he or she has completed a National Association of State Boating Law Administrators approved boater education course or equivalency examination from another state.

(g) As used in this Code section, the term:

(1) "Accompanied by" means in the physical presence within the vessel of a person who is not under the influence of alcohol, toxic vapors, or drugs to a degree which would constitute a violation of Code Section 52-7-12 were such person operating the vessel.

(2) "Personal watercraft" shall have the same meaning as set forth in Code Section 52-7-8.2.

(3) "Proper identification" shall have the same meaning as in subsection (d) of Code Section 3-3-23, relating to furnishing of alcoholic beverages.

History. — Code 1981, § 52-7-8.3, enacted by Ga. L. 1998, p. 679, § 2; Ga. L. 2000, p. 1563, § 1; Ga. L. 2003, p. 140, § 52; Ga. L. 2013, p. 92, § 6/SB 136.

Editor's notes. — Ga. L. 2013, p. 92, § 1/SB 136, not codified by the General Assembly, provides, in part, that Sections 5, 6, and 11 of this Act shall be known and may be cited as the "Kile Glover Boat Education Law".

Ga. L. 2013, p. 92, § 14/SB 136, not codified by the General Assembly, provides, in part, that the amendment of this Code section by that Act shall apply to all offenses occurring on and after May 15, 2013; provided, however, that for purposes of determining the number of prior convictions or pleas of nolo contendere pursuant to the felony provisions of paragraph (4) of subsection (m) of Code Section 52-7-12, only those offenses for which a conviction or a plea of nolo contendere is obtained on or after May 15, 2013, shall be considered.

52-7-8.4. Definitions; anchorage restriction areas; permit requirement for long-term anchoring in estuarine areas; short-term anchoring; safe harbor; exceptions.

(a) As used in this Code section, the term:

(1) "Anchorage restriction areas" means areas within the estuarine areas of this state in any location that lies within 300 feet of a marina, 150 feet from a marine structure other than a marina, or within 500 feet of approved commercial shellfish growing areas and designated public harvest areas as determined by the department.

(2) "Estuarine areas" means all tidally influenced waters, marshes, and marshlands lying within a tide-elevation range from 5.6 feet above mean tide level and below.

(3) "Live-aboard vessel" means a floating vessel or other watercraft capable of safe navigation using mechanical means, sails, oars, or other means of propulsion which is utilized primarily as a residence.

(4) "Long-term anchoring" means anchoring a vessel within a 5,280 foot radius of a documented anchoring point where a vessel is anchored for over 14 cumulative days in a calendar year.

(5) "Marina" means a facility that provides fuel, public dockage, public dinghy access, sale of goods or merchandise, vessel maintenance, or other marine services.

(6) "Marine structure" means a public or private dock, pier, bridge, or wharf. Marine structures include, but are not limited to, marinas, boat ramps, boatyards, or other vessel launching or loading facilities.

(7) "Overnight" means all consecutive hours between the hours of 30 minutes after sunset and 30 minutes before sunrise.

(8) "Short-term anchoring" means anchoring a vessel within a 5,280 foot radius of a documented anchoring point where a vessel is anchored for up to and including 14 cumulative days in a calendar year.

(b) It shall be unlawful for any person to anchor any vessel overnight within the anchorage restriction areas. Nothing in this Code section shall prohibit the owner of a vessel from docking at a private recreational dock so long as such vessel is not utilized as a live-aboard vessel.

(c) It shall be unlawful for any person to engage in long-term anchoring of a vessel in the estuarine areas of this state without having first obtained a long-term anchoring permit from the commissioner or his or her designee under such terms and conditions as the commissioner or his or her designee may prescribe.

(d) Nothing in this Code section shall prohibit a person from engaging in short-term anchoring of a vessel in the estuarine areas of this state so long as such vessel is not anchored overnight within the anchorage restriction areas.

(e) No part of this Code section shall restrict the ability of vessels to seek safe harbor in the event of dangerous weather or mechanical failure. A reasonable period of time whereby a vessel owner may seek safe harbor shall not exceed seven days.

(f) Exemptions to the requirements in this Code section may be granted by the commissioner or his or her designee for unique circumstances such as, but not limited to, certain commercial or educational activities.

History. — Code 1981, § 52-7-8.4, enacted by Ga. L. 2019, p. 741, § 1/HB 201; Ga. L. 2020, p. 48, § 1/HB 833; Ga. L. 2020, p. 493, § 52/SB 429.

Effective date. — This Code section became effective January 1, 2020.

The 2020 amendments. — The first 2020 amendment, effective July 1, 2020, rewrote this Code section. The second 2020 amendment, effective July 29, 2020, part of an Act to revise, modernize, and correct the Code, substituted "nonreleasable" for "non-releasable" in former subsection (g). See Editor's notes for explanation of implementation.

Editor's notes. — Ga. L. 2020, p. 493, § 54(e)/SB 429, not codified by the General Assembly, provides that: "In the event of a conflict between a provision in Sections 1 through 53 of this Act and a provision of another Act enacted at the 2020 regular session of the General Assembly, the provision of such other Act shall control over the conflicting provision in Sections 1 through 53 of this Act to the extent of the conflict."

RESEARCH REFERENCES

Am. Jur. 2d. — 70 Am. Jur. 2d, Shipping, § 499.

C.J.S. — 15 C.J.S., Collision § 92.

52-7-9. Boat liveries.

(a) The owner of a boat livery shall cause to be kept a record of the name and address of the person or persons hiring any vessel, the identification number thereof, the departure date and time, and the expected time of return. The record shall be preserved for at least six months.

(b) Neither the owner of a boat livery nor his agent or employees shall permit any vessel to depart from his premises unless it shall have been provided either by the owner or renter with the equipment required pursuant to Code Section 52-7-8 and any rules and regulations made pursuant thereto.

(c) No livery boat, except those having a length of 16 feet or less with a depth of 16 inches or less, shall be operated by any person unless there is on board a copy of the rental agreement authorizing such operation which shows the vessel number, the period of time the boat is authorized for use by such operator, and any other pertinent information that the department may require.

History. — Ga. L. 1973, p. 1427, § 9; Ga. L. 1976, p. 1632, § 4.

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, §§ 20, 21, 81, 82.

ALR. — Liability of owner or operator of boat livery for injury to patron, 94 A.L.R.3d 876.

52-7-10. Exhausts to be muffled; exemptions; noise level testing.

(a) The exhaust of every internal combustion engine used on any vessel, excluding those vessels documented by the United States Coast Guard and licensed pursuant to Code Section 27-2-8, shall be muffled or baffled and water injected, except those engines that exhaust through the lower unit or outdrive when the vessel is on plane, so as to decrease noise. Vessels competing in regattas or boat races approved under the provisions of Code Section 52-7-19 may be exempt from such provisions.

(b) The operator of any vessel, when requested to do so by any law enforcement officer authorized to enforce this title, shall submit the vessel to a noise level test.

History. — Ga. L. 1973, p. 1427, § 10; Ga. L. 1980, p. 738, § 5; Ga. L. 1987, p. 567, § 7; Ga. L. 1988, p. 410, § 3; Ga. L. 2000, p. 1563, § 2.

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, § 12.

52-7-11. Lights.

(a) **Categories.** Requirements for lights on vessels operated within this state fall into two categories: regulations for vessels using inland waters (waters of this state) and regulations for vessels using international waters (coastal waters). Vessels equipped to meet international waters requirements may operate on any waters; however, vessels equipped to meet inland waters requirements are restricted to inland waters.

(b) **Inland waters (waters within the state) requirements.**

(1) All nonmotorized vessels being operated during hours of darkness or low visibility shall have ready at hand a white light which shall be displayed in time to prevent collision.

(2) All motorized Class A and Class 1 vessels being operated during hours of darkness or low visibility shall display a 32 point white stern light visible for a distance of two miles, plus a 20 point combination red and green light on the bow or ten-point combination red and green side lights properly screened and visible for a distance of one mile and displayed lower than the white stern light.

(3) All motorized Class 2 and 3 vessels being operated during hours of darkness or low visibility shall display a 20 point white light on the bow visible for a distance of two miles, plus a 32 point white light on the stern fixed higher than the white light forward and visible for a distance of two miles, plus separate ten-point red and

green side lights fitted with inboard screens to keep the lights from showing across the bow and visible for a distance of one mile.

(4) Class A and Class 1 vessels equipped with sail only or sail and motor, when under sail only while being operated during hours of darkness or low visibility, shall display a 20 point combination red and green light on the bow visible for a distance of one mile, plus a 12 point white stern light visible for a distance of two miles.

(5) Class 2 and Class 3 vessels equipped with sail only or sail and motor, when under sail only while being operated during the hours of darkness or low visibility, shall display separate ten-point red and green side lights, properly screened and visible for a distance of at least one mile, plus a 12 point white stern light visible for a distance of at least two miles.

(6) When any vessel is being powered by sail and motor both, that vessel shall carry the same lights as those required for power alone.

(c) **International waters (coastal) requirements.**

(1) All motorized Class A, Class 1, and Class 2 vessels being operated during the hours of darkness or low visibility shall display either a 20 point combination red and green light on the bow, or else ten-point red and green side lights properly screened and visible for a distance of at least one mile, plus a 20 point white light displayed in the fore part of the vessel and visible for a distance of three miles displayed three feet above the combination or side lights, plus a 12 point white stern light visible for a distance of at least two miles.

(2) All motorized Class 3 vessels being operated during the hours of darkness or low visibility shall display either a 20 point combination red and green light on the bow or else ten-point red and green side lights properly screened and visible for a distance of one mile, plus a 20 point white light in the fore part of the vessel displayed nine feet above the gunwales and three feet higher than the colored lights and visible for a distance of three miles, plus a 12 point white stern light visible for at least two miles.

(3) All Class A, Class 1, and Class 2 vessels equipped with sail and motor being operated under power during hours of darkness or low visibility shall display either a 20 point combination red and green light on the bow or else ten-point red and green side lights properly screened and visible for one mile, plus a 20 point white light in the fore part of the vessel at least three feet higher than the colored lights and visible for a distance of three miles, plus a 12 point white stern light visible for a distance of two miles.

(4) All Class 3 vessels equipped with sail and motor being operated under power during hours of darkness or low visibility shall display

either a 20 point combination red and green light on the bow or else ten-point red and green side lights properly screened and visible for a distance of two miles, plus a 20 point white light in the fore part of the vessel at least nine feet above the gunwale and three feet higher than the colored lights and visible for a distance of two miles, plus a 12 point white stern light visible for a distance of two miles.

(5) All sailboats of Class A, Class 1, and Class 2 being operated under sail only during the hours of darkness or low visibility shall display a 20 point combination red and green bow light visible for a distance of one mile, or ten-point red and green side lights properly screened and visible for a distance of one mile, plus a 12 point white stern light visible for a distance of two miles.

(6) All sailboats of Class 3, being operated under sail only during the hours of darkness or low visibility shall display a 20 point combination red and green bow light visible for a distance of one mile, or ten-point red and green side lights properly screened and visible for a distance of one mile, plus a 12 point white stern light visible for a distance of two miles.

(7) Sailing vessels may carry on top of the foremast two 20 point lights in a vertical line one over the other and separated so as to be clearly distinguished. The upper light shall be red and the lower light green.

(d) **Vessels at anchor.** All vessels at anchor, except those anchored or moored within marinas or other designated anchorages, shall display a 32 point white stern light during hours of darkness or low visibility.

(e) **Other lights.** During the hours of darkness or low visibility, no other lights which may be mistaken for those prescribed shall be exhibited.

History. — Ga. L. 1977, p. 1182, § 7; Ga. L. 1995, p. 10, § 52; Ga. L. 2013, p. 92, § 7/SB 136.

Editor's notes. — Ga. L. 2013, p. 92, § 14/SB 136, not codified by the General Assembly, provides, in part, that the amendment of this Code section by that Act shall apply to all offenses occurring on and after May 15, 2013; provided, however, that for purposes of determining the number of prior convictions or pleas of nolo contendere pursuant to the felony provisions of paragraph (4) of subsection (m) of Code Section 52-7-12, only those offenses for which a conviction or a plea of nolo contendere is obtained on or after May 15, 2013, shall be considered.

JUDICIAL DECISIONS

Officer had authority to stop defendant for violation. — Department of Natural Resources officer who observed the defendant's boat operating with its docking lights improperly illuminated, O.C.G.A. § 52-7-11(b)(2), had the authority to detain the defendant and make a brief safety inspection under O.C.G.A. § 52-7-25(b)(4); the defendant was not in custody during the stop and Miranda

warnings were not required. Pedersen v. State, 337 Ga. App. 159, 786 S.E.2d 535 (2016), cert. denied, No. S16C1641, 2016 Ga. LEXIS 828 (Ga. 2016), overruled on other grounds by State v. Turnquest, 305 Ga. 758, 827 S.E.2d 865 (2019).

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, § 10.

52-7-12. Operation of watercraft while under influence of alcohol, toxic vapors, or drugs; legal drug use not exempted; blood and other chemical tests; test refusal; owner's liability for allowing another to operate while intoxicated; civil and criminal actions; child endangerment.

(a) No person shall operate, navigate, steer, or drive any moving vessel, or be in actual physical control of any moving vessel, nor shall any person manipulate any moving water skis, moving aquaplane, moving surfboard, or similar moving device while:

(1) Under the influence of alcohol to the extent that it is less safe for the person to operate, navigate, steer, drive, manipulate, or be in actual physical control of a moving vessel, moving water skis, moving aquaplane, moving surfboard, or similar moving device;

(2) Under the influence of any drug to the extent that it is less safe for the person to operate, navigate, steer, drive, manipulate, or be in actual physical control of a moving vessel, moving water skis, moving aquaplane, moving surfboard, or similar moving device;

(3) Under the intentional influence of any glue, aerosol, or other toxic vapor to the extent that it is less safe for the person to operate, navigate, steer, drive, manipulate, or be in actual physical control of a moving vessel, moving water skis, moving aquaplane, moving surfboard, or similar moving device;

(4) Under the combined influence of any two or more of the substances specified in paragraphs (1) through (3) of this subsection to the extent that it is less safe for the person to operate, navigate, steer, drive, manipulate, or be in actual physical control of a moving vessel, moving water skis, moving aquaplane, moving surfboard, or similar moving device;

(5) The person's alcohol concentration is 0.08 grams or more at any time within three hours after such operating, navigating, steering, driving, manipulating, or being in actual physical control of a moving vessel, moving water skis, moving aquaplane, moving surfboard, or similar moving device from alcohol consumed before such operating,

navigating, steering, driving, manipulating, or being in actual physical control ended; or

(6) Subject to the provisions of subsection (b) of this Code section, there is any amount of marijuana or a controlled substance, as defined in Code Section 16-13-21, present in the person's blood or urine, or both, including the metabolites and derivatives of each or both without regard to whether or not any alcohol is present in the person's breath or blood.

(b) The fact that any person charged with violating this Code section is or has been legally entitled to use a drug shall not constitute a defense against any charge of violating this Code section; provided, however, that such person shall not be in violation of this Code section unless such person is rendered incapable of operating, navigating, steering, driving, manipulating, or being in actual physical control of a moving vessel, moving water skis, moving aquaplane, moving surfboard, or similar moving device safely as a result of using a drug other than alcohol which such person is legally entitled to use.

(c) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while operating, navigating, steering, driving, manipulating, or being in actual physical control of a moving vessel, moving water skis, moving aquaplane, moving surfboard, or similar moving device while under the influence of alcohol or drugs, evidence of the amount of alcohol or drug in a person's blood, urine, breath, or other bodily substance at the alleged time, as determined by a chemical analysis of the person's blood, urine, breath, or other bodily substance, shall be admissible. Where such chemical test is made, the following provisions shall apply:

(1) Chemical analysis of the person's blood, urine, breath, or other bodily substance, to be considered valid under this Code section, shall have been performed according to methods approved by the Division of Forensic Sciences of the Georgia Bureau of Investigation and by an individual possessing a valid permit issued by the Division of Forensic Sciences for this purpose. The Division of Forensic Sciences of the Georgia Bureau of Investigation is authorized to approve satisfactory techniques or methods to ascertain the qualifications and competence of individuals to conduct analyses and to issue permits, which shall be subject to termination or revocation at the discretion of the Division of Forensic Sciences;

(2) When a person undergoes a chemical test at the request of a law enforcement officer under subsection (e) of this Code section, only a physician, registered nurse, laboratory technician, emergency medical technician, or other qualified person may withdraw blood for the purpose of determining the alcoholic or drug content therein, pro-

vided that this limitation shall not apply to the taking of breath or urine specimens. No physician, registered nurse, laboratory technician, emergency medical technician, or other qualified person or employer thereof shall incur any civil or criminal liability as a result of the medically proper obtaining of such blood specimens when requested in writing by a law enforcement officer;

(3) The person tested may have a physician or a qualified technician, chemist, registered nurse, or other qualified person of his or her own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer. The justifiable failure or inability to obtain an additional test shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer; and

(4) Upon the request of the person who submits to a chemical test or tests at the request of a law enforcement officer, full information concerning such test or tests shall be made available to such person or such person's attorney. The arresting officer at the time of arrest shall advise the person arrested of his or her rights to a chemical test or tests according to this Code section.

(d) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while operating, navigating, steering, driving, manipulating, or being in actual physical control of a moving vessel, moving water skis, moving aquaplane, moving surfboard, or similar moving device while under the influence of alcohol, the amount of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's blood, urine, breath, or other bodily substance, shall give rise to the following presumptions:

(1) If there was at that time an alcohol concentration of 0.05 grams or less, it shall be presumed that the person was not under the influence of alcohol, as prohibited by paragraphs (1), (4), and (5) of subsection (a) of this Code section;

(2) If there was at that time an alcohol concentration in excess of 0.05 grams but less than 0.08 grams, such fact shall not give rise to any presumption that the person was or was not under the influence of alcohol, as prohibited by paragraphs (1), (4), and (5) of subsection (a) of this Code section, but such fact may be considered with other competent evidence in determining whether the person was under the influence of alcohol, as prohibited by paragraphs (1), (4), and (5) of subsection (a) of this Code section; and

(3) If there was at that time or within three hours after operating, navigating, steering, driving, manipulating, or being in actual physical control of a moving vessel, moving water skis, moving aquaplane,

moving surfboard, or similar moving device from alcohol consumed before such operating, navigating, steering, driving, manipulating, or being in actual physical control ended an alcohol concentration of 0.08 or more grams, the person shall be in violation of paragraph (5) of subsection (a) of this Code section.

(e) The State of Georgia considers that persons who are under the influence of alcohol, toxic vapors, or drugs while operating a vessel on the waters of this state constitute a direct and immediate threat to the welfare and safety of the general public. Therefore, any person who operates a vessel upon the waters of this state shall be deemed to have given consent, subject to subsection (c) of this Code section, to a chemical test or tests of his or her blood, breath, or urine or other bodily substance for the purpose of determining the alcoholic or drug content of his or her blood if arrested for any offense arising out of acts alleged to have been committed while the person was operating, navigating, steering, driving, manipulating, or in actual physical control of a moving vessel, moving water skis, moving aquaplane, moving surfboard, or similar moving device while under the influence of alcohol, toxic vapors, or any drug. The test or tests shall be administered at the request of a law enforcement officer having reasonable grounds to believe that the person has been operating or was in actual physical control of a vessel upon the waters of this state while under the influence of alcohol, toxic vapors, or any drug. Subject to subsection (c) of this Code section, the requesting law enforcement officer shall designate which of the aforesaid tests shall be administered.

(f) Any person who is dead, unconscious, or otherwise in a condition rendering him or her incapable of refusal shall be deemed not to have withdrawn the consent provided by subsection (e) of this Code section, and the test or tests may be administered subject to subsection (c) of this Code section.

(g) If a person refuses, upon the request of a law enforcement officer, to submit to a chemical test designated by the law enforcement officer as provided in subsection (e) of this Code section, no test shall be given; however, such refusal shall be admissible in evidence.

(h) In the event of a boating accident involving a fatality, the investigating coroner or medical examiner having jurisdiction shall direct that a chemical blood test to determine alcohol concentration or the presence of drugs be performed on the dead person or persons and that the results of such test be properly recorded in his or her report.

(i) It shall be unlawful for the owner of any vessel knowingly to allow or authorize any person to operate such vessel or to manipulate any water skis, aquaplane, surfboard, or similar device being towed by such vessel when the owner knows or has reasonable grounds to believe that

said person is intoxicated or under the influence of alcohol, toxic vapors, or drugs in violation of this Code section.

(j) In any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person in violation of subsection (k) of this Code section, if there was at that time or within three hours after operating, navigating, steering, driving, or being in actual physical control of a moving vessel or personal watercraft from alcohol consumed before such operating, navigating, steering, driving, or being in actual physical control ended an alcohol concentration of 0.02 grams or more in the person's blood, breath, or urine, the person shall be in violation of subsection (k) of this Code section.

(k)(1) A person under the age of 21 years shall not operate, navigate, steer, drive, or be in actual physical control of any moving vessel, moving water skis, moving aquaplane, moving surfboard or similar moving device, or personal watercraft while such person's alcohol concentration is 0.02 grams or more at any time within three hours after such operating, navigating, steering, driving, or being in actual physical control from alcohol consumed before such operating, navigating, steering, driving, or being in actual physical control ended.

(2) No plea of nolo contendere shall be accepted for any person under the age of 21 years charged with a violation of this Code section.

(l) A person who violates this Code section while transporting in a moving vessel or personal watercraft or towing on water skis, an aquaplane, a surfboard, or similar device a child under the age of 14 years shall be guilty of the separate offense of endangering a child by operating a moving vessel or personal watercraft under the influence of alcohol, toxic vapors, or drugs. The offense of endangering a child by operating a moving vessel or personal watercraft under the influence of alcohol, toxic vapors, or drugs shall not be merged with the offense of operating a vessel under the influence of alcohol, toxic vapors, or drugs for the purposes of prosecution and sentencing. An offender who is convicted of a violation of this subsection shall be punished in accordance with the provisions of subsection (d) of Code Section 16-12-1.

(m) Every person convicted of violating this Code section shall, upon a first or second conviction thereof, be guilty of a misdemeanor; upon a third conviction thereof, be guilty of a high and aggravated misdemeanor; and upon a fourth or subsequent conviction thereof, be guilty of a felony except as otherwise provided in paragraph (4) of this subsection and shall be punished as follows:

(1) For the first conviction with no conviction of and no plea of nolo contendere accepted to a charge of violating this Code section within the previous ten years, as measured from the dates of previous

arrests for which convictions were obtained or pleas of nolo contendere were accepted to the date of the current arrest for which a conviction is obtained or a plea of nolo contendere is accepted:

(A) A fine of not less than $300.00 and not more than $1,000.00, which fine shall not, except as provided in subsection (n) of this Code section, be subject to suspension, stay, or probation;

(B) A period of imprisonment of not fewer than ten days nor more than 12 months, which period of imprisonment may, at the sole discretion of the judge, be suspended, stayed, or probated, except that if the offender's alcohol concentration at the time of the offense was 0.08 grams or more, the judge may suspend, stay, or probate all but 24 hours of any term of imprisonment imposed under this subparagraph;

(C) Not fewer than 40 hours of community service, except that for a conviction for violation of subsection (k) of this Code section where the person's alcohol concentration at the time of the offense was less than 0.08 grams, the period of community service shall be not fewer than 20 hours;

(D) Completion of a DUI Alcohol or Drug Use Risk Reduction Program as defined in Code Section 40-1-1. The sponsor of any such program shall provide written notice of the Department of Driver Services' certification of the program to the person upon enrollment in the program;

(E) A clinical evaluation as defined in Code Section 40-5-1 and, if recommended as a part of such evaluation, completion of a substance abuse treatment program as defined in Code Section 40-5-1; provided, however, that in the court's discretion, such evaluation may be waived; and

(F) If the person is sentenced to a period of imprisonment for fewer than 12 months, a period of probation of 12 months less any days during which the person is actually incarcerated;

(2) For the second conviction within a ten-year period of time, as measured from the dates of previous arrests for which convictions were obtained or pleas of nolo contendere were accepted to the date of the current arrest for which a conviction is obtained or a plea of nolo contendere is accepted:

(A) A fine of not less than $600.00 and not more than $1,000.00, which fine shall not, except as provided in subsection (n) of this Code section, be subject to suspension, stay, or probation;

(B) A period of imprisonment of not fewer than 90 days and not more than 12 months. The judge shall probate at least a portion of

such term of imprisonment, in accordance with subparagraph (F) of this paragraph, and to such other terms and conditions as the judge may impose; provided, however, that the offender shall be required to serve not fewer than 72 hours of actual incarceration;

(C) Not fewer than 30 days of community service;

(D) Completion of a DUI Alcohol or Drug Use Risk Reduction Program as defined in Code Section 40-1-1. The sponsor of any such program shall provide written notice of the Department of Driver Services' certification of the program to the person upon enrollment in the program;

(E) A clinical evaluation as defined in Code Section 40-5-1 and, if recommended as a part of such evaluation, completion of a substance abuse treatment program as defined in Code Section 40-5-1; and

(F) A period of probation of 12 months less any days during which the person is actually incarcerated;

(3) For the third conviction within a ten-year period of time, as measured from the dates of previous arrests for which convictions were obtained or pleas of nolo contendere were accepted to the date of the current arrest for which a conviction is obtained or a plea of nolo contendere is accepted:

(A) A fine of not less than $1,000.00 and not more than $5,000.00, which fine shall not, except as provided in subsection (n) of this Code section, be subject to suspension, stay, or probation;

(B) A mandatory period of imprisonment of not fewer than 120 days and not more than 12 months. The judge shall probate at least a portion of such term of imprisonment, in accordance with subparagraph (F) of this paragraph, and to such other terms and conditions as the judge may impose; provided, however, that the offender shall be required to serve not fewer than 15 days of actual incarceration;

(C) Not fewer than 30 days of community service;

(D) Completion of a DUI Alcohol or Drug Use Risk Reduction Program as defined in Code Section 40-1-1. The sponsor of any such program shall provide written notice of the Department of Driver Services' certification of the program to the person upon enrollment in the program;

(E) A clinical evaluation as defined in Code Section 40-5-1 and, if recommended as a part of such evaluation, completion of a substance abuse treatment program as defined in Code Section 40-5-1; and

(F) A period of probation of 12 months less any days during which the person is actually incarcerated;

(4) For the fourth or subsequent conviction within a ten-year period of time, as measured from the dates of previous arrests for which convictions were obtained or pleas of nolo contendere were accepted to the date of the current arrest for which a conviction is obtained or a plea of nolo contendere is accepted:

(A) A fine of not less than $1,000.00 and not more than $5,000.00, which fine shall not, except as provided in subsection (n) of this Code section, be subject to suspension, stay, or probation;

(B) A period of imprisonment of not less than one year and not more than five years; provided, however, that the judge may suspend, stay, or probate all but 90 days of any term of imprisonment imposed under this paragraph. The judge shall probate at least a portion of such term of imprisonment, in accordance with subparagraph (F) of this paragraph, and to such other terms and conditions as the judge may impose;

(C) Not fewer than 60 days of community service; provided, however, that if a defendant is sentenced to serve three years of actual imprisonment, the judge may suspend the community service;

(D) Completion of a DUI Alcohol or Drug Use Risk Reduction Program as defined in Code Section 40-1-1. The sponsor of any such program shall provide written notice of the Department of Driver Services' certification of the program to the person upon enrollment in the program;

(E) A clinical evaluation as defined in Code Section 40-5-1 and, if recommended as a part of such evaluation, completion of a substance abuse treatment program as defined in Code Section 40-5-1; and

(F) A period of probation of five years less any days during which the person is actually imprisoned;

provided, however, that if the ten-year period of time as measured in this paragraph commenced prior to May 15, 2013, then such fourth or subsequent conviction shall be a misdemeanor of a high and aggravated nature and punished as provided in paragraph (3) of this subsection;

(5) For the purpose of imposing a sentence under this subsection, a plea of nolo contendere based on a violation of this Code section shall constitute a conviction; and

(6) For purposes of determining the number of prior convictions or pleas of nolo contendere pursuant to the felony provisions of para-

graph (4) of this subsection, only those offenses for which a conviction is obtained or a plea of nolo contendere is accepted on or after May 15, 2013, shall be considered; provided, however, that nothing in this subsection shall be construed as limiting or modifying in any way sentence enhancement provisions under Georgia law, including, but not limited to, provisions relating to punishment of recidivist offenders pursuant to Title 17.

(n)(1) If the payment of the fine required under subsection (m) of this Code section will impose an economic hardship on the defendant, the judge, at his or her sole discretion, may order the defendant to pay such fine in installments, and such order may be enforced through a contempt proceeding or a revocation of any probation otherwise authorized by this Code section.

(2) In the sole discretion of the judge, he or she may suspend up to one-half of the fine imposed under subsection (m) of this Code section conditioned upon the defendant's undergoing treatment in a substance abuse treatment program as defined in Code Section 40-5-1.

(o) As used in this Code section, the term:

(1) "Homemade or inflatable raft" means any platform which floats on the water for purposes of providing buoyancy to a person and which renders transportation with only the aid of such person's hands, arms, legs, or feet.

(2) "Personal watercraft" shall have the same meaning as set forth in Code Section 52-7-8.2.

(3) "Vessel" means every description of watercraft, other than a sailboard or homemade or inflatable raft, used or capable of being used as a means of transportation on water.

History. — Ga. L. 1968, p. 487, § 10; Ga. L. 1973, p. 1427, § 11; Ga. L. 1986, p. 612, § 1; Ga. L. 1987, p. 3, § 52; Ga. L. 1992, p. 2075, § 3; Ga. L. 1994, p. 680, § 5; Ga. L. 1998, p. 672, § 1; Ga. L. 2013, p. 92, § 8/SB 136; Ga. L. 2013, p. 294, § 4-62/HB 242; Ga. L. 2014, p. 710, § 1-21/SB 298; Ga. L. 2014, p. 866, § 52/SB 340; Ga. L. 2016, p. 223, § 2/HB 172; Ga. L. 2020, p. 827, § 1-4/HB 998.

The 2020 amendment, effective August 5, 2020, substituted "alcohol concentration" for "blood alcohol concentration (BAC)" in the middle of subsection (h).

Cross references. — Implied consent to chemical tests by virtue of operating motor vehicle, § 40-5-55. Driving under the influence generally, § 40-6-391. Chemical tests in DUI cases, § 40-6-392. Obtaining blood sample where person unable to give consent, § 45-16-46. Liability of owner of watercraft for injury or damage caused by operation of watercraft, §§ 51-1-21, 51-1-22.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1994, "this Code section" was substituted for "O.C.G.A. 52-7-12" at the end of subsection (i).

Editor's notes. — Ga. L. 2013, p. 92, § 1/SB 136, not codified by the General Assembly, provides, in part, that Sections 8, 9, and 10 of this Act shall be known and may be cited as the "Jake and Griffin Prince BUI Law."

Ga. L. 2013, p. 92, § 14/SB 136, not codified by the General Assembly, pro-

vides, in part, that the amendment of this Code section by that Act shall apply to all offenses occurring on and after May 15, 2013; provided, however, that for purposes of determining the number of prior convictions or pleas of nolo contendere pursuant to the felony provisions of paragraph (4) of subsection (m) of Code Section 52-7-12, only those offenses for which a conviction or a plea of nolo contendere is obtained on or after May 15, 2013, shall be considered.

Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Ga. L. 2014, p. 866, § 54(e)/SB 340, not codified by the General Assembly, provides: "In the event of a conflict between a provision in Sections 1 through 53 of this Act and a provision of another Act enacted at the 2014 regular session of the General Assembly, the provision of such other Act shall control over the conflicting provision in Sections 1 through 53 of this Act to the extent of the conflict." Accordingly, the amendment to subparagraphs (m)(1)(D), (m)(2)(D), (m)(3)(D), and (m)(4)(D) of this Code section by Ga. L. 2014, p. 866 § 52/SB 340, was not given effect.

Law reviews. — For review of 1998 legislation relating to waters of the state, ports, and watercraft, see 15 Ga. St. U.L. Rev. 251 (1998).

JUDICIAL DECISIONS

Qualification of examiner. — Exclusion of the requirements for technical standards and procedures for the collection and testing of evidence by O.C.G.A. § 35-3-155 from the Administrative Procedure Act includes the procedure by which an officer obtains a Division of Forensic Sciences certificate to operate an Intoximeter 5000. State v. Corriher, 243 Ga. App. 648, 533 S.E.2d 800 (2000).

Rules for issuing permits for test operators. — Forensic Sciences Division of the Georgia Bureau of Investigation is exempt under O.C.G.A. § 35-3-155 from the requirement of O.C.G.A. § 50-13-3(b) that the Division publish the Division's rules for granting permits for the administration of breath, blood, and urine tests. State v. Bowen, 274 Ga. 1, 547 S.E.2d 286 (2001), reversing, State v. Bowen, 245 Ga. App. 159, 537 S.E.2d 417 (2000).

Brief investigatory stop authorized. — Merely observing a can of beer in the hand of one who is otherwise driving a car or operating a boat in a safe manner, in and of itself, constitutes an articulable suspicion that a violation of O.C.G.A. § 40-6-391 or O.C.G.A. § 52-7-12 may be occurring so as to authorize a brief investigatory stop. State v. Baker, 197 Ga. App. 1, 397 S.E.2d 554 (1990).

Department of Natural Resources officer who observed the defendant's boat operating with its docking lights improperly illuminated, O.C.G.A. § 52-7-11(b)(2), had the authority to detain the defendant and make a brief safety inspection under O.C.G.A. § 52-7-25(b)(4); the defendant was not in custody during the stop and Miranda warnings were not required prior to field sobriety tests. Pedersen v. State, 337 Ga. App. 159, 786 S.E.2d 535 (2016), cert. denied, No. S16C1641, 2016 Ga. LEXIS 828 (Ga. 2016), overruled on other grounds by State v. Turnquest, 305 Ga. 758, 827 S.E.2d 865 (2019).

Weight and sufficiency of the evidence. — Because defendant refused to submit to a breath test, smelled of alcohol, and failed several field sobriety tests, the trial court properly convicted defendant of violating O.C.G.A. § 52-7-12(a)(1) by operating a boat while under the influence of alcohol to the extent it was less safe to do so. Bowling v. State, 275 Ga. App. 45, 619 S.E.2d 688 (2005).

Cited in Fett v. Alderman, 117 Ga. App. 677, 161 S.E.2d 350 (1968).

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, §§ 12, 22, 32, 33.

Am. Jur. Pleading and Practice Forms. — 5 Am. Jur. Pleading and Practice Forms, Boats and Boating, § 1

ALR. — Law of general average as affected by fact that necessity for sacrifice or expenditure was due to negligent navigation, 25 A.L.R. 154.

Negligence in navigating as affecting right to recover for injury by obstruction to navigation, 25 A.L.R. 1556.

Liabilities of the parties to a contract to towage with respect to injury sustained by the tow or tug during the performance of the towage service, 54 A.L.R. 104.

Res ipsa loquitur with respect to personal injuries or death on or about ship, 1 A.L.R.3d 642.

Validity, construction, and operation of school "zero tolerance" policies towards drugs, alcohol, or violence, 117 A.L.R.5th 459.

Validity, construction, and application of statutes prohibiting boating while intoxicated, boating while under the influence, or the like, 47 A.L.R.6th 107.

Driving While Intoxicated: Duty of Law Enforcement Officer to Advise Suspect of Their Rights Under Implied Consent Law, Including Offers of Test Alternatives, 51 A.L.R.7th 2.

52-7-12.1. Reckless operation of vessel or other water device.

Any person who operates any vessel or manipulates any water skis, aquaplane, surfboard, tube, or similar device in reckless disregard for the safety of persons or property commits the offense of reckless operation of a vessel or other water device.

History. — Code 1981, § 52-7-12.1, enacted by Ga. L. 1994, p. 680, § 6.

52-7-12.2. Homicide by vessel.

(a) Any person who, without malice aforethought, causes the death of another person through the violation of subsection (j) of Code Section 52-7-8.2, Code Section 52-7-12 or 52-7-12.1, subsection (b) of Code Section 52-7-13, or subsection (c) of Code Section 52-7-25 commits the offense of homicide by vessel in the first degree. A person convicted under this subsection shall be guilty of a felony and shall be punished by imprisonment for not less than three years nor more than 15 years.

(b) Any operator of a vessel who, without malice aforethought, causes a collision or accident which causes the death of another person and leaves the scene of the collision or accident in violation of subsection (a) of Code Section 52-7-14 commits the offense of homicide by vessel in the first degree and, upon conviction thereof, shall be punished by imprisonment for not less than three years nor more than 15 years.

(c) Any person who causes the death of another person, without an intention to do so, by violating any provision of this title other than

subsection (j) of Code Section 52-7-8.2, Code Section 52-7-12 or 52-7-12.1, subsection (b) of Code Section 52-7-13, subsection (a) of Code Section 52-7-14, or subsection (c) of Code Section 52-7-25 commits the offense of homicide by vessel in the second degree when such violation is the cause of said death. A person convicted under this subsection shall be guilty of a misdemeanor and shall be punished as provided in Code Section 17-10-3.

History. — Code 1981, § 52-7-12.2, enacted by Ga. L. 1995, p. 236, § 2; Ga. L. 2008, p. 1164, § 4/SB 529.

Editor's notes. — Ga. L. 2008, p. 1164, § 6/SB 529, not codified by the General Assembly, provides that the amendment to this Code section shall apply to all offenses committed on or after July 1, 2008.

52-7-12.3. Feticide by vessel.

(a) For the purposes of this Code section, the term "unborn child" means a member of the species homo sapiens at any stage of development who is carried in the womb.

(b)(1) A person commits the offense of feticide by vessel in the first degree if he or she causes the death of an unborn child by any injury to the mother of such child through the violation of subsection (j) of Code Section 52-7-8.2, Code Section 52-7-12 or 52-7-12.1, subsection (b) of Code Section 52-7-13, subsection (a) of Code Section 52-7-14, or subsection (c) of Code Section 52-7-25, which would be homicide by vessel in the first degree as provided in subsection (a) or (b) of Code Section 52-7-12.2 if it resulted in the death of such mother.

(2) A person convicted of the offense of feticide by vessel in the first degree shall be guilty of a felony and shall be punished by imprisonment for not less than three years nor more than 15 years.

(c)(1) A person commits the offense of feticide by vessel in the second degree if he or she causes the death of an unborn child by any injury to the mother of such child by violating any provision of this title other than subsection (j) of Code Section 52-7-8.2, Code Section 52-7-12 or 52-7-12.1, subsection (b) of Code Section 52-7-13, subsection (a) of Code Section 52-7-14, or subsection (c) of Code Section 52-7-25, which would be homicide by vessel in the second degree as provided in subsection (c) of Code Section 52-7-12.2 if it resulted in the death of such mother.

(2) A person convicted of the offense of feticide by vessel in the second degree shall be guilty of a misdemeanor and shall be punished as provided in Code Section 17-10-3.

History. — Code 1981, § 52-7-12.3, enacted by Ga. L. 1995, p. 236, § 2; Ga. L. 2006, p. 643, § 4/SB 77; Ga. L. 2008, p. 1164, § 5/SB 529.

Editor's notes. — Ga. L. 2006, p. 643, § 5/SB 77, not codified by the General Assembly, provides that this Act shall apply to all offenses committed on or after July 1, 2006.

Ga. L. 2008, p. 1164, § 6/SB 529, not codified by the General Assembly, provides that the amendment to this Code section shall apply to all offenses committed on or after July 1, 2008.

Law reviews. — For article on the 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 37 (2006).

RESEARCH REFERENCES

ALR. — Homicide based on killing of unborn child, 64 A.L.R.5th 671.

52-7-12.4. Serious injury by vessel.

Whoever, without malice, shall cause bodily harm to another by depriving him or her of a member of his or her body, by rendering a member of his or her body useless, by seriously disfiguring his or her body or a member thereof, or by causing organic brain damage which renders the body or any member thereof useless through the violation of subsection (j) of Code Section 52-7-8.2 or Code Section 52-7-12 or Code Section 52-7-12.1 or subsection (b) of Code Section 52-7-13 or subsection (a) of Code Section 52-7-14 or subsection (c) of Code Section 52-7-25 shall be guilty of the crime of serious injury by vessel. A person convicted under this Code section shall be guilty of a felony and shall be punished by imprisonment for not less than one year nor more than five years.

History. — Code 1981, § 52-7-12.4, enacted by Ga. L. 1995, p. 236, § 2.

52-7-12.5. Ordering drug, alcohol, or other substance tests; implied consent warning; reports; suspension; hearing; certificate of inspection.

(a) The test or tests required under Code Section 52-7-12 shall be administered as soon as possible at the request of a law enforcement officer having reasonable grounds to believe that the person has been operating or was in actual physical control of a moving vessel upon the waters of this state in violation of Code Section 52-7-12 and the officer has arrested such person for a violation of Code Section 52-7-12, any federal law in conformity with Code Section 52-7-12, or any local ordinance which is identical to Code Section 52-7-12 in accordance with Code Section 52-7-21 or the person has been involved in a boating accident resulting in serious injuries or fatalities. Subject to Code Section 52-7-12, the requesting law enforcement officer shall designate which test shall be administered initially and may subsequently require a test or tests for any substance not initially tested.

(b) At the time a chemical test or tests are requested, the arresting officer shall select and read to the person the appropriate implied consent warning from the following:

(1) Implied consent notice for suspects under 21 years of age:

"The State of Georgia has conditioned your privilege to operate a vessel on the waters of this state upon your submission to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your privilege to operate a vessel on the waters of this state will be suspended for a minimum period of one year. Your refusal to submit to blood or urine testing may be offered into evidence against you at trial. If you submit to testing and the results indicate an alcohol concentration of 0.02 grams or more or the presence of any illegal drug, your privilege to operate a vessel on the waters of this state may be suspended for a minimum period of one year. After first submitting to the requested state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state administered chemical tests of your (designate which test)?"; or

(2) Implied consent notice for suspects 21 years of age or older:

"The State of Georgia has conditioned your privilege to operate a vessel on the waters of this state upon your submission to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your privilege to operate a vessel on the waters of this state will be suspended for a minimum period of one year. Your refusal to submit to blood or urine testing may be offered into evidence against you at trial. If you submit to testing and the results indicate an alcohol concentration of 0.08 grams or more or the presence of any illegal drug, your privilege to operate a vessel on the waters of this state may be suspended for a minimum period of one year. After first submitting to the requested state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state administered chemical tests of your (designate which test)?"

If any such notice is used by a law enforcement officer to advise a person of his or her rights regarding the administration of chemical testing, such person shall be deemed to have been properly advised of his or her rights under this Code section and under Code Section

52-7-12.6, and the results of any chemical test, or the refusal to submit to a test of such person's blood or urine, shall be admitted into evidence against such person. Such notice shall be read in its entirety but need not be read exactly so long as the substance of the notice remains unchanged.

(c) Nothing in this Code section shall be deemed to preclude the acquisition or admission of evidence of a violation of Code Section 52-7-12 if such evidence was obtained by voluntary consent or a search warrant as authorized by the Constitution or laws of this state or the United States.

(d) If a person under arrest or a person who was involved in any boating accident resulting in serious injuries or fatalities submits to a chemical test upon the request of a law enforcement officer and the test results indicate that a suspension of the privilege of operating a vessel on the waters of this state is required under this Code section, the results shall be reported to the department. Upon the receipt of a report of the law enforcement officer that the officer had reasonable grounds to believe the arrested person had been operating or was in actual physical control of a moving vessel upon the waters of this state in violation of Code Section 52-7-12 or that such person had been operating or was in actual physical control of a moving vessel upon the waters of this state and was involved in a boating accident involving serious injuries or fatalities and that the person submitted to a chemical test at the request of the law enforcement officer and the test results indicate either an alcohol concentration of 0.08 grams or more or, for a person under the age of 21 years, an alcohol concentration of 0.02 grams or more, and the vessel being operated was a motorized vessel having ten or more horsepower or was a sailboat more than 12 feet in length, the department shall suspend the person's privilege to operate a vessel upon the waters of this state pursuant to Code Section 52-7-12.6, subject to review as provided for in this Code section.

(e) If a person under arrest or a person who was involved in any boating accident resulting in serious injuries or fatalities refuses, upon the request of a law enforcement officer, to submit to a chemical test designated by the law enforcement officer as provided in subsection (a) of this Code section, no test shall be given; but the law enforcement officer shall report the refusal to the department. Upon the receipt of a report of the law enforcement officer that the officer had reasonable grounds to believe the arrested person had been operating or was in actual physical control of a moving vessel upon the waters of this state in violation of Code Section 52-7-12 or that such person had been operating or was in actual physical control of a moving vessel upon the waters of this state and was involved in a boating accident which resulted in serious injuries or fatalities and that the person had refused

to submit to the test upon the request of the law enforcement officer, and the vessel being operated was a motorized vessel having ten or more horsepower or was a sailboat more than 12 feet in length, the department shall suspend the person's privilege of operating a vessel on the waters of this state for a period of one year.

(f)(1) The law enforcement officer, acting on behalf of the department, shall personally serve the notice of intention to suspend or disqualify the privilege of operating a vessel on the waters of this state of the arrested person or other person refusing such test on such person at the time of the person's refusal to submit to a test or at the time at which such a test indicates that suspension or disqualification is required under this Code section. The officer shall forward to the department the notice of intent to suspend and the report required by subsection (d) or (e) of this Code section within ten calendar days after the date of the arrest of such person. The failure of the officer to transmit the sworn report required by this Code section within ten calendar days shall not prevent the department from accepting such report and utilizing it in the suspension of an operator's privilege as provided in this Code section.

(2) If notice has not been given by the arresting officer, the department, upon receipt of the report of such officer, shall suspend the person's privilege to operate a vessel and, by regular mail, at the last known address, notify such person of such suspension. The notice shall inform the person of the grounds of suspension, the effective date of the suspension, and the right to review. The notice shall be deemed received three days after mailing.

(g)(1) A person whose operator's privilege is suspended pursuant to this Code section shall request, in writing, a hearing within ten business days from the date of personal notice or receipt of notice sent by certified mail or statutory overnight delivery, return receipt requested, or the right to said hearing shall be deemed waived. Within 30 days after receiving a written request for a hearing, the department shall hold a hearing as is provided in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." The hearing shall be recorded. For purposes of such hearing, a copy of the report required by subsection (d) or (e) of this Code section shall be made a part of the hearing record and shall create a rebuttable presumption that the vessel being operated was a motorized vessel having ten or more horsepower or was a sailboat more than 12 feet in length.

(2) The scope of the hearing shall be limited to the following issues:

(A)(i) Whether the law enforcement officer had reasonable grounds to believe the person was operating or in actual physical control of a moving vessel while under the influence of alcohol or

a controlled substance and was lawfully placed under arrest for violating Code Section 52-7-12.

(ii) Whether the person was involved in a vessel accident or collision resulting in serious injury or fatality;

(B) Whether at the time of the request for the test or tests the officer informed the person of the person's implied consent rights and the consequence of submitting or refusing to submit to such test and:

(i) Whether the person refused the test; or

(ii) Whether a test or tests were administered and the results indicated an alcohol concentration of 0.08 grams or more or, for a person under the age of 21 years, an alcohol concentration of 0.02 grams or more; and

(C) Whether the test or tests were properly administered by an individual possessing a valid permit issued by the Division of Forensic Sciences of the Georgia Bureau of Investigation on an instrument approved by the Division of Forensic Sciences or a test conducted by the Division of Forensic Sciences, including whether the machine at the time of the test was operated with all its electronic and operating components prescribed by its manufacturer properly attached and in good working order, which shall be required. A copy of the operator's permit showing that the operator has been trained on the particular type of instrument used and one of the original copies of the test results or, where the test is performed by the Division of Forensic Sciences, a copy of the crime lab report shall satisfy the requirements of this subparagraph.

(3) The hearing officer shall, within five calendar days after such hearing, forward a decision to the department to rescind or sustain the suspension of the person's privilege to operate a vessel on the waters of this state. If no hearing is requested within the ten business days specified in paragraph (1) of this subsection, and the failure to request such hearing is due in whole or in part to the reasonably avoidable fault of the person, the right to a hearing shall have been waived. The request for a hearing shall not stay the suspension of the person's privilege to operate a vessel on the waters of this state; provided, however, that if the hearing is timely requested and is not held within 60 days and the delay is not due in whole or in part to the reasonably avoidable fault of the person, the suspension shall be stayed until such time as the hearing is held and the hearing officer's decision is made.

(4) In the event the person is acquitted of a violation of Code Section 52-7-12 or such charge is initially disposed of other than by a

conviction or plea of nolo contendere, then the suspension shall be terminated. An accepted plea of nolo contendere shall be entered on the operator's record and shall be considered and counted as a conviction for purposes of any future violations of Code Section 52-7-12.

(h) If the suspension is sustained after such a hearing, the person whose privilege to operate a vessel on the waters of this state has been suspended under this Code section shall have a right to file for a judicial review of the department's final decision, as provided for in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act"; while such appeal is pending, the order of the department shall not be stayed.

(i) Each time an approved breath-testing instrument is inspected, the inspector shall prepare a certificate which shall be signed under oath by the inspector and which shall include the following language:

> "This breath-testing instrument (serial no. _____) was thoroughly inspected, tested, and standardized by the undersigned on (date _____) and all of its electronic and operating components prescribed by its manufacturer are properly attached and are in good working order."

When properly prepared and executed, as prescribed in this subsection, the certificate shall, notwithstanding any other provision of law, be self-authenticating, shall be admissible in any court of law, and shall satisfy the pertinent requirements of paragraph (1) of subsection (c) of Code Section 52-7-12 and subparagraph (g)(2)(C) of this Code section.

History. — Code 1981, § 52-7-12.5, enacted by Ga. L. 1998, p. 672, § 2; Ga. L. 1999, p. 81, § 52; Ga. L. 2000, p. 1589, § 3; Ga. L. 2013, p. 92, § 9/SB 136; Ga. L. 2019, p. 295, § 3/HB 471; Ga. L. 2020, p. 827, § 1-5/HB 998.

The 2019 amendment, effective April 28, 2019, substituted the present provisions of subsection (b) for the former provisions, which read: "At the time a chemical test or tests are requested, the arresting officer shall select and read to the person the appropriate implied consent warning from the following:

"(1) Implied consent notice for suspects under 21 years of age:

'Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your privilege to operate a vessel on the waters of this state will be suspended for a minimum period of one year. Your refusal to submit to the required testing may be offered into evidence against you at trial. If you submit to testing and the results indicate an alcohol concentration of 0.02 grams or more or the presence of any illegal drug, your privilege to operate a vessel on the waters of this state may be suspended for a minimum period of one year. After first submitting to the required state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state administered chemical tests of your (designate which tests) under the implied consent law?'; or

"(2) Implied consent notice for suspects 21 years of age or older:

'Georgia law requires you to submit to state administered chemical tests of your

blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your privilege to operate a vessel on the waters of this state will be suspended for a minimum period of one year. Your refusal to submit to the required testing may be offered into evidence against you at trial. If you submit to testing and the results indicate an alcohol concentration of 0.08 grams or more or the presence of any illegal drug, your privilege to operate a vessel on the waters of this state may be suspended for a minimum period of one year. After first submitting to the required state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state administered chemical tests of your (designate which tests) under the implied consent law?'

"If any such notice is used by a law enforcement officer to advise a person of his or her rights regarding the administration of chemical testing, such person shall be deemed to have been properly advised of his or her rights under this Code section and under Code Section 52-7-12.6, and the results of any chemical test, or the refusal to submit to a test, shall be admitted into evidence against such person. Such notice shall be read in its entirety but need not be read exactly so long as the substance of the notice remains unchanged."

The 2020 amendment, effective August 5, 2020, substituted "requested state tests" for "required state tests" in the fifth sentence of paragraphs (b)(1) and (b)(2).

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the Act shall be applicable with respect to notices delivered on or after July 1, 2000.

Ga. L. 2013, p. 92, § 1/SB 136, not codified by the General Assembly, provides, in part, that Sections 8, 9, and 10 of this Act shall be known and may be cited as the "Jake and Griffin Prince BUI Law."

Ga. L. 2013, p. 92, § 14/SB 136, not codified by the General Assembly, provides, in part, that the amendment of this Code section by that Act shall apply to all offenses occurring on and after May 15, 2013; provided, however, that for purposes of determining the number of prior convictions or pleas of nolo contendere pursuant to the felony provisions of paragraph (4) of subsection (m) of Code Section 52-7-12, only those offenses for which a conviction or a plea of nolo contendere is obtained on or after May 15, 2013, shall be considered.

Law reviews. — For review of 1998 legislation relating to waters of the state, ports, and watercraft, see 15 Ga. St. U.L. Rev. 251 (1998).

JUDICIAL DECISIONS

Cited in Klink v. State, 272 Ga. 605, 533 S.E.2d 92 (2000).

52-7-12.6. Terms of suspension; return of operating privilege; operation when suspended.

(a) Any operator's privilege to operate a vessel on the waters of this state required to be suspended under subsection (d) of Code Section 52-7-12.5 shall be suspended subject to the following terms and conditions:

(1) Upon the first suspension pursuant to subsection (d) of Code Section 52-7-12.5 within the previous five years, as measured from the dates of previous arrests for which a suspension was obtained to the date of the current arrest for which a suspension is obtained, the period of suspension shall be one year. Not sooner than 120 days

following the effective date of suspension, the person may apply to the department for reinstatement of his or her operator's privilege. Such privilege shall be reinstated if such person submits proof of completion of a DUI Alcohol or Drug Use Risk Reduction Program certified by the Department of Driver Services and pays a restoration fee of $200.00. An operator's privilege suspended pursuant to Code Section 52-7-12.5 shall remain suspended until such person submits proof of completion of a DUI Alcohol or Drug Use Risk Reduction Program certified by the Department of Driver Services and pays a restoration fee of $200.00, unless such conviction was a recidivist conviction, in which case the restoration fee shall be $500.00;

(2) Upon the second suspension pursuant to subsection (d) of Code Section 52-7-12.5 within five years, as measured from the dates of previous arrests for which suspensions were obtained to the date of the current arrest for which a suspension is obtained, the period of suspension shall be three years. Not sooner than 18 months following the effective date of suspension, the person may apply to the department for reinstatement of his or her operator's privilege. Such privilege shall be reinstated if such person submits proof of completion of a DUI Alcohol or Drug Use Risk Reduction Program certified by the Department of Driver Services and pays a restoration fee of $200.00. An operator's privilege suspended pursuant to Code Section 52-7-12.5 shall remain suspended until such person submits proof of completion of a DUI Alcohol or Drug Use Risk Reduction Program certified by the Department of Driver Services and pays a restoration fee of $200.00;

(3) Upon the third or subsequent suspension pursuant to subsection (d) of Code Section 52-7-12.5 within five years, as measured from the dates of previous arrests for which suspensions were obtained to the date of the current arrest for which a suspension is obtained, the period of suspension shall be not less than five years and until such person submits proof of completion of a DUI Alcohol or Drug Use Risk Reduction Program certified by the Department of Driver Services and pays a restoration fee of $200.00; and

(4) Any person convicted of violating Code Section 52-7-12.2, 52-7-12.3, or 52-7-12.4 shall have his or her privilege to operate a vessel on the waters of this state suspended for three years. Such privilege shall be reinstated after the expiration of the three-year period if such person submits proof of completion of a boating education course approved by the department and pays a restoration fee of $200.00, unless such conviction was a recidivist conviction, in which case the restoration fee shall be $500.00.

(b) In all cases in which the department may return the privilege to operate a vessel on the waters of this state to an operator prior to the

termination of the full period of suspension, the department may require such tests of operating skill and knowledge as it determines to be proper, and the department's discretion shall be guided by the operator's past operating record and performance and the operator's payment of a restoration fee of $200.00, unless such conviction was a recidivist conviction, in which case the restoration fee shall be $500.00.

(c) Any person who operates a vessel or personal watercraft on any of the waters of this state at a time when such person's privilege to do so has been suspended shall be guilty of a misdemeanor and shall be punished by a fine of not less than $500.00 nor more than $1,000.00; provided, however, that for a second and each subsequent conviction within a five-year period measured from the date of the previous arrest upon which a conviction was obtained to the date of the current arrest, such person shall be guilty of a misdemeanor of a high and aggravated nature and shall be punished by a fine of not less than $1,000.00 nor more than $1,500.00. The period suspension of the privilege to operate a vessel on the waters of the state of any person convicted under this subsection shall be extended for an additional six months for each such conviction.

History. — Code 1981, § 52-7-12.6, enacted by Ga. L. 1998, p. 672, § 3; Ga. L. 2001, p. 1000, § 2; Ga. L. 2005, p. 334, § 31-1/HB 501; Ga. L. 2013, p. 92, § 10/SB 136; Ga. L. 2014, p. 710, § 1-22/SB 298.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2002, "five-year period" was substituted for "five year period" in the first sentence in subsection (c).

Editor's notes. — Ga. L. 2013, p. 92, § 1/SB 136, not codified by the General Assembly, provides, in part, that Sections 8, 9, and 10 of this Act shall be known and may be cited as the "Jake and Griffin Prince BUI Law."

Ga. L. 2013, p. 92, § 14/SB 136, not codified by the General Assembly, provides, in part, that the amendment of this Code section by that Act shall apply to all offenses occurring on and after May 15, 2013; provided, however, that for purposes of determining the number of prior convictions or pleas of nolo contendere pursuant to the felony provisions of paragraph (4) of subsection (m) of Code Section 52-7-12, only those offenses for which a conviction or a plea of nolo contendere is obtained on or after May 15, 2013, shall be considered.

Law reviews. — For review of 1998 legislation relating to waters of the state, ports, and watercraft, see 15 Ga. St. U.L. Rev. 251 (1998).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — An offense under O.C.G.A. § 52-7-12.6 would be designated as one which requires fingerprinting. 1998 Op. Att'y Gen. No. 98-20.

52-7-12.7. Suspension of privileges to operate a vessel upon waters of this state for violations of vessel laws.

(a) Except as provided for in Code Sections 52-7-12, 52-7-12.5, and 52-7-12.6, and notwithstanding criminal proceedings that may be initiated by law, upon a determination by the department that a person

has violated this chapter or any rule or regulation promulgated pursuant thereto, is in noncompliance with a citation issued by another state regarding the operation of a vessel, or is suspended by another state from operating a vessel, the department may suspend such person's privilege to operate a vessel upon the waters of this state for a period of up to two years following the determination of such violation, or if the suspension is due to noncompliance with a citation or a suspension regarding the operation of a vessel in another state, then such person's privilege to operate a vessel upon the waters of this state may remain suspended until satisfactory evidence of compliance or restoration of privileges from the other state has been received by the department as such satisfactory evidence is determined by rules and regulations of the department. Such person shall be notified of the proposed suspension personally or by a letter sent by certified mail or statutory overnight delivery at such person's last known address. The notice shall inform such person of the grounds of suspension, the effective date of the suspension, and the right to review. The notice shall be deemed received three days after mailing. The proposed suspension shall become final 30 days after issuance of notice if the proposed suspension is not appealed as provided in this Code section.

(b) Any person whose privilege is proposed for suspension shall, upon petition within 30 days of issuance of notice given as stated in subsection (a) of this Code section, have a right to a hearing before an administrative law judge appointed by the board. The hearing before the administrative law judge shall be conducted in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," and the rules and regulations adopted by the board pursuant thereto. The decision of the administrative law judge shall constitute the final decision of the board, and any party to the hearing, including the department, shall have the right of judicial review thereof in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(c) Any person who operates a vessel on any of the waters of this state at a time when such person's privilege to do so has been suspended under this Code section shall be subject to the provisions of subsection (c) of Code Section 52-7-12.6.

History. — Code 1981, § 52-7-12.7, enacted by Ga. L. 2014, p. 624, § 1/HB 777.

52-7-13. Boating safety zones; restrictions on use of motors and operation of houseboats on certain lakes; exceptions.

(a)(1) The following are established as boating safety zones from May 1 through the following September 30:

(A) The ocean waters adjacent to Jekyll Island, which shall include all those waters for a distance of 1,000 feet from the high-water mark on Jekyll Beach from the northernmost point to the southernmost point of Jekyll Island;

(B) The ocean waters adjacent to Tybee Island Beach, which shall include all those waters for a distance of 1,000 feet from the high-water mark on Tybee Island Beach from the northernmost point to the southernmost point of Tybee Island Beach;

(C) The ocean waters adjacent to Saint Simons Island, which shall include all those waters for a distance of 1,000 feet from the high-water mark on Saint Simons Island from the northernmost point to the southernmost point of Saint Simons Island; and

(D) The ocean waters adjacent to Sea Island, which shall include all those waters for a distance of 1,000 feet from the high-water mark on Sea Island from the northernmost point to the southernmost point of Sea Island.

(2) The following are established as boating safety zones at all times of the year:

(A) The area within the marked boundary of any designated swimming area; and

(B) The area within the marked boundary upstream or downstream of any dam designated by the commissioner.

(3) The following are established as boating safety zones for the purpose of ensuring maritime and homeland security:

(A) All those waters within the Elba Island liquefied natural gas mooring slip; provided, however, that liquefied natural gas tank ships and authorized vessels actively engaged in the escort, maneuvering, or support of such ships shall be permitted in such zone;

(B) The area within 100 yards of any United States navy vessel; and

(C) The area within 100 yards of any vessel escorted to, from, or within any port of this state by a law enforcement vessel displaying applicable law enforcement agency markings, whether such escorted vessel is in motion or anchored or moored.

(b) Except for lifesaving, emergency, law enforcement, or dam operation and maintenance craft, it shall be unlawful to launch, float, or operate:

(1) Any power boat within the boundaries of those boating safety zones defined in subsection (a) of this Code section; or

(2) Any vessel within the boundaries of those boating safety zones defined in subparagraphs (a)(2)(A) and (a)(2)(B) of this Code section, provided such zones are marked in accordance with the uniform waterway marking system.

(c) With the exception of law enforcement crafts, no motor in excess of 9.9 horsepower shall be used on any vessel being operated on the Ogeechee River from the point where it crosses State Highway No. 119 to its point of origin.

(d) The operation of any vessel, specifically including a houseboat, with a marine toilet, galley, or sleeping quarters shall be prohibited on Lake Burton, Bull Sluice Lake, Goat Rock Lake, Lake Harding, Lake Jackson, North Highlands Lake, Lake Oliver, Lake Rabun, Seed Lake, Tallulah Falls Lake, Tugalo Lake, Lake Oconee, and Yonah Lake.

(e)(1) No person shall operate or use any vessel within an area designated and appropriately marked as a "hazardous area" unless each person aboard such vessel is wearing a United States Coast Guard approved personal flotation device, which device is designated as a Type I, Type II, Type III, or Type V device. Such device must be properly fastened, in good and serviceable condition, and the proper size for the person wearing the device.

(2) The provisions of this subsection shall not affect regulations promulgated by any agency of the federal government related to activities that may or may not be conducted within designated hazardous areas which are located within the jurisdiction of such agency.

(f) With the exception of law enforcement or scientific research or dam operation and maintenance craft, no motor in excess of 25 horsepower shall be used on any vessel being operated on Tugalo Lake.

(g) The operation of any of the following vessels on Lake Oconee shall be prohibited:

(1) Any motorized vessel greater than 30 feet six inches in length; provided, however, that this paragraph shall not apply to:

(A) Law enforcement, scientific research, or dam operation and maintenance craft; or

(B) A vessel not greater than 40 feet in length used for conducting group tours on behalf of the owner or operator of a REAP certified by the Department of Community Affairs under Code Section 50-8-192 if the same vessel was lawfully operated on the lake by such REAP owner or operator under former provisions of this paragraph as such existed immediately prior to May 29, 2007; in addition, such vessel may be replaced by the same REAP owner

or operator but only by one vessel at a time and only if each such predecessor vessel has been retired from lawfully operating on the lake and the replacement vessel does not exceed 40 feet in length; or

(2) Any vessel equipped with any type of bypass mechanism that reduces or eliminates the effectiveness of the muffler or baffler system required by Code Section 52-7-10.

(h) The operation of any of the following vessels on Lake Burton, Seed Lake, Lake Rabun, Lake Tugalo, Tallulah Falls Lake, Lake Sinclair, and Lake Yonah shall be prohibited:

(1) Any motorized vessel greater than 30 feet six inches in length; except for:

(A) Law enforcement, scientific research, or dam operation and maintenance craft; or

(B) Any vessel that was lawfully operated on Lake Sinclair immediately prior to May 20, 2010, and was as of such date included on the tax roll of any county within which any part of such lake lies; or

(2) Any vessel equipped with any type of bypass mechanism that reduces or eliminates the effectiveness of the muffler or baffler system required by Code Section 52-7-10.

(i) The provisions of this Code section shall not apply to vessels engaged in any activity authorized under Code Section 52-7-19.

History. — Ga. L. 1977, p. 1182, § 8; Ga. L. 1978, p. 1743, § 3; Ga. L. 1980, p. 738, §§ 6-8; Ga. L. 1982, p. 873, §§ 1, 2; Ga. L. 1984, p. 22, § 52; Ga. L. 1984, p. 422, § 1; Ga. L. 1987, p. 567, § 8; Ga. L. 1990, p. 317, § 1; Ga. L. 1992, p. 998, § 3; Ga. L. 1993, p. 351, § 2; Ga. L. 1993, p. 790, § 1; Ga. L. 1996, p. 101, § 1; Ga. L. 1998, p. 1133, §§ 17, 18; Ga. L. 1999, p. 657, § 1; Ga. L. 2003, p. 795, § 1; Ga. L. 2006, p. 96, § 6/HB 1490; Ga. L. 2007, p. 622, § 1/HB 510; Ga. L. 2008, p. 943, § 1/HB 964; Ga. L. 2010, p. 118, § 2/SB 99.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1999, "defined in subparagraphs (a)(2)(A) and (a)(2)(B)" was substituted for "defined in paragraphs (5) and (6) of subsection (a)" in paragraph (b)(2).

Pursuant to Code Section 28-9-5, in 2007, "May 29, 2007" was substituted for "the effective date of this subparagraph" in subparagraph (g)(1)(B).

Pursuant to Code Section 28-9-5, in 2010, "May 20, 2010," was substituted for "the effective date of this subparagraph" in subparagraph (h)(1)(B).

Pursuant to Code Section 28-9-5, in 2011, a misspelling of "liquefied" was corrected in subparagraph (a)(3)(A).

Editor's notes. — Ga. L. 1993, p. 790, § 1 amended subsection (e) of this Code section, which was redesignated as subsection (d) by Ga. L. 1993, p. 351, § 2.

JUDICIAL DECISIONS

Cited in Fett v. Alderman, 117 Ga. App. 677, 161 S.E.2d 350 (1968).

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, §§ 12, 22, 32, 33.

ALR. — Law of general average as affected by fact that necessity for sacrifice or expenditure was due to negligent navigation, 25 A.L.R. 154.

Negligence in navigating as affecting right to recover for injury by obstruction to navigation, 25 A.L.R. 1556.

Res ipsa loquitur with respect to personal injuries or death on or about ship, 1 A.L.R.3d 642.

52-7-14. Collisions, accidents, and casualties; salvage rights.

(a) **Duty to render assistance and identify vessel and self.** It shall be the duty of the operator of a vessel involved in a collision, accident, or other casualty, so far as he can do so without serious danger to his own vessel, crew, and passengers, to render to other persons affected by the collision, accident, or other casualty such assistance as may be practicable and as may be necessary in order to save them from or minimize any danger caused by the collision, accident, or other casualty and also to give his name, address, and identification of his vessel in writing to any person injured and to the owner of any property damaged in the collision, accident, or other casualty.

(b) **Good Samaritan clause.** Any person complying with subsection (a) of this Code section who gratuitously and in good faith renders assistance at the scene of a vessel collision, accident, or other casualty without the objection of any person assisted, shall not be held liable for any civil damages as a result of the rendering of assistance or for any act of assistance in providing or arranging salvage towage, medical treatment, or other assistance if the assisting person acts as a reasonably prudent man would have acted under the same or similar circumstances.

(c) **Accident reports required.**

(1) All boating accidents must be reported to the department within 48 hours of the accident if:

(A) A person dies within 24 hours as a result of the accident;

(B) A person is disabled for more than 24 hours;

(C) A person requires medical treatment for injuries;

(D) A person disappears from a vessel.

(2) Reports of reportable boating accidents must be made within five days if not earlier required by paragraph (1) of this subsection.

(3) Accident reports must be on forms supplied by the department, which must be filled out in their entirety and dated and signed by the person submitting the report. Such reports shall be filed by the operator or, if no operator, by the owner of any vessel involved in the boating accident. If the operator or owner is incapable of making the report, the investigating officer shall submit the report. Reports must contain at a minimum the following information:

(A) The name, address, and telephone number of each operator of each vessel involved;

(B) The number and name of each vessel involved;

(C) The name, address, and telephone number of each owner of each vessel involved;

(D) The name of the nearest city or town, the county, the state, and the body of water on which the accident occurred;

(E) The location of the accident on the water;

(F) The time and date of the accident;

(G) Visibility, weather, and water conditions;

(H) The age, date of birth, vessel operating experience, and boat safety training of the operator making the report;

(I) The number of persons on board or towed on skis by each vessel;

(J) The name, address, and date of birth of each person fatally injured;

(K) The cause of death of each;

(L) The name and address of each owner of property, other than vessels or boats, involved;

(M) The availability and use of personal flotation devices;

(N) The type of fire extinguisher used;

(O) The nature and extent of each injury resulting from the accident;

(P) A description of all property and vessel damage within an estimated cost of repairs;

(Q) A description of any equipment failures that caused or contributed to the accident;

(R) A description of the accident;

(S) An opinion of the cause of the accident;

(T) The make, model, type, hull identification number, beam width, length, horsepower and type of motor, and hull material of the reporting operator's vessel, and the year it was built.

(4)(A) As used in this paragraph, the term "medical facility" means any licensed general or specialized hospital, institutional infirmary, public health center, or diagnostic and treatment center. The term also includes, without being limited to, any building or facility, not under the operation or control of a hospital, which is primarily devoted to the provision of surgical treatment to patients not requiring hospitalization and which is classified by the Department of Community Health as an ambulatory surgical treatment center.

(B) Any:

(i) Physician, including any doctor of medicine licensed to practice under the laws of this state;

(ii) Licensed registered nurse employed by a medical facility;

(iii) Security personnel employed by a medical facility; or

(iv) Other personnel employed by a medical facility whose employment duties involve the care and treatment of patients therein

having cause to believe that a patient has had physical injury or injuries inflicted upon him or her as a result of a reportable boating accident shall report or cause reports to be made in accordance with this paragraph.

(C) An oral report shall be made immediately by telephone or otherwise and shall be followed by a report in writing, if requested, to the person in charge of the medical facility or his or her designated delegate. The person in charge of the medical facility or his or her designated delegate shall then notify the local law enforcement agency having primary jurisdiction in the area in which the medical facility is located of the contents of the report. The report shall contain the name and address of the patient, the nature and extent of the patient's injuries, and any other information that the reporting person believes might be helpful in establishing the cause of the injuries and the identity of the perpetrator.

(D) Notwithstanding any other provision of law, copies of medical records relating to the treatment of such patient shall be furnished to the investigatory law enforcement officer of the department, or any local, state, or federal law enforcement agency upon receipt of a written request or subpoena issued by such law enforcement agency or the prosecuting attorney having jurisdiction

over such accident. Such medical records shall be handled in a manner which assures the confidentiality of such records.

(E) Any person or persons participating in the making of a report or causing a report to be made to the appropriate police authority pursuant to this paragraph or participating in any judicial proceeding or any other proceeding resulting therefrom shall in so doing be immune from any civil liability that might otherwise be incurred or imposed, providing such participation pursuant to this paragraph shall be in good faith.

(d) **Salvage rights.** Any person who fails to salvage any vessel within 12 months after its sinking shall forfeit his ownership to the vessel and thereafter any person may salvage and claim the vessel.

(e) **Official authority.** Any officer empowered to enforce this article shall have the authority to stop, board, and detain any vessel involved in a reportable boating accident and to continue the detention of such vessel if necessary for evidentiary purposes for such reasonable period of time as such necessity continues.

History. — Ga. L. 1960, p. 235, § 8; Ga. L. 1968, p. 487, § 8; Ga. L. 1973, p. 1427, § 12; Ga. L. 1977, p. 1182, § 9; Ga. L. 1978, p. 1743, § 4; Ga. L. 1998, p. 679, §§ 3, 4; Ga. L. 2008, p. 12, § 2-39/SB 433.

Cross references. — Limitation of liability of persons rendering emergency care at scene of accident or emergency generally, § 51-1-29.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1998, a comma was added following "state" in the first sentence of subparagraph (c)(4)(D).

U.S. Code. — Marine casualty reporting systems, 46 U.S.C. § 6101 et seq.

Law reviews. — For comment, "Good Samaritan Laws—Legal Disarray: An Update," see 38 Mercer L. Rev. 1439 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, § 19.

ALR. — Law of general average as affected by fact that necessity for sacrifice or expenditure was due to negligent navigation, 25 A.L.R. 154.

Rights in and ownership of wrecked or derelict vessels and their contents not cast upon the shore, 63 A.L.R.2d 1369.

Criminal liability for injury or death caused by operation of pleasure boat, 8 A.L.R.4th 886.

Construction and application of "Good Samaritan" statutes, 68 A.L.R.4th 294.

Liability in admiralty for collision between vessel and drawbridge structure, 134 A.L.R. Fed 537.

52-7-15. Furnishing information to federal officials and agencies.

In accordance with any request duly made by an authorized official or agency of the United States, any information compiled or otherwise available to the department pursuant to subsection (c) of Code Section 52-7-14 shall be transmitted to such official or agency of the United States for analytical and statistical purposes.

History. — Ga. L. 1960, p. 235, § 9; Ga. L. 1968, p. 487, § 9; Ga. L. 1973, p. 1427, § 13.

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, § 19.

52-7-16. Towing persons on water skis, aquaplanes, surfboards or similar device.

(a) No person shall operate a vessel on any of the waters of this state for towing a person or persons on water skis, aquaplane, surfboard, or any similar device unless the vessel is equipped with a wide-angle mirror mounted in such a manner as to permit the operator of the vessel to observe at all times the person or persons being towed or unless there is in such vessel a competent person, in addition to the operator, in a position to observe at all times the person or persons being towed.

(b) No person shall operate any vessel on any of the waters of this state for towing a person or persons on water skis, aquaplane, surfboard, or similar devices nor shall any person or persons engage in water skiing, aquaplaning, surfboarding, or similar activities unless such person or persons being towed are wearing a ski belt, ski jacket, or a Type I, II, or III United States Coast Guard approved personal flotation device.

(c) No person shall operate a vessel on any waters of this state towing a person or persons on water skis, aquaplane, surfboard, or similar devices nor shall any person engage in water skiing, aquaplaning, surfboarding, or similar activity at any time between the hours from sunset to sunrise.

(d) Subsections (a), (b), and (c) of this Code section do not apply to a performer engaged in a professional exhibition or a person or persons engaged in an activity authorized under Code Section 52-7-19.

History. — Ga. L. 1968, p. 487, § 10; Ga. L. 1973, p. 1427, § 14; Ga. L. 1978, p. 1743, § 5; Ga. L. 1982, p. 3, § 52; Ga. L. 1995, p. 10, § 52.

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, §§ 2, 14.

ALR. — Liability for injury or death of nonparticipant caused by water skiing, 67 A.L.R.3d 1218.

52-7-17. Speed and load restrictions; riding of bow or gunwale of vessel.

(a) The speed of each vessel shall at all times be regulated so as to avoid danger or injury or damage or unnecessary inconvenience, directly or by the effect of the wash or wave raised by the vessel, while in the vicinity of swimming areas, docks, floating boat houses, moored boats, or boats engaged in fishing activities.

(b) No vessel shall be loaded beyond the recommended capacity.

(c) No person operating any vessel shall allow any person or persons to ride the bow or gunwale of any vessel nor shall any person or persons ride on the bow or gunwale of any vessel unless the vessel is equipped with a railing or some other retaining device on the bow or gunwale, so located that any person or persons might hold to such railing or other retaining device to avoid falling or being thrown overboard. For the purposes of this Code section, eyes or cleats shall not be considered retaining devices.

(d) No vessel shall be operated at a speed greater than is reasonable and prudent under the conditions, and such vessel's operator shall have regard for the actual and potential hazards then existing.

History. — Ga. L. 1968, p. 487, § 10; Ga. L. 1973, p. 1427, § 15; Ga. L. 1998, p. 679, § 5.

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, §§ 15, 17, 66.

52-7-18. Rules of the road for boat traffic.

(a) All vessels operating on the coastal waters of this state shall conform to the "Steering and Sailing Rules" established by Section II, Rules 11 through 18, of the International Navigation Rules Act of 1977, as amended.

(b) All vessels operating on the inland waters of this state shall conform to the "Steering and Sailing Rules" established by Subpart II, Rules 11 through 18, of the Inland Navigation Rules Act of 1980, as amended.

(c) It shall be the duty of each operator to keep his vessel to the starboard or right side of the center of any channel, stream, or other narrow body of water; provided, however, this provision shall not give to the operator of a sailing vessel the right to hamper, in a narrow channel, the safe passage of another vessel which can navigate only inside that channel.

(d) Powered vessels approaching nonpowered vessels shall reduce their speed so that their wake shall not endanger the life or property of those occupying the nonpowered vessel.

(e) Whenever a vessel approaches a bend, point, or other blind area, it shall be the duty of the operator to:

(1) Move as far to the right or starboard as possible;

(2) Reduce speed to allow for an unexpected stop if necessary; and

(3) Sound a blast of eight to ten seconds' duration on a sounding device if such a device is carried.

(f) No person shall operate any vessel or tow a person or persons on water skis, an aquaplane, a surfboard, or any similar device on the waters of this state at a speed greater than idle speed within 100 feet of any vessel which is moored, anchored, or adrift outside normal traffic channels, or any wharf, dock, pier, piling, bridge structure or abutment, person in the water, or shoreline adjacent to a full-time or part-time residence, public park, public beach, public swimming area, marina, restaurant, or other public use area. This subsection shall not be interpreted to prohibit any person from initiating or terminating water skiing from any wharf, dock, or pier owned by such person or used by such person with the permission of the owner of said wharf, dock, or pier nor shall it be interpreted to prohibit the immediate return of a tow vessel to a downed water skier.

(g) No vessel shall run around or within 100 feet of another vessel at a speed greater than idle speed unless such vessel is overtaking or meeting such other vessel in compliance with the rules of the road for vessel traffic.

(h) No vessel shall be operated in such a manner as to ride or jump the wake of another vessel within 100 feet of such other vessel unless the vessel is overtaking or meeting such other vessel in compliance with the rules of the road for vessel traffic and, having passed or overtaken such other vessel, the operator of the passing or overtaking vessel shall not change or reverse course for the purpose of riding or jumping the wake of such other vessel within 100 feet of such other vessel.

(i) Subsections (f), (g), and (h) of this Code section shall not apply to ocean-going ships or to tugboats or other powered vessels which are assisting ocean-going ships during transit or during docking or undocking maneuvers.

History. — Ga. L. 1976, p. 1632, § 8; Ga. L. 1977, p. 1182, § 10; Ga. L. 1980, p. 738, §§ 9, 10; Ga. L. 1987, p. 567, § 9; Ga. L. 1998, p. 679, § 6.

Cross references. — Liability of owner of watercraft for tort caused by operation of watercraft, §§ 51-1-21, 51-1-22.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1998, "water

skiing" was substituted for "waterskiing" in the second sentence of subsection (f).

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, §§ 15, 19.

ALR. — Negligence in navigating as affecting right to recover for injury by obstruction to navigation, 25 A.L.R. 1556.

52-7-19. Regattas, boat races, marine parades, tournaments, and exhibitions.

(a) The department may regulate the holding of regattas, boat races, marine parades, tournaments, or exhibitions which by their nature, circumstance, or location will introduce extra or unusual hazards to the safety or lives of participants or observers or will subject the water and adjoining upland resource upon which the event will be held to extra or unusual stress from pollution, litter, or overuse. The board may adopt and may from time to time amend regulations concerning the safety of vessels and persons thereon, either observers or participants, and the protection of the water and adjoining upland resources of this state. Whenever a regatta, boat race, marine parade, tournament, or exhibition is proposed to be held, the person in charge thereof shall, at least 30 days prior thereto, file an application with the department for permission to hold such regatta, race, parade, tournament, or exhibition. The application shall set forth the date, time, and location proposed for holding such regatta, race, parade, tournament, or exhibition and such other information as the department may require. It shall be unlawful to conduct such regatta, race, parade, tournament, or exhibition without authorization of the department.

(b)(1) Any person sponsoring an event requiring a permit under this Code section and which is anticipated to attract 10,000 or more participants shall provide to the department an indemnity bond issued by a surety company authorized to transact business in this state in the amount of $50,000.00 or such lesser amount as determined appropriate by the commissioner in his discretion under criteria set forth in regulations adopted by the board. The bond shall be payable to the department and conditioned upon the faithful performance of the requirements set forth in this Code section, the regulations promulgated pursuant to this Code section, and the conditions of the permit issued under this Code section.

(2) Upon the failure or refusal of the sponsor to comply with any requirement of this Code section, the regulations promulgated pursuant to this Code section, or the conditions of a permit issued under this Code section, which failure results in damage to the department or to this state, the commissioner may make demand upon the

sponsor and the surety for such portion of the face amount of the bond as he determines is necessary to compensate the department or the state for all damages suffered. Upon refusal or failure of the sponsor or surety to pay over the sum demanded, he shall initiate an action at law to recover the sum.

(3) Upon recovery of the sum, the department is authorized to reimburse itself for any expenses incurred in connection with the cleanup and minimization of damage to natural resources, to expend such sum to clean up and minimize the damage, or both.

(4) Any person sponsoring an event requiring a permit under this Code section and which is anticipated to attract 10,000 or more participants and spectators shall also provide a forfeiture bond issued by a surety company authorized to transact business in this state in the amount of $50,000.00 or such lesser amount as determined appropriate by the commissioner in his discretion under criteria set forth in regulations by the board. The bond shall be payable to the department and conditioned upon the faithful performance of the requirements set forth in this Code section, the regulations promulgated pursuant to this Code section, and the conditions of the permit issued under this Code section.

(5) Upon the failure or refusal of the sponsor to comply with any requirement of this Code section, the regulations promulgated pursuant to this Code section, or the conditions of a permit issued under this Code section, the commissioner may make demand upon the sponsor and the surety for the face amount of the bond; provided, however, that the commissioner may, in his discretion and in accordance with regulations adopted by the board, make demand for an amount less than the face amount. In exercising such discretion, he may consider the seriousness and degree of the noncompliance. Upon refusal or failure of the sponsor or surety to pay over the sum demanded, he shall initiate an action at law to recover the sum.

(6) Upon recovery of the sum, it shall be paid into the state treasury.

(c) The commissioner may in the exercise of his discretion deny an application for a permit for a proposed marine event when, having considered the number of participants and spectators likely to be attracted to the event, the nature and purpose of the event, and the area in which it would be held, he determines that:

(1) The ability of the sponsor to enlist a sufficient number of authorized peace officers to enforce, during the course of the marine event, the applicable state laws and the conditions of the marine event permit issued therefor and to control properly the number of participants is inadequate under the circumstances;

(2) The conduct of the event will subject the waters upon which the event will be held or the adjoining upland resource to such extraordinary stress from pollution or damage due to overuse or create such extraordinary hazards to the safety or lives of participants or spectators that such pollution or damage or such safety hazards cannot be successfully prevented or mitigated by permit conditions; or

(3) The financial and manpower costs incurred by public agencies in the regulation of the marine event are greater than the recreational benefits likely to accrue to the general public from the conduct of the event.

(d) Any peace officer, including law enforcement personnel of the department, assigned to duty assisting in the supervision of any event permitted under this Code section may enforce any of the criminal laws of this state in connection with such assignment.

(e) This Code section shall not exempt any person from compliance with applicable federal laws or regulations.

History. — Ga. L. 1973, p. 1427, § 16; Ga. L. 1980, p. 738, § 11; Ga. L. 1981, p. 987, § 1; Ga. L. 1982, p. 3, § 52; Ga. L. 1995, p. 10, § 52.

Cross references. — Powers of Department of Community Health with regard to control of mass gatherings, T. 31, C. 27.

OPINIONS OF THE ATTORNEY GENERAL

Language "may regulate" contained in subsection (a) must be read to mean "shall regulate." 1979 Op. Att'y Gen. No. 79-22.

Authorization for the promulgation of rules under subsection (a) confers a discretionary power on the board. 1979 Op. Att'y Gen. No. 79-22.

Promulgation of rules under subsection (a) is not necessary for a case determination of application acceptability. 1979 Op. Att'y Gen. No. 79-22.

Subsection (a) authorizes the department by necessary implication to impose conditions on any authorization the department may give. 1979 Op. Att'y Gen. No. 79-22.

Any "information" required to be filed with or furnished to the department must necessarily be reasonably related to the subject matter being policed by the department. 1979 Op. Att'y Gen. No. 79-22.

Department obligated to regulate authorized races. — Language in subsection (a), mandating that the person in charge of a boat (raft) race regulated thereunder ask permission and obtain authorization from the department prior to the holding of the race, imposes upon the department an obligation to regulate any such race. 1979 Op. Att'y Gen. No. 79-22.

RESEARCH REFERENCES

ALR. — Water sports, amusements, or exhibitions as nuisance, 80 A.L.R.2d 1124.

52-7-20. Operation of vessels in vicinity of regulatory markers and aids to navigation; tampering with regulatory markers and aids to navigation.

(a) As used in this Code section, the term:

(1) "Aids to navigation" means buoys, beacons, or other fixed objects in the water which are used to mark obstructions to navigation or to direct navigation through safe channels.

(2) "Regulatory markers" means any anchored or fixed marker in or on the water or any sign on the shore or on a bridge over the water other than aids to navigation and shall include, but not be limited to, bathing markers, speed zone markers, information markers, danger zone markers, boat keep-out area markers, and mooring buoys.

(b) It shall be unlawful to operate a power boat, except at an idle speed, or to create a wake in the vicinity of those marinas, bridges, public access ramps, and blind points which are identified by appropriate signs and markers which conform to the system of aids to navigation prescribed by the United States Coast Guard and to the system of uniform waterway markers approved by the Advisory Panel of State Officials to the Merchant Marine Council or on any portion of the Chattahoochee River between the Morgan Falls Dam and the Georgia Highway 400 bridge which the department so marks as being so restricted.

(c) It shall be unlawful to tow a person on water skis, aquaplanes, surfboards, or any similar device or to manipulate any such device on any public waters of the state which the commissioner has designated as a hazardous area or on the Chattahoochee River between the Morgan Falls Dam and the Georgia Highway 400 bridge in any area identified by regulatory markers as a no ski area.

(d) The commissioner is authorized to regulate and restrict vessel operation and other recreational water related activities on the public waters of the state. The Department of Natural Resources is authorized to place or designate the placement of signs and markers so as to identify the areas restricted by this Code section.

(e) No city, county, or individual may attempt to regulate the public waters of this state by use of the above-mentioned signs and markers without the express written permission of the commissioner of natural resources.

(f) The operation of any vessel within prohibited areas that are marked shall be prima-facie evidence of negligent operation.

(g) It shall be unlawful for a person to operate a vessel on the waters of this state in a manner other than that prescribed or permitted by regulatory markers.

(h) No person shall moor or fasten a vessel to or willfully damage, tamper, remove, obstruct, or interfere with any aid to navigation or regulatory marker established pursuant to this Code section.

History. — Ga. L. 1968, p. 487, § 10; Ga. L. 1973, p. 1427, § 17; Ga. L. 1980, p. 738, §§ 12, 13; Ga. L. 1982, p. 3, § 52; Ga. L. 1993, p. 351, §§ 3, 4; Ga. L. 1996, p. 1273, § 2.

JUDICIAL DECISIONS

Cited in State v. Givens, 211 Ga. App. 71, 438 S.E.2d 387 (1993).

RESEARCH REFERENCES

ALR. — Measure and elements of damages for injury to bridge, 31 A.L.R.5th 171.

52-7-21. Local regulations concerning operation, equipment, numbering, and other matters relating to vessels.

(a) This article and other applicable laws of this state shall govern the operation, equipment, and numbering of vessels and all other matters relating thereto, whenever any vessel shall be operated on the waters of this state or when any activity regulated by this article shall take place thereon; but nothing in this article shall be construed to prevent the adoption of any ordinance or local law relating to operation and equipment of vessels, the provisions of which are identical to the provisions of this article, amendments thereto, or regulations issued thereunder, provided that such ordinances or local laws shall be operative only so long as and to the extent that they continue to be identical to provisions of this article, amendments thereto, or regulations issued thereunder.

(b) Any political subdivision may at any time, but only after approval by the commissioner upon a showing of necessity because of unusual or special circumstances, adopt any ordinance or local law relating to the operation and equipment of vessels on any waters within its territorial limits which is more stringent than those provided for in this article.

History. — Ga. L. 1973, p. 1427, § 18; Ga. L. 1977, p. 1182, § 11.

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, § 8.

52-7-22. Comprehensive boating educational programs; required completion; exception.

(a) The department shall establish a comprehensive boating education program and may seek the cooperation of boatmen, the federal government, and other states. The department may accept moneys made available under federal safety programs and may issue boating certificates to persons who complete courses in boating education.

(b) Effective July 1, 2014, and except as otherwise provided by this chapter, anyone born on or after January 1, 1998, who operates any motorized vessel on the waters of this state shall complete a boating education course approved by the department prior to the operation of such vessel.

(c) A person shall be exempt from the provisions of subsection (b) of this Code section if he or she is:

(1) Licensed by the United States Coast Guard as a master of a vessel;

(2) Operating such vessel on a private lake or pond; or

(3) A nonresident who has in his or her possession proof that he or she has completed a National Association of State Boating Law Administrators approved boater education course or the equivalency from another state.

History. — Ga. L. 1973, p. 1427, § 1; Ga. L. 2013, p. 92, § 11/SB 136.

Editor's notes. — Ga. L. 2013, p. 92, § 1/SB 136, not codified by the General Assembly, provides, in part, that Sections 5, 6, and 11 of this Act shall be known and may be cited as the "Kile Glover Boat Education Law".

Ga. L. 2013, p. 92, § 14/SB 136, not codified by the General Assembly, provides, in part, that the amendment of this Code section by that Act shall apply to all offenses occurring on and after May 15, 2013; provided, however, that for purposes of determining the number of prior convictions or pleas of nolo contendere pursuant to the felony provisions of paragraph (4) of subsection (m) of Code Section 52-7-12, only those offenses for which a conviction or a plea of nolo contendere is obtained on or after May 15, 2013, shall be considered.

52-7-23. Power of Board of Natural Resources to adopt rules and regulations.

The Board of Natural Resources is authorized to adopt any regulations necessary for the administration and enforcement of this article, including, but not limited to, regulations setting forth the criteria for determining when an indemnity bond shall be required under Code Section 52-7-19 and the appropriate amount of the bond and when a forfeiture bond shall be required under Code Section 52-7-19, the appropriate amount of the bond, and the conditions for default thereunder. In adopting the indemnity bond regulations, the board shall

include, without limitation, criteria relating to the expense of restoring the water body and its surrounding area to the state of cleanliness existing before the conduct of an event authorized under Code Section 52-7-19. In adopting the forfeiture bond regulations, the board shall include, without limitation, criteria relating to the magnitude of the event, the water body and surrounding area upon which it will be held, and the potential public safety hazard inherent in the event. The board may, by regulation, establish bond forfeiture conditions for categories of noncompliance, including, but not limited to, failure or refusal to comply with requirements to provide facilities for the convenience of participants and spectators, requirements relating to public safety, and requirements relating to damage to the water body and surrounding area upon which the event was held.

History. — Ga. L. 1973, p. 1427, § 21; Ga. L. 1981, p. 987, § 2.

JUDICIAL DECISIONS

Cited in Stephens v. Stewart, 118 Ga. App. 811, 165 S.E.2d 572 (1968).

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, § 4 et seq.

52-7-24. Filing and publication of rules and regulations and amendments thereto.

A copy of the regulations adopted pursuant to this article and of any amendments thereto shall be filed in the office of the department and in the office of the Secretary of State. Rules and regulations shall be published by the department in a convenient form.

History. — Ga. L. 1973, p. 1427, § 22.

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, § 18.

52-7-25. Enforcement of article.

(a) Any person empowered to enforce this article and any rule or regulation adopted pursuant hereto shall have the authority to stop and board any vessel subject to this article or any such regulation for the purpose of inspection or determining compliance with this article and is empowered to issue a summons for appearance in court or before a

magistrate for all violations of this article or of the rules and regulations prescribed hereunder. Vessels of law enforcement personnel shall be marked to identify them as designated enforcement vessels.

(b) An officer empowered to enforce this article shall have the power:

(1) To arrest on view for any violation relating to boating and all rules and regulations prescribed by the board under this article;

(2) To execute all warrants and search warrants for violations of the boat laws and regulations;

(3) To serve subpoenas issued for the examination, investigation, and trial of all offenses against the laws and regulations relating to boats;

(4) To board vessels in use, for purposes of examining any documents and safety equipment, and to search without warrant any vessel which is not at its regular mooring or berth when he believes that any law of this state or any rule or regulation of the Board of Natural Resources relating to boating has been violated;

(4.1) To board vessels in use or floating, whether moored or not, for purposes of examining any marine toilets, holding tanks, and documents related to them, including records of pump-out and certificates of compliance, and to search without warrant any such vessel to determine compliance with the provisions of this article related to marine toilets when the officer believes that any of said provisions of this article relating to marine toilets have been violated;

(5) To detain the vessel and arrest the operator of a suspected stolen vessel;

(6) To enter upon any land or water in the performance of his duty;

(7) To demand and secure proper assistance in case of emergency;

(8) To exercise the powers and duties of peace officers; and

(9) To investigate any boating accident which occurs on the waters of this state.

(c) Every vessel subject to this article if underway and upon being hailed by a designated law enforcement officer shall stop immediately and lay to or shall maneuver in such a way as to permit the officer to come aboard.

(d) Any person employed or elected by this state or a political subdivision thereof, whose duty it is to preserve the peace or to make arrests or to enforce the law, including, but not limited to, members of the sheriffs' departments, state patrolmen, and game wardens, are empowered to enforce this article. The Department of Natural Re-

sources shall be primarily responsible for enforcement of this article and the rules and regulations issued under this chapter.

(e) It shall be unlawful for any person to resist or interfere by force, menace, threat, or in any other manner with any arrest for violation of this article. It shall also be unlawful for any person to refuse to go with any law enforcement officer of this state after an arrest has been made or to interfere with the officer in the performance of his duty.

(f) The department is authorized and empowered to identify by appropriate signs and markers those public waters in which certain activities may be prohibited or restricted.

History. — Ga. L. 1960, p. 235, § 12; Ga. L. 1973, p. 1427, § 23; Ga. L. 1977, p. 1182, § 12; Ga. L. 1980, p. 738, §§ 14-17; Ga. L. 1988, p. 1343, § 4; Ga. L. 2019, p. 808, § 7/SB 72.

The 2019 amendment, effective July 1, 2019, substituted "game wardens" for "conservation rangers" near the end of the first sentence of subsection (d).

Cross references. — Acceptance of cash bonds for violation of boating laws, § 17-6-5 et seq. Powers and duties of conservation rangers with regard to laws pertaining to boating safety, § 27-1-20. Authority of agents of Georgia Bureau of Investigation to enforce laws relating to operation of vessels or boats upon waters of state, § 27-1-24.

Law reviews. — For survey article on criminal law and procedure for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 117 (2003).

JUDICIAL DECISIONS

Constitutional. — O.C.G.A. § 52-7-25, allowing suspicionless stops of boats to check for required safety equipment and vehicle registration, promotes the state's important interest in maintaining safe conditions for boaters on Georgia's lakes and rivers, and the procedure used is minimally intrusive, so that the statute does not violate U.S. Const., amend. IV. Peruzzi v. State, 275 Ga. 333, 567 S.E.2d 15 (2002).

Authority to make investigatory stops. — Provisions of O.C.G.A. § 52-7-25 clearly authorize officers to make investigatory stops of watercraft for the sole purpose of verifying that the operator has the proper documentation and safety equipment on board; the officer need not suspect wrongdoing before such a stop is permitted. Jackson v. State, 214 Ga. App. 726, 448 S.E.2d 761 (1994).

Department of Natural Resources officer who observed the defendant's boat operating with its docking lights improperly illuminated, O.C.G.A. § 52-7-11(b)(2), had the authority to detain the defendant and make a brief safety inspection under O.C.G.A. § 52-7-25(b)(4); the defendant was not in custody during the stop and Miranda warnings were not required. Pedersen v. State, 337 Ga. App. 159, 786 S.E.2d 535 (2016), cert. denied, No. S16C1641, 2016 Ga. LEXIS 828 (Ga. 2016), overruled on other grounds by State v. Turnquest, 305 Ga. 758, 827 S.E.2d 865 (2019).

Cited in Dalton v. State, 216 Ga. App. 411, 454 S.E.2d 554 (1995).

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, §§ 7, 10, 14, 17.

ALR. — Laches: waiver or estoppel on part of government respecting obstruction to navigation, 2 A.L.R. 1694.

Criminal liability for injury or death

caused by operation of pleasure boat, 8 A.L.R.4th 886.

52-7-26. Penalty.

(a) Except as otherwise provided in this article, any person who violates this article or any rule or regulation promulgated hereunder shall be guilty of a misdemeanor. For purposes of establishing criminal violations of the rules and regulations promulgated by the board as provided in this article, the term "rules and regulations" means those rules and regulations of the board in force and effect on January 1, 2021.

(b) Notwithstanding subsection (c) of Code Section 17-6-12, the release of a person on an unsecured judicial release as provided for in Code Section 17-6-12 for violations under Code Sections 52-7-12, 52-7-12.2, 52-7-12.3, and 52-7-12.4 shall be prohibited.

History. — Ga. L. 1960, p. 235, § 13; Ga. L. 1968, p. 487, § 12; Ga. L. 1973, p. 1427, § 25; Ga. L. 1983, p. 3, § 41; Ga. L. 1995, p. 236, § 3; Ga. L. 2012, p. 739, § 29/HB 869; Ga. L. 2013, p. 92, § 12/SB 136; Ga. L. 2014, p. 344, § 3/HB 783; Ga. L. 2014, p. 624, § 2/HB 777; Ga. L. 2020, p. 570, § 3-4/SB 402; Ga. L. 2021, p. 105, § 3-1/HB 362.

The 2020 amendment, effective January 1, 2021, substituted "an unsecured judicial release as provided for in Code Section 17-6-12" for "his or her own recognizance" in subsection (b).

The 2021 amendment, effective April 27, 2021, substituted "January 1, 2021" for "January 1, 2014" at the end of subsection (a).

Editor's notes. — Ga. L. 2013, p. 92, § 14/SB 136, not codified by the General Assembly, provides, in part, that the amendment of this Code section by that Act shall apply to all offenses occurring on and after May 15, 2013; provided, however, that for purposes of determining the number of prior convictions or pleas of nolo contendere pursuant to the felony provisions of paragraph (4) of subsection (m) of Code Section 52-7-12, only those offenses for which a conviction or a plea of nolo contendere is obtained on or after May 15, 2013, shall be considered.

Ga. L. 2014, p. 344, § 5/HB 783, not codified by the General Assembly, provides: "This Act shall become effective on May 1, 2014, and shall apply to offenses occurring on or after such date."

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, §§ 4, 5, 9, 11, 13, 21.

ALR. — Negligence in navigating as affecting right to recover for injury by obstruction to navigation, 25 A.L.R. 1556.

Criminal liability for injury or death caused by operation of pleasure boat, 8 A.L.R.4th 886.

ARTICLE 1A

INTERSTATE BOATING VIOLATOR COMPACT

Editor's notes. — Boating Violator Compact, Official Compilation of the Rules and Regulations of the State of Georgia, Georgia Department of Natural

Resources, Wildlife Resources Division, Subject 3914-17.

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, §§ 1 et seq., 24 et seq.

52-7-30. Compact enacted and entered into; provisions of compact.

The Interstate Boating Violator Compact is enacted into law and entered into by the State of Georgia with any and all states legally joining therein in accordance with its terms. The compact is substantially as follows:

"INTERSTATE BOATING VIOLATOR COMPACT

ARTICLE I. TITLE

This compact shall be known as the 'Interstate Boating Violator Compact.'

ARTICLE II. DEFINITIONS

Unless the context requires otherwise, the following definitions in this article apply throughout this compact and are intended only for the implementation of this compact:

(1) 'Boating activities' means activities involving the operation of vessels on public waters.

(2) 'Boating authority' means the board, department, or division within a party state which is authorized by law to regulate the operation of vessels.

(3) 'Boating law' means laws, regulations, ordinances, or administrative rules developed and enacted to regulate boating activities.

(4) 'Boating violation' means violation of laws, regulations, ordinances, or administrative rules developed and enacted to regulate the operation of vessels.

(5) 'Citation' means summons, complaint, ticket, penalty assessment, or other official document containing an order which requires the person to respond.

(6) 'Collateral' means cash or other security deposited to secure an appearance for trial, in connection with the issuance of a citation.

(7) 'Compact manual' means the procedures, forms, and information adopted by rule by a boating authority.

(8) 'Conviction' means an adjudication of guilt or a plea of guilty or nolo contendere to the commission of an offense related to the operation of vessels which is prohibited by the law, regulation, ordinance, or administrative rule of any state, territory, or possession of the United States, including the District of Columbia and the Commonwealth of Puerto Rico; a forfeiture of bail, bond, or other security deposited to secure appearance by a person charged with having committed any such offense; or the imposition of a deferred or suspended sentence by a court, magistrate, or tribunal.

(9) 'Home state' means the state, territory, or possession of the United States, including the District of Columbia and the Commonwealth of Puerto Rico, that is the primary residence of a person.

(10) 'Issuing state' means a party state which issues a citation.

(11) 'License' means privilege to operate, permit, registration, certificate of operation, or other public document or privilege that conveys to or allows a person to operate by law, regulation, ordinance, or administrative rule of a party state.

(12) 'Officer' means individuals authorized by a party state to issue a citation for a boating violation.

(13) 'Operate' means navigating or otherwise using a vessel which is not at anchor or moored, including vessels which are being paddled, are drifting, or are being powered by machinery.

(14) 'Party state' means any state, territory, or possession of the United States, including the District of Columbia and the Commonwealth of Puerto Rico, which enacts legislation to become a member of the Interstate Boating Violator Compact.

(15) 'Personal recognizance' means an agreement by a person made at the time of issuance of a citation that the person will comply with the conditions and options expressly stated in such citation.

(16) 'Suspension' means any revocation, denial, or withdrawal of any license.

(17) 'Vessel' means every description of watercraft, other than a seaplane on the water or a sailboard, used or capable of being used as a means of transportation on the water and specifically includes, but is not limited to, inflatable rafts and homemade watercraft.

ARTICLE III. FINDINGS, DECLARATION OF POLICY, AND PURPOSE

(a) Party states find that:

(1) Boating activities are managed for the benefit of all residents and visitors;

(2) The benefits of boating activities can be materially affected by the degree that a citation is answered, through appearance at a court, magistrate, or tribunal and the payment of fines, costs, and surcharges, if any;

(3) The management of boating activities contributes immeasurably to the aesthetic, recreational, and economic aspects of party states;

(4) Boating activities are valuable without regard to political boundaries. Therefore, all persons should be required to comply with boating laws of party states as a condition precedent to the privilege to operate;

(5) Violation of boating laws interferes with the management of boating activities and may endanger the safety of persons and property;

(6) The mobility of people who violate boating laws necessitates the maintenance of channels of communication among party states;

(7) In most instances, when an issuing state is a location other than a home state, a person:

(A) Must post collateral or bond;

(B) If unable to post collateral or bond, is taken into custody until the collateral or bond is posted; or

(C) Is taken directly to a court, magistrate, or tribunal for an immediate appearance;

(8) The purpose of the enforcement practices described in paragraph (7) of this subsection is to ensure that a citation is answered, through appearance at a court, magistrate, or tribunal and the payment of fines, costs, and surcharges, if any, by the person who, if permitted to continue on his or her way after receiving the citation, could return to his or her home state and disregard his or her duty under the conditions and options expressly stated in the citation;

(9) In most instances, a person receiving a citation in his or her home state is permitted to accept such situation from the officer at the scene and to immediately continue on the person's way after agreeing or being instructed to comply with the conditions and options expressly stated in the citation;

(10) The practice described in paragraph (7) of this subsection causes unnecessary inconvenience and, at times, a hardship for the person who is unable at the time to post collateral or bond, stand trial, or pay the fine and thus is compelled to remain in custody until some alternative arrangement can be made; and

(11) The enforcement practices described in paragraph (7) of this subsection consume an undue amount of law enforcement time.

(b) It is the policy of party states to:

(1) Promote adherence to boating laws and have a citation answered through a court, magistrate, or tribunal appearance and the payment of fines, costs, and surcharges, if any;

(2) Recognize that any revocation, denial, or withdrawal of any license by a party state should be treated the same in all states, territories, and possessions of the United States, including the District of Columbia and the Commonwealth of Puerto Rico;

(3) Allow violators to accept a citation, except as provided in subsection (b) of Article IV of this compact, and proceed on the violator's way without delay whether or not the violator is a resident where the citation was issued, provided that the home state of the violator is a party state;

(4) Report to the appropriate party state, as provided in the compact manual, any conviction recorded against a person whose home state was not the issuing state;

(5) Allow a home state to recognize and treat convictions recorded for its residents which occurred in a party state as if they had occurred in the home state;

(6) Extend cooperation to its fullest extent among party states for having citations which are issued in a party state answered through court, magistrate, or tribunal appearances and the payment of fines, costs, and surcharges, if any;

(7) Maximize effective use of law enforcement personnel and information; and

(8) Assist court systems in the efficient disposition of boating violations.

(c) The purposes of this compact are to:

(1) Provide a means through which party states may participate in a reciprocal program to effectuate policies enumerated in subsection (b) of this article in a uniform and orderly manner; and

(2) Provide for the fair and impartial treatment of a person issued a citation within a party state in recognition of such person's right of due process and the sovereign status of such party state.

ARTICLE IV. PROCEDURES FOR ISSUING STATE

(a) A citation shall be issued in the same manner as if the person receiving such citation was a resident of the issuing state and shall not

require the person to post collateral, subject to the exceptions contained in subsection (b) of this article, if the officer receives the person's personal recognizance.

(b) Personal recognizance is acceptable if:

(1) It is not prohibited by local law or the compact manual; and

(2) The violator provides adequate proof of his or her identification to the officer.

(c) Upon conviction or failure of a person to comply with the conditions and options expressly stated in a citation, the appropriate official shall report the conviction or failure to comply to the boating authority of the party state in which the citation was issued. The report shall be made in accordance with procedures specified by the issuing state and shall contain the information specified in the compact manual as minimum requirements for effective processing by the home state.

(d) Upon receipt of the report of conviction or failure to comply as required by subsection (c) of this article, the boating authority of the issuing state shall transmit to the boating authority of the home state the information in a form and content as contained in the compact manual.

ARTICLE V. PROCEDURES FOR HOME STATE

(a) Upon receipt of a report of failure to comply with the conditions and options expressly stated in a citation from the boating authority of the issuing state, the boating authority of the home state shall notify the violator, shall initiate a suspension in accordance with the home state's suspension procedures, and shall suspend the violator's license until satisfactory evidence of compliance with the conditions and options expressly stated in such citation has been furnished by the issuing state to the boating authority of the home state. Due process safeguards shall be accorded.

(b) Upon receipt of a report of conviction from the boating authority of the issuing state, the boating authority of the home state shall enter the conviction in its records and shall treat the conviction as if it occurred in the home state for the purposes of a suspension.

(c) The boating authority of a home state shall maintain a record of actions taken and make reports to issuing states as provided in the compact manual.

ARTICLE VI. RECIPROCAL RECOGNITION OF SUSPENSION

(a) A party state shall recognize a suspension of any person by any state, territory, or possession of the United States, including the District of Columbia and the Commonwealth of Puerto Rico, as if the

violation on which the suspension is based occurred in such party state and could have been the basis for suspension in such party state.

(b) Each party state shall communicate suspension information to other party states in a form and content as contained in the compact manual.

ARTICLE VII. APPLICABILITY OF OTHER LAWS

Except as expressly required by provisions of this compact, nothing in this compact shall be construed to affect the right of a party state to apply any of its boating laws to a person or circumstance or to invalidate or prevent any agreement or other cooperative arrangements between a party state and any other state, territory, or possession of the United States, including the District of Columbia and the Commonwealth of Puerto Rico, concerning boating law enforcement.

ARTICLE VIII. COMPACT ADMINISTRATOR PROCEDURES

(a) For the purpose of administering the provisions of this compact and to serve as a governing body for the resolution of all matters relating to the operation of this compact, a board of boating compact administrators is established. The board of boating compact administrators shall be composed of one representative from each party state to be known as the boating compact administrator. The boating compact administrator shall be appointed by the head of the boating authority and shall serve and be subject to removal in accordance with the laws of the state, territory, or possession of the United States, including the District of Columbia and the Commonwealth of Puerto Rico, the boating compact administrator represents. A boating compact administrator may provide for the discharge of his or her duties and the performance of his or her functions as a board member by an alternate. An alternate shall not be entitled to serve unless written notification of the alternate's identity has been given to the board of boating compact administrators.

(b) Each boating compact administrator is entitled to one vote. No action of the board of boating compact administrators is binding unless taken at a meeting at which a majority of the total number of votes on such board is cast in favor thereof. Action by the board of boating compact administrators shall be only at a meeting at which a majority of party states are represented.

(c) The board of boating compact administrators shall elect annually, from its membership, a chairperson and vice chairperson.

(d) The board of boating compact administrators shall adopt bylaws, not inconsistent with the provisions of this compact or the laws of any party state, for the conduct of its business and shall have the power to amend and rescind its bylaws.

(e) The board of boating compact administrators may accept for any of its purposes and functions under this compact all donations and grants of money, equipment, supplies, materials, and services, conditional or otherwise, from any state, territory, or possession of the United States, including the District of Columbia and the Commonwealth of Puerto Rico, the United States, or any governmental agency and may receive, utilize, and dispose of the same.

(f) The board of boating compact administrators may contract with or accept services or personnel from any governmental or intergovernmental agency, individual, firm, corporation, or private nonprofit organization or institution.

(g) The board of boating compact administrators shall formulate all necessary procedures and develop uniform forms and documents for administering the provisions of this compact. All procedures and forms adopted pursuant to the action of the board of boating compact administrators shall be contained in the compact manual.

ARTICLE IX. ENTRY INTO COMPACT AND WITHDRAWAL

(a) This compact shall become effective when it has been adopted by at least two states, territories, or possessions of the United States, including the District of Columbia and the Commonwealth of Puerto Rico.

(b)(1) Entry into the compact shall be made by resolution of ratification executed by the authorized officials of the applying state, territory, or possession of the United States, including the District of Columbia and the Commonwealth of Puerto Rico, and submitted to the chairperson of the board of boating compact administrators.

(2) The resolution shall be in a form and content as provided in the compact manual and shall include statements that in substance are as follows:

(A) The authority by which the state, territory, or possession of the United States, including the District of Columbia and the Commonwealth of Puerto Rico, is empowered to become a member of this compact;

(B) Agreement to comply with the terms and provisions of this compact; and

(C) That compact entry is with party states.

(3) The effective date of becoming a member of this compact shall be specified by the applying state, territory, or possession of the United States, including the District of Columbia and the Commonwealth of Puerto Rico, but shall not be less than 60 days after notice has been given by the chairperson of the board of boating compact

administrators or by the secretary of such board to the party states that the resolution from the applying state, territory, or possession of the United States, including the District of Columbia and the Commonwealth of Puerto Rico, has been received.

(c) Party states may withdraw from this compact by official written notice to party states, but a withdrawal shall not take effect until 90 days after notice of withdrawal is given. The notice shall be directed to the boating compact administrator of each party state. No withdrawal shall affect the validity of this compact as to the party states.

ARTICLE X. AMENDMENTS TO THE COMPACT

(a) This compact may be amended from time to time. Amendments shall be presented in resolution form to the chairperson of the board of boating compact administrators and may be initiated by party states.

(b) Adoption of an amendment shall require endorsement by all party states and shall become effective after this compact has been amended by law by a party state.

ARTICLE XI. CONSTRUCTION AND SEVERABILITY

This compact shall be liberally construed so as to effectuate the purposes stated in it. The provisions of this compact are severable, and if any phrase, clause, sentence, or provision of this compact is declared to be contrary to the constitution of a party state or the United States Constitution or the applicability of this compact to any government, agency, individual, or circumstance is held invalid, the compact shall not be affected by it. If this compact is held contrary to the constitution of a party state, the compact shall remain in full force and effect as to the remaining party states and in full force and effect as to the party state affected as to all severable matters."

History. — Code 1981, § 52-7-30, enacted by Ga. L. 2014, p. 624, § 3/HB 777.

Editor's notes. — Ga. L. 2014, p. 624, § 3/HB 777 enacts the Interstate Boating Violator Compact. That Act became effective on July 1, 2014. As of May 16, 2014, when South Carolina adopted the compact, the adoption contingency required pursuant to Article IX of the compact has been met.

52-7-31. Administration of compact; reciprocal suspension when operating privileges suspended in party state; Board of Natural Resources to publish rules and regulations; creation of compact manual.

(a) The commissioner of natural resources shall appoint an Interstate Boating Violator Compact administrator for this state. Such administrator shall serve at the pleasure of the commissioner.

(b) The department may suspend the operating privileges of any person to operate a vessel upon the waters of this state as provided for

in Code Section 52-7-12.7 to the extent that such person's privileges to operate a vessel upon the waters of a state have been suspended when such state is a party state, as such term is defined in Code Section 52-7-30.

(c) The Board of Natural Resources shall make and publish such rules and regulations, including the creation of the compact manual, not inconsistent with law, as it deems necessary to carry out the purposes of this article.

History. — Code 1981, § 52-7-31, enacted by Ga. L. 2014, p. 624, § 3/HB 777.

ARTICLE 2

DISPLAYING OF WATERCRAFT INFORMATION

Cross references. — Tagging and identification requirements for vessels licensed by department, § 27-4-117.

52-7-40. Definitions.

As used in this article, the term:

(1) "Capacity plate" means a plate attached to watercraft with information thereon as provided in this article.

(2) "Manufacturer" means a person, firm, or corporation who constructs or assembles a watercraft or alters a watercraft in such manner as to change its weight capacity.

(3) "Watercraft" means any boat, vessel, or craft, other than a seaplane, used or capable of being used as a means of transportation on water, which is less than 26 feet in length and is designed to carry two or more persons.

History. — Ga. L. 1971, p. 419, § 1.

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, § 1.

52-7-41. Requirement as to attachment of capacity plates to vessels generally.

It shall be unlawful to manufacture, sell, or offer for sale in this state any watercraft to which a capacity plate has not been attached.

History. — Ga. L. 1971, p. 419, § 2.

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Boats and Boating, § 23.

52-7-42. Information to be marked on capacity plate.

A capacity plate shall bear the following information, permanently marked thereon in such manner as to be clearly visible and legible from the position designed or normally intended to be occupied by the operator of the watercraft when the watercraft is in operation:

(1) For all watercraft designed for or represented by the manufacturer as being suitable for use with an outboard motor:

(A) The total weight of all persons, motor, gear, and other articles which the watercraft is capable of carrying with safety under normal conditions;

(B) The recommended number of persons commensurate with the weight capacity of the watercraft and the presumed weight in pounds of each such person; but in no instance shall such presumed weight per person be less than 150 pounds;

(C) Clear notice that the information appearing on the capacity plate is applicable under normal conditions and that the weight of the outboard motor and associated equipment is considered to be part of the total weight capacity; and

(D) The maximum horsepower of the motor which the watercraft is designed or intended to accommodate.

(2) For all other watercraft to which this article applies:

(A) The total weight of all persons, gear, and other articles which the watercraft is capable of carrying with safety under normal conditions;

(B) The recommended number of persons commensurate with the weight capacity of the watercraft and the presumed weight in pounds of each such person; but in no instance shall such presumed weight per person be less than 150 pounds; and

(C) Clear notice that the information appearing on the capacity plate is applicable under normal conditions.

History. — Ga. L. 1971, p. 419, § 3.

52-7-43. Determination of maximum capacity.

The information relating to maximum capacity which is required to appear on capacity plates by Code Section 52-7-42 shall be determined

in accordance with such methods and formulas as shall be prescribed by rules or regulations adopted by the Board of Natural Resources. In prescribing such methods and formulas, the Board of Natural Resources shall be guided by and give due regard to the necessity for uniformity in methods and formulas lawful for use in determining small watercraft capacity in the several states and to any methods and formulas which may be recognized or recommended by the United States Coast Guard or any successor agency.

History. — Ga. L. 1971, p. 419, § 4.

52-7-44. Affixing of capacity plate by person other than vessel manufacturer; effect of such action on liability of manufacturer.

Any person may affix a capacity plate to any watercraft to which this article applies and which does not have a capacity plate meeting the requirements of law affixed thereto by the manufacturer thereof in accordance with such rules and regulations as the Board of Natural Resources may prescribe. Such watercraft may thereafter be offered for sale in this state. However, no action pursuant to this Code section, or in the manner described herein, shall relieve any manufacturer from liability for failure to comply with the requirements of this article.

History. — Ga. L. 1971, p. 419, § 5.

52-7-45. Information on capacity plate as constituting a warranty; nature of warranty.

The information appearing on a capacity plate shall be deemed to be a warranty:

(1) That the manufacturer or other person affixing a capacity plate as permitted by Code Section 52-7-44 has correctly and faithfully employed a method and formula for the calculation of maximum weight capacity prescribed by the Board of Natural Resources;

(2) That the information appearing on the capacity plate, with respect to maximum weight capacity and recommended number of persons, is the result of the application of such method and formula; and

(3) With respect to information concerning horsepower limitations, that such information is not a deliberate or negligent misrepresentation.

History. — Ga. L. 1971, p. 419, § 6.
Cross references. — Warranties generally, § 11-2-312 et seq.

52-7-46. Alternative compliance with article if affixing of capacity plate deemed impracticable or undesirable.

If any watercraft which is required by this article to have a capacity plate affixed thereto is of such design or construction as to make it impracticable or undesirable to affix such plate, the manufacturer or other person having the responsibility for affixing the plate may represent such impracticability or undesirability in writing to the Department of Natural Resources. Upon determination by the Department of Natural Resources that such representation has merit and that a proper and effective substitute for the capacity plate, which will serve the same purpose, is feasible, the Department of Natural Resources may authorize such alternative compliance. Such alternative compliance shall thereafter be deemed compliance with the capacity plate requirements of this article.

History. — Ga. L. 1971, p. 419, § 7.

52-7-47. Exemption of watercraft by rules and regulations of Board of Natural Resources.

The Board of Natural Resources may, by rules and regulations, exempt any watercraft from the requirements of this article which it finds to be of such unconventional design or construction that the information required on capacity plates would not assist in promoting safety or that such information is not reasonably obtainable.

History. — Ga. L. 1971, p. 419, § 8.

52-7-48. Promulgation of rules and regulations by Board of Natural Resources generally.

The Board of Natural Resources is authorized to promulgate, issue, and amend rules and regulations necessary to carry out the purposes of this article.

History. — Ga. L. 1971, p. 419, § 9.

52-7-49. Exemption of watercraft manufactured for personal use.

Nothing contained within this article shall be construed so as to apply to any person who shall manufacture or construct a watercraft for his own personal use and so long as such watercraft remains the property of the person who manufactured or constructed such watercraft.

History. — Ga. L. 1971, p. 419, § 10.

52-7-50. Applicability of article.

This article shall apply to watercraft manufactured after January 1, 1972.

History. — Ga. L. 1971, p. 419, § 11.

52-7-51. Penalty.

(a) Any person who violates this article or any rules and regulations issued hereunder shall be guilty of a misdemeanor. For purposes of establishing criminal violations of the rules and regulations promulgated by the Board of Natural Resources as provided in this article, the term "rules and regulations" means those rules and regulations of the Board of Natural Resources in force and effect on January 1, 2014.

(b) Failure to affix a proper capacity plate shall constitute a separate violation for each watercraft with respect to which such failure occurs.

History. — Ga. L. 1971, p. 419, § 12; Ga. L. 2012, p. 739, § 30/HB 869; Ga. L. 2013, p. 92, § 13/SB 136; Ga. L. 2014, p. 344, § 4/HB 783.

Editor's notes. — Ga. L. 2013, p. 92, § 14/SB 136, not codified by the General Assembly, provides, in part, that the amendment of this Code section by that Act shall apply to all offenses occurring on and after May 15, 2013; provided, however, that for purposes of determining the number of prior convictions or pleas of nolo contendere pursuant to the felony provisions of paragraph (4) of subsection (m) of Code Section 52-7-12, only those offenses for which a conviction or a plea of nolo contendere is obtained on or after May 15, 2013, shall be considered.

Ga. L. 2014, p. 344, § 5/HB 783, not codified by the General Assembly, provides: "This Act shall become effective on May 1, 2014, and shall apply to offenses occurring on or after such date."

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting not required. — Misdemeanor offenses arising under O.C.G.A. § 52-7-51 are offenses for which those charged are not to be fingerprinted. 2012 Op. Att'y Gen. No. 12-6.

ARTICLE 3

ABANDONED VESSELS

52-7-70. Definitions.

As used in this article, the term:

(1) "Abandoned vessel" means a vessel:

(A) Which has been left by the owner or some person acting for the owner with a vessel dealer, repairman, or wrecker service for repair or for some other reason and has not been called for by such

owner or other person within a period of 30 days after the time agreed upon; or within 30 days after such vessel is turned over to such dealer, repairman, or wrecker service when no time is agreed upon; or within 30 days after the completion of necessary repairs;

(B) Which is left unattended upon or in any public water or at any port in this state without the consent of the agency having jurisdiction or docked at any private property without the consent of the owner of such property for a period of at least five days and when it reasonably appears to a law enforcement officer that the individual who left such vessel unattended does not intend to return and remove such vessel;

(C) Which has been lawfully towed onto the property of another at the request of a law enforcement officer and left there for a period of not less than 30 days without anyone's having made claim thereto;

(D) Which has been lawfully towed onto the property of another at the request of a property owner on whose property the vessel was abandoned and left there for a period of not less than 30 days without the owner's having made claim thereto; or

(E) Which has been left unattended on private property for a period of not less than 30 days without anyone's having made claim thereto.

(2) "Owner" means the owner, lessor, lessee, security interest holders, and all lienholders as shown on the records of the Department of Natural Resources.

(3) "Vessel" means every description of watercraft, other than a seaplane on the water, used or capable of being used as a means of transportation on water and specifically includes, but is not limited to, inflatable rafts.

History. — Code 1981, § 52-7-70, enacted by Ga. L. 1989, p. 613, § 1.

52-7-71. Removal and storage of vessels; procedure.

(a) Any person who removes a vessel from public property or public water at the request of a law enforcement officer or stores such vessel shall, if the owner of the vessel is unknown, seek the identity of and address of the last known registered owner of such vessel from the law enforcement officer requesting removal of such vessel or such officer's agency within 72 hours of removal.

(b) Any person who removes a vessel from private property or private waters at the request of the property owner or stores such vessel shall,

if the owner of the vessel is unknown, notify in writing a local law enforcement agency of the location of the vessel, the vessel certificate of number, and the hull identification number, model, year, and make of the vessel, if known or if readily ascertainable, within 72 hours of the removal of such vessel and shall seek from the local law enforcement agency the identity and address of the last known registered owner of such vessel and any information indicating that such vessel is a stolen vessel.

(c) If any vessel removed under conditions set forth in subsection (a) or (b) of this Code section is determined to be a stolen vessel, the local law enforcement officer or agency shall notify the Georgia Crime Information Center and the owner, if known, of the location of such vessel within 72 hours after receiving notice that such vessel is a stolen vessel.

(d) If any vessel removed under conditions set forth in subsection (a) or (b) of this Code section is determined not to be a stolen vessel or is not a vessel being repaired by a repair facility or is not being stored by an insurance company providing insurance to cover damages to the vessel, the person removing or storing such vessel shall, within seven calendar days of the day such vessel was removed, notify the owner, if known, by certified or registered mail or statutory overnight delivery of the location of such vessel, the fees connected with removal and storage of such vessel, and the fact that such vessel will be deemed abandoned under this article unless the owner redeems such vessel within 30 days of the date such vessel was removed.

(e) If the person identified as the owner fails to redeem such vessel as described in subsection (d) of this Code section, or if a vessel being repaired by a repair facility or being stored by an insurance company providing insurance to cover damages to the vessel becomes abandoned, the person removing or storing such vessel shall, within seven calendar days of the day such vessel became an abandoned vessel, give notice in writing, by sworn statement, to the Department of Natural Resources stating the vessel certificate of number, the hull identification number, the fact that such vessel is an abandoned vessel, the model, year, and make of the vessel, if known or if readily ascertainable, the date the vessel became an abandoned vessel, the date the vessel was removed, and the present location of such vessel and requesting the name and address of all owners, lessors, lessees, security interest holders, and lienholders of such vessel. If a person removing or storing the vessel has knowledge of facts which reasonably indicate that the vessel is registered or titled in a certain other state, such person shall check the vessel records of that other state in the attempt to ascertain the identity of the owner of the vessel.

(e.1)(1)(A) Upon notice to the Department of Natural Resources as described in subsection (e) of this Code section, then the commis-

sioner may revoke, suspend, deny, or refuse to renew any vessel certificate of number or commercial fishing boat license required by this title or Title 27 which is held by or has been applied for by the person, until all fees connected with removal and storage of the vessel have been paid and any lien acquired under Code Section 52-7-73 for such fees has been satisfied. The person shall be notified of the proposed order for revocation, suspension, denial, or nonrenewal personally or by a letter sent by certified mail or statutory overnight delivery to the name and address indicated on the application for the certificate of number or license, or both. The proposed order for revocation, suspension, denial, or nonrenewal shall become final 30 days after issuance if not appealed as provided in this paragraph.

(B) Any person whose vessel certificate of number or commercial fishing boat license is proposed for revocation, suspension, denial, or nonrenewal under this paragraph shall have the right to enter an appeal in the superior court of the county of his or her residence or in the Superior Court of Fulton County. Such appeal shall name the commissioner as defendant and must be filed within 30 days from the date the notice of the proposed order was sent. The person filing the appeal shall neither be required to post any bond nor to pay the costs in advance. If the person so desires, the appeal may be heard by the judge at term or in chambers or by a jury at the first term. The hearing on the appeal shall be de novo, but no appeal shall act as a supersedeas of any orders or acts of the department.

(2)(A) Upon notice to the Department of Natural Resources as described in subsection (e) of this Code section and delivery of a copy of such notice to the state revenue commissioner, then the state revenue commissioner may revoke, suspend, deny, or refuse to renew any motor vehicle registration required by Title 40 which is held by or has been applied for by the person, until all fees connected with removal and storage of the vessel have been paid and any lien acquired under Code Section 52-7-73 for such fees has been satisfied. The person shall be notified of the proposed order for revocation, suspension, denial, or nonrenewal personally or by a letter sent by certified mail or statutory overnight delivery to the name and address indicated on the application for the registration. The proposed order for revocation, suspension, denial, or nonrenewal shall become final 30 days after issuance if not appealed as provided in this paragraph.

(B) Any person whose motor vehicle registration is proposed for revocation, suspension, denial, or nonrenewal under this paragraph shall have the right to enter an appeal in the superior court of the county of his or her residence or in the Superior Court of

Fulton County. Such appeal shall name the state revenue commissioner as defendant and must be filed within 30 days from the date the notice of the proposed order was sent. The person filing the appeal shall neither be required to post any bond nor to pay the costs in advance. If the person so desires, the appeal may be heard by the judge at term or in chambers or by a jury at the first term. The hearing on the appeal shall be de novo, but no appeal shall act as a supersedeas of any orders or acts of the department.

(f) Upon ascertaining the owner of such vessel, the person removing or storing such vessel shall, within five calendar days, by certified or registered mail or statutory overnight delivery, notify the owner, lessors, lessees, security interest holders, and lienholders of the vessel of the location of such vessel and of the fact that such vessel is deemed abandoned and shall be disposed of if not redeemed.

(g) If the identity of the owner of such vessel cannot be ascertained, the person removing or storing such vessel shall place an advertisement in a newspaper of general circulation in the county where such vessel was obtained or, if there is no newspaper in such county, shall post such advertisement at the county courthouse in such place where other public notices are posted. Such advertisement shall run in the newspaper once a week for two consecutive weeks or shall remain posted at the courthouse for two consecutive weeks. The advertisement shall contain a complete description of the vessel, its certificate of number and hull identification number, the location from where such vessel was initially removed, the present location of such vessel, and the fact that such vessel is deemed abandoned and shall be disposed of if not redeemed.

(h) Reserved.

(i) Any person storing a vessel under the provisions of this Code section shall notify the Department of Natural Resources if the vessel is recovered, is claimed by the owner, is determined to be stolen, or is for any reason no longer an abandoned vessel. Such notice shall be provided within seven calendar days of such event.

(j) If vessel information on the abandoned vessel is not in the files of the Department of Natural Resources, the department may require such other information or confirmation as it determines is necessary or appropriate to determine the identity of the vessel.

(k) Any person who does not provide the notice and information required by this Code section shall not be entitled to any storage fees.

(l) Any person who knowingly provides false or misleading information when providing any notice or information as required by this Code section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished as for a misdemeanor.

History. — Code 1981, § 52-7-71, enacted by Ga. L. 1989, p. 613, § 1; Ga. L. 2000, p. 1589, § 4; Ga. L. 2007, p. 105, § 2/HB 132; Ga. L. 2020, p. 479, § 1/SB 308; Ga. L. 2021, p. 922, § 52/HB 497.

The 2020 amendment, effective January 1, 2021, deleted "and the Georgia Bureau of Investigation," in the first sentence of subsection (e) and near the beginning of subsection (i); and deleted subsection (h), which read: "Information forwarded to the Georgia Bureau of Investigation as required by this Code section shall be placed by the bureau on the National Crime Information Center Network."

The 2021 amendment, effect May 10, 2021, part of an Act to revise, modernize, and correct the Code, designated subsection (h), which was repealed, as reserved.

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the Act shall be applicable with respect to notices delivered on or after July 1, 2000.

RESEARCH REFERENCES

ALR. — Construction and application of requirement that vessel be in marine peril to support claim of marine salvage, 70 A.L.R. Fed. 2d 251.

Construction and application of requirement that service be voluntarily rendered to support claim of marine salvage, 71 A.L.R. Fed. 2d 253.

52-7-72. Authority of peace officer to cause removal of unattended vessels; notifications; duties.

(a) Any peace officer who finds a vessel which has been left unattended in or upon any public waters or other public property for a period of at least five days, if such peace officer reasonably believes that the person who left such vessel unattended does not intend to return and remove such vessel, shall notify the Department of Natural Resources of such finding in accordance with subsection (d) of this Code section and may cause such vessel to be removed to a garage or other place of safety.

(b) Any peace officer who finds a vessel which has been left unattended in or upon any public waters or other public property, when such vessel poses a threat to public health or safety, shall notify the Department of Natural Resources of such finding in accordance with subsection (d) of this Code section and may immediately cause such vessel to be removed to a garage or other place of safety.

(c) Any peace officer who, under the provisions of this Code section, causes any vessel to be removed to a garage or other place of safety shall be liable for gross negligence only.

(d)(1) Any peace officer who finds a vessel under such conditions as described in subsection (a) or (b) of this Code section shall within 72 hours from the time of such finding:

(A) Notify the Department of Natural Resources of the description of the vessel, whether the vessel has been removed or not, and, if removed, the location to which such vessel has been removed; and

(B) If available on the Georgia Crime Information Center Network, determine the name and address of the last known registered owner of such vessel.

If vessel information is not in the files of the Department of Natural Resources, the department may require such other information or confirmation as it determines is necessary or appropriate to determine the identity of the vessel.

(2) If any such vessel is determined to be a stolen vessel, the local law enforcement officer or agency shall notify the Georgia Crime Information Center and the owner, if known, of the location of such vessel within 72 hours after receiving notice that such vessel is a stolen vessel.

(3) If the vessel is removed and the name and address of the last known registered owner of the vessel is obtained from the Georgia Crime Information Center, the peace officer who causes the vessel to be removed shall, within three calendar days of removal, make available to the person removing such vessel the name and address of the last known registered owner of such vessel. If such information is not available, the peace officer shall, within three calendar days of removal, notify the person removing or storing such vessel of such fact.

History. — Code 1981, § 52-7-72, enacted by Ga. L. 1989, p. 613, § 1; Ga. L. 2007, p. 105, § 3/HB 132; Ga. L. 2020, p. 479, § 2/SB 308.

The 2020 amendment, effective January 1, 2021, deleted "and the Georgia Crime Information Center" in subparagraph (d)(1)(A).

52-7-72.1. Penalty for failing to remove unattended vessel.

(a)(1) If any vessel for which the Department of Natural Resources and the Georgia Crime Information Center have received notice pursuant to subsection (d) of Code Section 52-7-72 has not been removed and is determined not to be a stolen vessel, the commissioner may proceed to take action against the owner as provided by this Code section.

(2) If any vessel for which the Department of Natural Resources and the Georgia Crime Information Center have received notice pursuant to subsection (d) of Code Section 52-7-72 has been removed, the provisions of this Code section shall not apply and the provisions of Code Section 52-7-71 shall apply instead.

(b)(1)(A) Upon notice to the Department of Natural Resources as described in subsection (d) of Code Section 52-7-72, then the commissioner may revoke, suspend, deny, or refuse to renew any vessel certificate of number or commercial fishing boat license required by this title or Title 27 which is held by or has been

applied for by a person who owns the vessel, until the owner restores and resumes operation of the vessel or removes it from public waters or public property. The person shall be notified of the proposed order for revocation, suspension, denial, or nonrenewal personally or by a letter sent by certified mail or statutory overnight delivery to the name and address indicated on the application for the certificate of number or license, or both. The proposed order for revocation, suspension, denial, or nonrenewal shall become final 30 days after issuance if not appealed as provided in this paragraph.

(B) Any person whose vessel certificate of number or commercial fishing boat license is proposed for revocation, suspension, denial, or nonrenewal under this paragraph shall have the right to enter an appeal in the superior court of the county of his or her residence or in the Superior Court of Fulton County. Such appeal shall name the commissioner as defendant and must be filed within 30 days from the date the notice of the proposed order was sent. The person filing the appeal shall neither be required to post any bond nor to pay the costs in advance. If the person so desires, the appeal may be heard by the judge at term or in chambers or by a jury at the first term. The hearing on the appeal shall be de novo, but no appeal shall act as a supersedeas of any orders or acts of the department.

(2)(A) Upon notice to the Department of Natural Resources as described in subsection (d) of Code Section 52-7-72 and delivery of a copy of such notice to the state revenue commissioner, then the state revenue commissioner may revoke, suspend, deny, or refuse to renew any motor vehicle registration required by Title 40 which is held by or has been applied for by a person who owns the vessel, until the owner restores and resumes operation of the vessel or removes it from public waters or public property. The person shall be notified of the proposed order for revocation, suspension, denial, or nonrenewal personally or by a letter sent by certified mail or statutory overnight delivery to the name and address indicated on the application for the registration. The proposed order for revocation, suspension, denial, or nonrenewal shall become final 30 days after issuance if not appealed as provided in this paragraph.

(B) Any person whose motor vehicle registration is proposed for revocation, suspension, denial, or nonrenewal under this paragraph shall have the right to enter an appeal in the superior court of the county of his or her residence or in the Superior Court of Fulton County. Such appeal shall name the state revenue commissioner as defendant and must be filed within 30 days from the date the notice of the proposed order was sent. The person filing the appeal shall neither be required to post any bond nor to pay the

costs in advance. If the person so desires, the appeal may be heard by the judge at term or in chambers or by a jury at the first term. The hearing on the appeal shall be de novo, but no appeal shall act as a supersedeas of any orders or acts of the department.

History. — Code 1981, § 52-7-72.1, enacted by Ga. L. 2007, p. 105, § 4/HB 132.

52-7-73. Lien on vessel; foreclosure in courts competent to hear civil cases.

(a) Any person who removes or stores any vessel which is or becomes an abandoned vessel shall have a lien on such vessel for the reasonable fees connected with such removal or storage plus the cost of any advertisement. Prior to acquiring such lien, the person must have complied with the requirements of Code Section 52-7-71.

(b) The lien acquired under subsection (a) of this Code section may be foreclosed in any court which is competent to hear civil cases, including, but not limited to, magistrate courts. Liens shall be foreclosed in magistrate courts only when the amount of the lien does not exceed the jurisdictional limits established by law for such courts.

History. — Code 1981, § 52-7-73, enacted by Ga. L. 1989, p. 613, § 1.

52-7-74. Procedure for foreclosure.

All liens acquired under Code Section 52-7-73 shall be foreclosed as follows:

(1) Any proceeding to foreclose a lien on an abandoned vessel must be instituted within one year from the time the lien is recorded or is asserted by retention;

(2) The person desiring to foreclose a lien on an abandoned vessel shall, by certified or registered mail or statutory overnight delivery, make a demand upon the owner for the payment of the reasonable fees for removal and storage plus the costs of any advertisement. Such written demand shall include an itemized statement of all charges. No such written demand shall be required if the identity of the owner cannot be ascertained and the notice requirements of subsection (g) of Code Section 52-7-71 have been complied with;

(3)(A) If, within ten days of delivery to the appropriate address of the written demand required by paragraph (2) of this Code section, the owner of the abandoned vessel fails to respond to such demand or refuses to pay, or if the owner of the abandoned vessel cannot be ascertained, the person removing or storing the abandoned vessel

may foreclose such lien. The person asserting such lien may move to foreclose by making an affidavit to a court of competent jurisdiction showing all facts necessary to constitute such lien and the amount claimed to be due. Such affidavit shall aver that the notice requirements of Code Section 52-7-71 have been complied with, and such affidavit shall also aver that a demand for payment has been made and refused or that the identity of the owner cannot be ascertained. The person foreclosing shall verify the statement by oath or affirmation and shall affix his signature thereto.

(B) Regardless of the court in which the affidavit required by this paragraph is filed, the fee for filing such affidavit shall be $5.00 per vessel upon which a lien is asserted;

(4)(A) Upon such affidavit's being filed, the lien claimant shall give the clerk or judge of the court the address, if known, of the owner, lessor, lessee, security interest holders, and lienholders of the abandoned vessel. The clerk or judge of the court shall serve notice upon such owner, lessor, lessee, security interest holders, and lienholders of the abandoned vessel of a right to a hearing to determine if reasonable cause exists to believe that a valid debt exists; that such hearing must be petitioned for within ten days after receipt of such notice; and that, if no petition for such hearing is filed within the time allowed, the lien will conclusively be deemed a valid one and foreclosure thereof allowed.

(B) Any notice required by this paragraph shall be by certified mail or statutory overnight delivery or, if the owner, lessor, lessee, security interest holder, or lienholder is unknown, by posting such notice at the county courthouse in such place where other public notices are posted;

(5) If a petition for a probable cause hearing is filed within the time allowed, the court shall set such a hearing within ten days of filing of the petition. If, at the hearing, the court determines that reasonable cause exists to believe that a valid debt exists, then the person asserting the lien shall retain possession of the vessel or the court shall obtain possession of the vessel, as ordered by the court. The owner-debtor may obtain possession of the vessel by giving bond and security in the amount determined to be probably due and costs of the action;

(6) Within five days of the probable cause hearing, a party defendant must petition the court for a full hearing on the validity of the debt if a further determination of the validity of the debt is desired. If no such petition is filed, the lien for the amount determined reasonably due shall conclusively be deemed a valid one and foreclosure thereof allowed. If such a petition is filed, the court shall set a

full hearing thereon within 15 days of the filing of the petition. Upon the filing of such petition by a party defendant, neither the prosecuting lienholder nor the court may sell the vessel, although possession of the vessel may be retained;

(7) If, after a full hearing, the court finds that a valid debt exists, then the court shall authorize foreclosure upon and sale of the vessel subject to the lien to satisfy the debt if such debt is not otherwise immediately paid;

(8) If the court finds the actions of the person asserting the lien in retaining possession of the vessel were not taken in good faith, then the court, in its discretion, may award damages to the owner, any party which has been deprived of the rightful use of the vessel, or the lessee due to the deprivation of the use of the vessel; and

(9) If no petition for a hearing is filed, or if, after a full hearing, the court determines that a valid debt exists, the court shall issue an order authorizing the sale of such vessel. However, the holder of a security interest in or a lien on the vessel, other than the holder of a lien created by Code Section 52-7-73, shall have the right, in the order of priority of such security interest or lien, to pay the debt and court costs. If the holder of a security interest or lien does so pay the debt and court costs, such person shall have the right to possession of the vessel, and that person's security interest in or lien on such vessel shall be increased by the amount so paid. A court order shall be issued to this effect, and in this instance there shall not be a sale of the vessel.

History. — Code 1981, § 52-7-74, enacted by Ga. L. 1989, p. 613, § 1; Ga. L. 2000, p. 1589, §§ 3, 4.

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the Act shall be applicable with respect to notices delivered on or after July 1, 2000.

52-7-75. Public sale of vessel; disposition of excess proceeds.

(a)(1) As used in this subsection, the term "public sale" means a sale:

(A) Held at a place reasonably available to persons who might desire to attend and submit bids;

(B) At which those attending shall be given the opportunity to bid on a competitive basis;

(C) At which the sale, if made, shall be made to the highest and best bidder; and

(D) Except as otherwise provided in Title 11 for advertising or dispensing with the advertising of public sales, of which notice is given by advertisement once a week for two weeks in the newspaper in which the sheriff's advertisements are published in the

county where the sale is to be held, and which notice shall state the day and hour, between 9:00 A.M. and 5:00 P.M., and the place of sale and shall briefly identify the goods to be sold.

(2) Upon order of the court, the person holding the lien on the abandoned vessel shall be authorized to sell such vessel at public sale.

(b) After satisfaction of the lien, the person selling such vessel shall turn the remaining proceeds of such sale, if any, over to the clerk of the court.

History. — Code 1981, § 52-7-75, enacted by Ga. L. 1989, p. 613, § 1; Ga. L. 2015, p. 996, § 3C-6/SB 65.

Editor's notes. — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides: "(a) This Act shall be known and may be cited as the 'Debtor-Creditor Uniform Law Modernization Act of 2015.'

"(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships."

52-7-76. Issuance of certificate of title.

The purchaser at a sale as authorized in this article shall receive a certified copy of the court order authorizing such sale. Any such purchaser may obtain a certificate of title to such vessel by filing the required application, paying the required fees, and filing a certified copy of the order of the court with the Department of Natural Resources. The Department of Natural Resources shall then issue a certificate of title, which shall be free and clear of all liens and encumbrances.

History. — Code 1981, § 52-7-76, enacted by Ga. L. 1989, p. 613, § 1.

52-7-77. Payment of balance remaining after satisfaction of liens, security interests, and debts.

The clerk of the court shall retain the remaining balance of the proceeds of a sale conducted under Code Section 52-7-75, after satisfaction of liens, security interests, and debts, for a period of 12 months; and, if no claim has been filed against such proceeds by the owner of the abandoned vessel or any interested party, then he shall pay such remaining balance as follows:

(1) If the abandoned vessel came into the possession of the person creating the lien other than at the request of a peace officer, the proceeds of the sale shall be divided equally and paid into the general fund of the county in which the sale was made and into the general fund of the municipality, if any, in which the sale was made;

(2) If the abandoned vessel came into the possession of the person creating the lien at the request of a police officer of a municipality, the proceeds of the sale shall be paid into the general fund of the municipality;

(3) If the abandoned vessel came into the possession of the person creating the lien at the request of a county sheriff, deputy sheriff, or county police officer, the proceeds of the sale shall be paid into the general fund of the county in which the sale was made; or

(4) If the abandoned vessel came into the possession of the person creating the lien at the request of a member of the Georgia State Patrol or other employee of the State of Georgia, the proceeds of the sale shall be paid into the general fund of the county in which the sale was made.

History. — Code 1981, § 52-7-77, enacted by Ga. L. 1989, p. 613, § 1.

CHAPTER 8

DISCHARGE OF SUBSTANCES DANGEROUS TO NAVIGATION OR PROPERTY

Sec.		Sec.	
52-8-1.	Throwing stone, gravel, or other ballast into navigable waters.	52-8-4.	Power of municipalities to prohibit throwing or depositing of substances which might lessen depth of navigable waters.
52-8-2.	Duty of pilots to report unlawful discharge of stone, gravel, or other ballast into bays and harbors.	52-8-5.	Power of municipalities to prohibit throwing or depositing of substances dangerous to navigation or injurious to vessels.
52-8-3.	Recovery of forfeiture; attachment and replevy of vessels.		

Cross references. — Use of anti-syphon devices for irrigation systems, § 2-1-4. Disposal of sewage and waste into waters of state generally, § 12-5-29. Control of soil erosion and sedimentation, T. 12, C. 7.

RESEARCH REFERENCES

Am. Jur. 2d. — 70 Am. Jur. 2d, Shipping, § 102.

C.J.S. — 80 C.J.S., Shipping, §§ 20, 21.

ALR. — Substantive law of state as applicable to action for personal injury not resulting in death growing out of a maritime tort, 59 A.L.R. 504.

Liability for failure to rescue seaman who has gone overboard, 91 A.L.R.2d 1032.

52-8-1. Throwing stone, gravel, or other ballast into navigable waters.

Any master of a vessel or watercraft who shall throw or permit to be thrown any stone, gravel, or other ballast from on board the vessel or watercraft into any of the waters of any bay or harbor of this state or within three miles of the outside bar of any such bay or harbor shall forfeit a sum not less than $500.00 nor more than $2,000.00 for each such offense. One-half of the forfeiture shall be paid to the person who first gives information of the offense to the Board of Pilotage Commissioners and the other half shall be paid to the use of the commissioners of the harbors, respectively, for improvement of navigation. In addition, any such master may be punished by imprisonment for not over three months, in the discretion of the court.

History. — Laws 1847, Cobb's 1851 Digest, p. 50; Code 1863, § 1486; Code 1868, § 1543; Code 1873, § 1537; Code 1882, § 1537; Civil Code 1895, § 1685; Penal Code 1895, § 646; Civil Code 1910, § 1931; Penal Code 1910, § 686; Code 1933, §§ 98-102, 98-9902.

52-8-2. Duty of pilots to report unlawful discharge of stone, gravel, or other ballast into bays and harbors.

Every pilot having knowledge of the discharge of any stone, gravel, or other ballast in any bay or harbor of this state, or within three miles of the outside bar of any such bay or harbor, as specified in Code Section 52-8-1, must give information thereof to the Board of Pilotage Commissioners as soon as practicable; and, upon his failure to do so, such pilot shall be deprived of his license and shall be forever disqualified for the office of pilot.

History. — Orig. Code 1863, § 1488; Code 1868, § 1545; Code 1873, § 1539; Code 1882, § 1539; Civil Code 1895, § 1687; Civil Code 1910, § 1933; Code 1933, § 98-103.

52-8-3. Recovery of forfeiture; attachment and replevy of vessels.

Upon receipt by the Board of Pilotage Commissioners of satisfactory evidence of the offense specified in Code Section 52-8-1, it shall be the duty of the board to proceed to recover the forfeiture provided for in that Code section by process of attachment in the name of the state, which may be issued as other attachments on the oath of the informer or of one of the commissioners and may be levied on the vessel from which the offense was committed. The vessel may be replevied by the master, owner, or consignee by giving bond, payable to the state, in double the amount of the penalty, with the condition to have the vessel forthcoming to satisfy such judgment as may be rendered in the action.

History. — Orig. Code 1863, § 1487; Code 1868, § 1544; Code 1873, § 1538; Code 1882, § 1538; Civil Code 1895, § 1686; Civil Code 1910, § 1932; Code 1933, § 98-104.

RESEARCH REFERENCES

C.J.S. — 80 C.J.S., Shipping, § 5.

52-8-4. Power of municipalities to prohibit throwing or depositing of substances which might lessen depth of navigable waters.

The corporate authorities of any municipality in this state are authorized, within their respective jurisdictions, to prohibit, under proper penalties, the throwing or depositing in navigable waters of any substance of any nature or kind which might in any degree lessen the depth of navigable water within the jurisdictional limits of such municipalities.

History. — Orig. Code 1863, § 1489; Code 1868, § 1546; Code 1873, § 1540; Code 1882, § 1540; Civil Code 1895, § 1688; Civil Code 1910, § 1934; Code 1933, § 98-105; Ga. L. 1982, p. 3, § 52.

52-8-5. Power of municipalities to prohibit throwing or depositing of substances dangerous to navigation or injurious to vessels.

The corporate authorities of any municipality in this state are authorized, within their respective jurisdictions, to prohibit under proper penalties the throwing or depositing in navigable waters, of any substance which they might consider dangerous to navigation or injurious to vessels or to property abutting upon such navigable waters; and the master of any vessel from which any forbidden substance is thrown or deposited in violation of any ordinance promulgated under this Code section shall be guilty of a misdemeanor.

History. — Ga. L. 1945, p. 279, § 26.

CHAPTER 9

RIVER AND HARBOR DEVELOPMENT

Sec.
52-9-1. Projects for improving navigation channels.
52-9-2. Disposal of sand and sediment originating from water navigation related projects.

Cross references. — Powers of State Properties Commission regarding leases authorizing dredging of bottom or bank of state-owned waterway, § 50-16-43(j).

Law reviews. — For note on the 2002 amendment of this chapter, see 19 Ga. St. U.L. Rev. 343 (2002).

52-9-1. Projects for improving navigation channels.

The General Assembly recognizes the need for maintaining navigation inlets, harbors, and rivers to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that dredging activities to deepen or maintain navigation channels within tidal inlets, as well as the entrances to harbors and rivers, often alter the natural drift of sand resources within the littoral zone. This alteration can be exacerbated when the sand resources are deposited in designated upland or offshore disposal areas instead of being returned to the natural river-sand transport-beach system. This alteration can adversely impact natural resources, recreation, tourism, and associated coastal economies. Moreover, the General Assembly believes in the duties of government to protect life and property. Therefore, it is the policy of this state that there shall be no net loss of sand from the state's coastal barrier beaches resulting from dredging activities to deepen or maintain navigation channels within tidal inlets, as well as the entrances to harbors and rivers.

History. — Ga. L. 1967, p. 516; Ga. L. 1972, p. 1015, § 1516; Ga. L. 2002, p. 569, § 2; Ga. L. 2004, p. 784, § 1.

Cross references. — Powers and duties of Department of Natural Resources regarding rivers, § 12-5-331.

52-9-2. Disposal of sand and sediment originating from water navigation related projects.

(a) With regard to all sand that is suitable for beach replenishment originating from the dredging of navigation channels within tidal inlets, as well as the entrances to harbors and rivers:

(1) Such sand shall be used to replenish the adjacent coastal beaches, if feasible, either by deposition of sand into the nearshore littoral zone or direct placement on affected beaches;

(2) If such sand is placed elsewhere, then a quality and quantity of sand from an alternate location necessary to mitigate any adverse effects caused by the dredging shall be used to replenish affected coastal beaches; provided, however, that this paragraph shall apply only where beach replenishment is necessary to mitigate effects from the dredging and dredged material removal from the natural river-sand transport-beach system of a specific project and beach replenishment from another source is the least costly environmentally sound mitigation option;

(3) The disposition of sand shall be completed in cooperation with and, when required by applicable state or federal law, with the approval of the local governing authority and the Department of Natural Resources according to the requirements of Part 2 of Article 4 of Chapter 5 of Title 12, the "Shore Protection Act"; and

(4) All such activities shall provide protection to coastal marshlands as defined in paragraph (3) of Code Section 12-5-282 and to nesting sea turtles and hatchlings and their habitats.

(b) The Department of Natural Resources and the party undertaking the dredging shall coordinate to determine the option under subsection (a) of this Code section for beach replenishment that is most beneficial to the adjacent or affected coastal beaches, including, where applicable, identifying an alternate source of sand for purposes of paragraph (2) of subsection (a) of this Code section, after taking into consideration environmental impacts and any limitation of applicable state and federal law.

History. — Ga. L. 1967, p. 516; Ga. L. 1972, p. 1015, § 1516; Ga. L. 2002, p. 569, § 2; Ga. L. 2004, p. 784, § 1; Ga. L. 2005, p. 60, § 52/HB 95.

Cross references. — Authority of Department of Natural Resources to contract and make agreements, § 12-3-5.

CHAPTER 10

FOREIGN TRADE ZONES

Sec.		Sec.	
52-10-1.	"Public corporation" defined.	52-10-4.	Authority to establish and operate foreign trade zone; conditions and restrictions of act of Congress.
52-10-2.	Application by public corporation to establish and operate foreign trade zone.		
52-10-3.	Application by private corporation to establish and operate foreign trade zone.		

Cross references. — Storage and distribution of alcoholic beverages by corporations granted privilege of establishing, operating, and maintaining foreign trade zones, § 3-3-30.

52-10-1. "Public corporation" defined.

As used in this chapter, "public corporation" means the State of Georgia or any political subdivision thereof, any public agency of this state or of any political subdivision thereof, or any public board, bureau, commission, or authority created by the General Assembly.

History. — Ga. L. 1965, p. 40, § 2.

52-10-2. Application by public corporation to establish and operate foreign trade zone.

Any public corporation of the State of Georgia, as that term is defined in Code Section 52-10-1, is authorized to make application for the privilege of establishing, operating, and maintaining a foreign trade zone in accordance with an act of Congress approved June 18, 1934, entitled "An Act to provide for the establishment, operation, and maintenance of foreign trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes."

History. — Ga. L. 1965, p. 40, § 1.

U.S. Code. — The Act providing for foreign-trade zones, referred to in this Code section, is codified as 19 U.S.C. § 81a et seq.

52-10-3. Application by private corporation to establish and operate foreign trade zone.

Any private corporation hereafter organized under the laws of this state for the purpose of establishing, operating, and maintaining a

foreign trade zone in accordance with the act of Congress referred to in Code Section 52-10-2 is authorized to make application for the privilege of establishing, operating, and maintaining a foreign trade zone in accordance with the said act of Congress.

History. — Ga. L. 1965, p. 40, § 3.
U.S. Code. — The Act providing for foreign-trade zones, referred to in this Code section, is codified as 19 U.S.C. § 81a et seq.
Law reviews. — For article discussing advantages of foreign trade zones and limits of their availability, see 27 Mercer L. Rev. 629 (1976).

52-10-4. Authority to establish and operate foreign trade zone; conditions and restrictions of act of Congress.

Any public or private corporation authorized by this chapter to make application for the privilege of establishing, operating, and maintaining a foreign trade zone, whose application is granted pursuant to the terms of the act of Congress referred to in Code Section 52-10-2, is authorized to establish such foreign trade zone and to operate and maintain it, subject to the conditions and restrictions of said act of Congress and any amendments thereto and under such rules and regulations and for the period of time that may be prescribed by the board established by such act of Congress to carry out the provisions of such act.

History. — Ga. L. 1965, p. 40, § 4; Ga. L. 1984, p. 22, § 52.
U.S. Code. — The Act providing for foreign-trade zones, referred to in this Code section, is codified as 19 U.S.C. § 81a et seq.

TITLE 53

WILLS, TRUSTS, AND ADMINISTRATION OF ESTATES

Chap.

1. General Provisions, 53-1-1 through 53-1-20.
2. Descent and Distribution, 53-2-1 through 53-2-51.
3. Year's Support, 53-3-1 through 53-3-21.
4. Wills, 53-4-1 through 53-4-75.
5. Probate, 53-5-1 through 53-5-71.
6. Administrators and Personal Representatives, 53-6-1 through 53-6-64.
7. Administration of Estates Generally, 53-7-1 through 53-7-78.
8. Investments, Sales, and Conveyances, 53-8-1 through 53-8-15.
9. Missing Persons and Persons Believed to be Dead, 53-9-1 through 53-9-21.
10. Simultaneous Death, 53-10-1 through 53-10-6.
11. Proceedings in Probate Court, 53-11-1 through 53-11-11.
12. (Revised Trust Code of 2010) Trusts, 53-12-1 through 53-12-506.
13. Revised Uniform Fiduciary Access to Digital Assets, 53-13-1 through 53-13-40.
14. Testamentary Additions to Trusts, 53-14-1 through 53-14-5 [Repealed]
15. Incorporation of Fiduciary Powers by Reference, 53-15-1 through 53-15-4 [Repealed]
16. Foreign Corporation Fiduciaries, 53-16-1 through 53-16-5 [Repealed]
17. Uniform Act for Simplification of Fiduciary Security Transfers, 53-17-1 through 53-17-11 [Repealed]

Cross references. — Equitable principles pertaining to administration of estates generally, § 23-2-90 et seq. Estate taxes, T. 48, C. 12.

Law reviews. — For article, "Pitfalls in Probate Practice and Procedure," see 21 Ga. B.J. 169 (1958). For article, "Improving Georgia's Probate Code," see 4 Ga. L. Rev. 505 (1970). For article discussing important elements of estate planning and will construction, see 9 Ga. St. B.J. 197 (1973). For article discussing developments in the law of wills, trusts and administration of estates in Georgia from 1976 to 1977, see 29 Mercer L. Rev. 291 (1977). For annual survey of law on wills, trusts, and administration of estates, see 35 Mercer L. Rev. 341 (1983). For annual survey on wills, trusts, and administration of estates, see 36 Mercer L. Rev. 375 (1984). For article surveying trust and estate law in 1984-1985, see 37 Mercer L. Rev. 443 (1985). For annual survey of law on wills, trusts, and administration of estates, see 39 Mercer L. Rev. 363 (1987). For article, "Probate and Tax Checklist for Estates in Georgia," see 23 Ga. St. B.J. 140 (1987). For annual survey of law of wills, trusts, and administration of estates, see 40 Mercer L. Rev. 471 (1988) and 41 Mercer L. Rev. 411 (1989). For annual survey of wills, trusts, and administration of estates, see 42 Mercer L. Rev. 491 (1990). For annual survey of wills, trusts, and administration, see 43 Mercer L. Rev. 457 (1991). For annual survey of law of wills, trusts, and administration of estates, see 44 Mercer L. Rev. 445 (1992). For annual survey article on law of wills, trusts, and administration of estates, see 45 Mercer L. Rev. 475 (1993). For annual survey article on the law of wills, trusts, and administration of estates, see 46 Mercer L. Rev. 517 (1994). For annual survey article on the law of wills, trusts, and administration of estates, see 49 Mercer L. Rev. 363 (1997). For annual survey article on wills, trusts, and administration of estates, see 50 Mercer L. Rev. 381 (1998). For article, "Immortal Fame: Publicity Rights, Taxation, and the Power of Testation," see 44 Ga. L. Rev. 1 (1999). For annual survey article discussing wills, trusts, and administration of estates, see 51 Mercer L. Rev. 487 (1999). For annual survey article discussing wills, trusts, and administration of estates, see 52 Mercer L. Rev. 481 (2000). For article, "Tax Apportionment Problems under the Georgia Probate Code," see 8 Ga. St. B.J. 16 (2003). For annual survey of wills, trusts, guardianships, and fiduciary administration, see 57 Mercer L. Rev. 403 (2005).

For note, "Wills and the Attorney-Client Privilege," see 14 Ga. L. Rev. 325 (1980).

CODE REVISION COMMISSION NOTE ON COMMENTS

The comments appearing in this title have been prepared under the supervision of the Probate Code Revision Committee of the Fiduciary Law Section of the State Bar of Georgia and are included in the Official Code of Georgia Annotated at the request of the committee. Neither the General Assembly of Georgia nor the Code Revision Commission of the State of Georgia has participated in the drafting of these comments or has reviewed the comments for their content. The comments should not be considered to constitute a statement of legislative intention by the General Assembly of Georgia nor do they have the force of statutory law.

NOTES AS TO COMMENTS

The Comments that appear in Chapters 1 through 11 of Title 53 were prepared by the Probate Code Revision Committee of the Fiduciary Law Section of the State Bar of Georgia and are included in the Official Code of Georgia Annotated at the request of the Committee. The Committee members are: William Linkous, Jr., Chairman; A. Kimbrough Davis, Julian R. Friedman, Gregory L. Fullerton, John M. Graham III, Larry V. McLeod, Faryl S. Moss, J. Warren Ott, E. Lowry Reid, Jr., Albert P. Reichert, Jr., Ann S. Salo, and Rees M. Sumerford. The Reporter for the Committee is Mary F. Radford, Professor of Law, Georgia State University College

of Law. The Comments should not be considered to constitute a statement of legislative intention by the General Assembly of Georgia nor do they have the force of statutory law.

RESEARCH REFERENCES

ALR. — Construction and operation of will or trust provision appointing advisors to trustee or executor, 56 A.L.R.3d 1249.

CHAPTER 1

GENERAL PROVISIONS

Article 1

In General

Sec.
53-1-1. Short title; effective date of provisions.
53-1-2. Definitions.
53-1-3. Dower and tenancy by curtesy.
53-1-4. Effect on support obligation of use of income from estate or trust for support.
53-1-5. Right of individual who feloniously and intentionally kills or conspires to kill to inherit.
53-1-6. Payment to surviving spouse of state or federal income tax overpayments.
53-1-7. Surviving spouse under the age of 18 years.
53-1-8. Adopted individuals.
53-1-9. Survival of common law and equity.

Article 2

Advancements

53-1-10. Lifetime transfers.
53-1-11. Value.
53-1-12. Manner of taking into account.
53-1-13. Consideration of satisfaction or advancement when recipient predeceases transferor.

Article 3

Renunciation

53-1-20. Renouncing property; procedures; relation back; abridgement; fiduciary duties.

Editor's notes. — This chapter was effective January 1, 1998, to the extent that no vested rights of title, year's support, succession, or inheritance are impaired, as provided by the version of Code Section 53-1-1 enacted by Ga. L. 1996, p. 504, § 10, as amended by Ga. L. 1997, p. 1352, § 1.

Ga. L. 1996, p. 504, § 10, effective January 1, 1998, repealed the Code sections formerly codified at this chapter, and enacted the current chapter. The former chapter consisted of §§ 53-1-1 through 53-1-6, and was based on Orig. Code 1863, § 2239; Code 1868, § 2233; Code 1873, § 2259; Code 1882, § 2259; Civil Code 1895, § 3094; Civil Code 1910, § 3670; Code 1933, § 85-608; Ga. L. 1962, p. 623, § 1; Ga. L. 1969, p. 123, § 1; Code 1981, § 53-1-4, enacted by Ga. L. 1984, p. 1036, § 2; Code 1981, § 53-1-5, enacted by Ga. L. 1989, p. 1193, § 1; Code 1981, § 53-1-6, enacted by Ga. L. 1990, p. 350, § 1; Ga. L. 1991, p. 810, § 9.

ARTICLE 1

IN GENERAL

53-1-1. Short title; effective date of provisions.

(a) This chapter and Chapters 2 through 11 of this title, as such chapters were enacted by an Act approved April 2, 1996 (Ga. L. 1996, p. 504), and as amended by an Act approved April 29, 1997 (Ga. L. 1997, p. 1352), and as such chapters may be amended in the future, shall be known and may be cited as the "Revised Probate Code of 1998."

(b) Except as otherwise provided by law, the provisions contained in this chapter and Chapters 2 through 11 of this title shall be effective on January 1, 1998; provided, however, that no vested rights of title, year's support, succession, or inheritance shall be impaired.

History. — Code 1981, § 53-1-1, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 1; Ga. L. 1998, p. 1586, § 5; Ga. L. 2011, p. 752, § 53/HB 142.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

COMMENT

The provisions in Chapters One through Eleven of this Title resulted from an overall revision of Chapters One through Eleven of former OCGA Title 53 that became effective on January 1, 1998. Substantive variations from the former law are noted in the Comments to each section. Modifications in the language of former Code sections, which were made where appropriate for clarity or modernization, are not noted in the Comments.

JUDICIAL DECISIONS

Application of Revised Probate Code. — Subsequently-enacted legislation which stated that if an administrator was not appointed within five years after the death of an intestate, then the estate property would be vested in decedent's heirs, and which did not mention anything about divestment of the estate property, did not apply to prevent the probate court from granting the estate administrator's petition to distribute decedent's property even though the estate administrator was not appointed for nearly four decades after the death of the decedent, as the law in effect at the time the estate administrator was appointed had no time limit for the appointment and the subsequently-enacted legislation did not apply to prohibit the estate administrator from being appointed and distributing the property. Williams v. Williams, 259 Ga. App. 888, 578 S.E.2d 582 (2003).

Cited in In re Estate of Ehlers, 289 Ga. App. 14, 656 S.E.2d 169 (2007); Huggins v. Powell, 293 Ga. App. 436, 667 S.E.2d 219 (2008); In re Estate of Wade, 331 Ga. App. 535, 771 S.E.2d 214 (2015).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 8C Am. Jur. Pleading and Practice Forms, Dower and Curtesy, § 1.

53-1-2. Definitions.

As used in this chapter and Chapters 2 through 11 of this title, the term:

(1) "Administrator" means any person appointed and qualified to administer an intestate estate, including an intestate estate already partially administered by an administrator and from any cause unrepresented.

(2) "Administrator with the will annexed" means any person, other than an executor, appointed and qualified to administer a testate

estate, including a testate estate already partially administered and from any cause unrepresented.

(3) "Beneficiary" means a person, including a trust, who is designated in a will to take an interest in real or personal property.

(4) "Codicil" means an amendment to or republication of a will.

(5) "County administrator" means any individual or individuals appointed by the probate court of the county and qualified to represent an estate that is unrepresented and unlikely to be represented.

(6) "Descendants" means the lineal descendants of an individual including those individuals who are treated as lineal descendants by virtue of adoption.

(7) "Executor" means any person nominated in a will who has qualified to administer a testate estate, including a person nominated as alternative or successor executor.

(8) "Guardian" means the guardian ad litem or representative described in Code Section 53-11-2 who represents one or more parties to a probate court proceeding who are not sui juris, are unborn, or are unknown.

(9) "Heirs" means those one or more individuals who survive the decedent and are determined under the rules of inheritance to take the property of the decedent that is not disposed of by will.

(10) "Nominated executor" means any person nominated in the will to serve as executor who has not yet qualified to serve as executor.

(11) "Person" means an individual, corporation, partnership, association, joint-stock company, business trust, unincorporated organization, limited liability company, or two or more persons having a joint or common interest, including an individual or a business entity acting as a personal representative or in any other fiduciary capacity.

(12) "Personal representative" means any administrator, administrator with the will annexed, county administrator, or executor.

(13) "Qualified" means that a personal representative has taken the oath, posted any required bond, and been issued letters of administration or letters testamentary, as provided in this title.

(14) "Sui juris" means an individual is age 18 or over and not suffering from any legal disability.

(15) "Temporary administrator" means any person granted temporary letters of administration upon an unrepresented estate.

(16) "Testamentary gift" means the interest in real or personal property which a beneficiary is designated to take in a will.

(17) "Will" means the legal declaration of an individual's testamentary intention regarding that individual's property or other matters. Will includes the will and all codicils to the will.

History. — Code 1981, § 53-1-2, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 6.

Cross references. — Filing of wills by testators in office of judge of probate court, § 15-9-38.

Law reviews. — For article surveying wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982). For article, "Transfer-on-Death Securities Registration: A New Title Form," see 21 Ga. L. Rev. 789 (1987). For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004). For survey article on wills, trusts, guardianships, and fiduciary administration, see 60 Mercer L. Rev. 417 (2008). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 64 Mercer L. Rev. 325 (2012).

COMMENT

Former OCGA Title 53 contained no general definitions section. This section combines definitions that appeared in various sections of former Title 53 as well as adding new definitions. Subsection (a) includes as an "administrator" an "administrator de bonis non" of an intestate estate and subsection (b) includes as an "administrator with the will annexed" an "administrator de bonis non" of a testate estate. The concept of "administrator de bonis non" appeared in former OCGA Secs. 53-6-30 and 53-6-31. The term "beneficiary" in subsection (c) is used to replace the words "legatee" and "devisee" that appeared in former Title 53. The term is defined somewhat differently in OCGA Sec. 53-12-2 for use throughout Chapter 12 (Trusts). The definition of "codicil" that appeared in former OCGA Sec. 53-2-5 is modified and placed in subsection (d). Subsection (e) carries forward the definition of "County Administrator" that appeared in former OCGA Sec. 53-6-90. Former OCGA Title 53 contained no definition of the term "descendants". This term, which is now defined in subsection (f), is used to replace the term "lineal descendants" in former Title 53. Subsection (g) includes as an "executor" any person who is nominated in the will, whether that person is the executor or a successor executor. Subsection (i) distinguishes a "nominated executor" as one who has been nominated in the will but has not yet qualified. Former OCGA Title 53 contained no definition of the terms "guardian" or "heirs". The term "heirs," as defined in subsection (i), is used to replace the term "heirs at law" from former Title 53. Subsection (k) contains the same definition of "person" that appears in the Georgia Trust Code at Sec. 53-12-2(5), with the addition of limited liability companies. Subsection (l) introduces the term "Personal Representative," which includes administrators, administrators with the will annexed, county administrators and executors, but does not include temporary administrators. In order to meet the definitions of subsections (a), (b), (e), (g), and (o), a person must have "qualified" to serve as a personal representative, as defined in subsection (m). Subsection (m) provides that a personal representative has "qualified" upon the taking of the oath, the issuance of appropriate letters and the posting of any required bond. The term "sui juris" in subsection (n) describes an individual who is of legal age and suffering under no other legal disability. Subsection (o) carries forward portions of the definition of "Temporary Administrator" that appeared in former OCGA Sec. 53-6-34. The term "testamentary gift" in subsection (p) is used to replace the terms "legacy" and "devise". The definition of the term "will" in subsection (q) appeared in former OCGA Sec. 53-2-1. The definition is modified to add that the will may speak of

matters other than the disposition of property (for example, the appointment of a guardian for minor children of the decedent) and that, unless the context otherwise requires, the "will" includes the will and all codicils to it.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 3827, former Code 1933, §§ 113-101 and 113-1207, and former O.C.G.A. § 53-6-34 are included in the annotations for this Code section.

Powers granted. — Former statute empowered a temporary administrator to collect and take care of effects of deceased until permanent letters of administration are granted. Kelly v. Citizens & S. Nat'l Bank, 160 Ga. App. 405, 287 S.E.2d 343 (1981) (decided under former Code 1933, § 113-1207).

Statutory consistency. — There is no inconsistency between O.C.G.A. § 44-12-151, requiring selection of remedies, and former O.C.G.A. §§ 53-6-34 and 53-7-93, requiring collection and preservation of assets of an estate and just and timely payment of the debts of an estate. Howard v. Parker, 163 Ga. App. 159, 293 S.E.2d 548 (1982) (decided under former O.C.G.A. § 53-6-34).

Attorney's fees. — Temporary administrator's right to attorney fees may not extend beyond fees for such services as may have been necessary to assist the administrator in the securing of temporary letters of administration and the collection and preservation of the assets of the estate. Hudson v. Abercrombie, 258 Ga. 729, 374 S.E.2d 83 (1988) (decided under former O.C.G.A. § 53-6-34).

Definition of a will makes disposition of property an indispensable requisite under Georgia law and to do this a legatee is essential. Lawson v. Hurt, 217 Ga. 827, 125 S.E.2d 480 (1962) (decided under former Code 1933, § 113-101).

When the sole legatee died prior to the death of the testator, there was no legatee and consequently no disposition of property by the instrument offered for probate. Lawson v. Hurt, 217 Ga. 827, 125 S.E.2d 480 (1962) (decided under former Code 1933, § 113-101).

Cited in Dameron v. Southern Ry., 44 Ga. App. 444, 161 S.E. 641 (1931); Chance v. Buxton, 177 F.2d 297 (5th Cir. 1949); Jenkins v. Shuften, 206 Ga. 315, 57 S.E.2d 283 (1950); Cummings v. Cummings, 89 Ga. App. 529, 80 S.E.2d 204 (1954); Lampkin v. Edwards, 222 Ga. 288, 149 S.E.2d 708 (1966); Lavender v. Wilkins, 237 Ga. 510, 228 S.E.2d 888 (1976); Howington v. Howington, 242 Ga. 767, 251 S.E.2d 514 (1979); Guyett v. Guyett, 160 Ga. App. 622, 287 S.E.2d 632 (1981); Deller v. Smith, 250 Ga. 157, 296 S.E.2d 49 (1982); Smith v. Watts, 181 Ga. App. 524, 352 S.E.2d 840 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 9 Am. Jur. 2d, Wills, § 2.

Am. Jur. Pleading and Practice Forms. — 10A Am. Jur. Pleading and Practice Forms, Executors and Administrators, §§ 842, 896. 25 Am. Jur. Pleading and Practice Forms, Wills, § 2.

ALR. — May instrument inter vivos operate also as a will, or part of will, 45 A.L.R. 843.

Notation on note or securities as a will or codicil, 62 A.L.R. 292.

Suppression of will, or agreement for its suppression, as contrary to public policy or to statute in that regard, 117 A.L.R. 1249.

Testamentary character of memorandum or other informal writing not testamentary on its face regarding ownership or disposition of specific personal property, 117 A.L.R. 1327.

What testamentary language passes United States bonds, 100 A.L.R.2d 1004.

Determination whether will is absolute or conditional, 1 A.L.R.3d 1048.

Electronic tape recording as will, 42 A.L.R.4th 176.

What constitutes contest or attempt to

defeat will within provision thereof forfeiting share of contesting beneficiary, 3 A.L.R.5th 590.

53-1-3. Dower and tenancy by curtesy.

There is no right of dower or tenancy by curtesy in this state.

History. — Code 1981, § 53-1-3, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

The concepts of this section were formerly codified at OCGA Secs. 53-1-1 and 53-1-2.

53-1-4. Effect on support obligation of use of income from estate or trust for support.

Whenever income from an estate or trust is available for the benefit of an individual whose support is the legal obligation of another and the income is actually used for such individual's support, the legal obligation of the other to support the individual is reduced to the extent the income is actually used for such individual's support.

History. — Code 1981, § 53-1-4, enacted by Ga. L. 1996, p. 504, § 10.

Cross references. — Enforcement of duty of support of spouse and children, T. 19, C. 11.

Law reviews. — For article, "Trusts for Dependents: Effect of Georgia's Support Obligation on Federal Income Taxation," see 8 Ga. St. B.J. 323 (1972).

For note discussing Georgia's child support laws, their problems, and some proposed solutions, see 11 Ga. L. Rev. 387 (1977).

COMMENT

This section carries over former OCGA Sec. 53-1-3.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1962, p. 623, § 1, are included in the annotations for this Code section.

Payment of tuition, books, and fees charged by a private school at the elementary or secondary level is included in "legal obligation" to support as those words were used in Ga. L. 1962, p. 623, § 1. McElrath v. Citizens & S. Nat'l Bank, 229 Ga. 20, 189 S.E.2d 49 (1972) (decided under Ga. L. 1962, p. 623, § 1).

Father is entitled to reimbursement for child support payments made by him, and which could and should have been paid by the trustee, to the extent that income of the trusts was sufficient for the support, maintenance, and education of the minor children. McElrath v. Citizens & S. Nat'l Bank, 229 Ga. 20, 189 S.E.2d 49 (1972) (decided under Ga. L. 1962, p. 623, § 1).

Availability of trust funds may reduce statutory or legal obligation of father. — To the extent that funds from a trust were available and must be used for the support, maintenance, and education

of minor children, the father's statutory obligation under former Code 1933, § 74-105 (see O.C.G.A. § 19-7-2) or his legal obligation required by a court decree was reduced. McElrath v. Citizens & S. Nat'l Bank, 229 Ga. 20, 189 S.E.2d 49 (1972) (decided under Ga. L. 1962, p. 623, § 1).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Welfare Laws, § 82 et seq.

53-1-5. Right of individual who feloniously and intentionally kills or conspires to kill to inherit.

(a) An individual who feloniously and intentionally kills or conspires to kill or procures the killing of another individual forfeits the right to take an interest from the decedent's estate and to serve as a personal representative or trustee of the decedent's estate or any trust created by the decedent. For purposes of this Code section, the killing or conspiring to kill or procuring another to kill is felonious and intentional if the killing would constitute murder or felony murder or voluntary manslaughter under the laws of this state.

(b) An individual who forfeits the right to take an interest from a decedent's estate by virtue of this Code section forfeits the right to take any interest such individual would otherwise take at the decedent's death by intestacy, year's support, will, deed, power of appointment, or by any other conveyance duly executed during life by the decedent and is treated as having predeceased the decedent for purposes of determining the distribution of the decedent's property and of appointing personal representatives or trustees.

(c) This Code section shall have no effect on the rights of the descendants of the individual who forfeits the right to take from the decedent's estate; provided, however, that if the descendants are taking by intestacy in place of the individual who forfeits, the descendants may take only that share of the decedent's estate to which the individual who forfeits would have been entitled. The provisions of Code Section 53-4-64 shall not apply with respect to the descendants of the individual who forfeits the right to take from the decedent's estate unless those descendants are also descendants of the decedent.

(d) A final judgment of conviction or a guilty plea for murder, felony murder, or voluntary manslaughter is conclusive in civil proceedings under this Code section. In the absence of such a conviction or plea, the felonious and intentional killing must be established by clear and convincing evidence.

History. — Code 1981, § 53-1-5, enacted by Ga. L. 1996, p. 504, § 10.

Cross references. — Homicide generally, § 16-5-1 et seq. Denial of right of

person who commits murder or voluntary manslaughter to receive benefits from insurance policy on life of victim, § 33-25-13.

Law reviews. — For article, "The Time Gap in Wills: Problems Under Georgia's Lapse Statutes," see 6 Ga. L. Rev. 268 (1972). For article discussing effect of homicide on succession by the slayer, and devolution of his share, see 10 Ga. L. Rev. 447 (1976). For annual survey of law on wills, trusts, guardianships, and fiduciary administration, see 62 Mercer L. Rev. 365 (2010). For article, "Killers Shouldn't Inherit from their Victims - Or Should They?," see 48 Ga. L. Rev. 145 (2013). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 66 Mercer L. Rev. 231 (2014).

For note, "Not Just For Kids: Why Georgia's Statutory Disinheritance of Deadbeat Parents Should Extend to Intestate Adults," see 43 Ga. L. Rev. 867 (2009). For note, "Vesting Title in a Murderer: Where is the Equity in the Georgia Supreme Court's Interpretation of the Slayer Statute in Levenson?," see 45 Ga. L. Rev. 877 (2011).

COMMENT

This section modifies former OCGA Sec. 53-4-6. This section expands the forfeiture provisions to apply not only to the killer's right to take a property interest from the decedent but also to serve as a fiduciary of the decedent's estate or any trust created by the decedent. The rule applies only to prevent a killer from receiving benefits from the slain person or serving as a fiduciary and does not affect the distribution of the killer's estate. (See OCGA Sec. 33-25-13, which contains a similar rule relating to the receipt of benefits from a life insurance policy.)

This section applies to situations in which the "killing" is such as would constitute murder, felony murder, or voluntary manslaughter, as described in OCGA Secs. 16-5-1 and 16-5-2. The section does not apply to homicide by vehicle, as defined in OCGA Sec. 40-6-393. The nature of the killing may be established either by a criminal conviction or a guilty plea or, in a civil proceeding, by clear and convincing evidence.

Subsection (b) carries forward the rule of former OCGA Sec. 53-4-6 that the share of the individual who engages in the felonious and intentional killing is distributed as if the killer predeceased the decedent. Additionally, the appointment of personal representatives or trustees will proceed as if the killer had predeceased the decedent.

Subsection (c) clarifies that the descendants of the killer are not precluded from taking from the slain person's estate or serving as personal representative or trustee. However, if the descendants are taking by intestacy in place of the killer, the descendants may not take a greater share of the decedent's estate than the share to which the killer would have been entitled. This subsection prevents unfairness in those circumstances in which the treatment of an individual as having predeceased the decedent would result in a diminution of the shares that other individuals would have received had that individual not been treated as having predeceased the decedent. The following example illustrates the application of this rule: Assume that a decedent who dies intestate is survived by a brother who has three children and by the one child of a predeceased sister. Under Code Sec. 53-2-1, the sister's child takes one-half of the estate and the brother takes one-half of the estate. But if the brother (as well as the sister) had predeceased the decedent, the same statute directs that the four nieces and nephews of the decedent would share the estate equally. Consequently, the sister's child's share would be diminished to one-fourth. The last sentence of subsection (b) avoids that result by providing that, if the brother is treated as having predeceased the decedent because he killed the decedent, the brother's children (who are taking in place of the brother) will only take the one-half interest that the brother would have taken.

Subsection (c) also reflects the rule that Code Sec. 53-4-64 (the anti-lapse statute) does not apply in cases in which a beneficiary is treated as having predeceased the testator due to the fact that the beneficiary killed the testator unless the individuals who would take as substitute beneficiaries for their "predeceased" parent are also descendants of the testator.

JUDICIAL DECISIONS

Analysis

General Consideration
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1. In General
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Entitlement of Heirs of Disinherited Heir

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1952, p. 288, §§ 1 and 3, Ga. L. 1959, p. 299, § 1, and former O.C.G.A. § 53-4-6 are included in the annotations for this Code section.

Constitutionality. — The contention that Ga. L. 1959, p. 299, § 1 is void as being in violation of U.S. Const., Art. I, Sec. 10, Cl. 1 which prohibits passage of any bill of attainder or ex post facto law, or because it is a law impairing the obligations of a contract, or that it operates to deprive a murderer of the murderer's property without due process of law, or that the statute is in violation of U.S. Const., amend. 14 which prohibits states from enforcing any law abridging the privileges or immunities of citizens or denying to citizens within its borders the equal protection of the laws and the contention that a conviction in such a case would work corruption of blood or forfeiture of property in violation of Ga. Const. 1976, Art. I, Sec. II, Para. III (now see Ga. Const. 1983, Art. I, Sec. I, Para. XX) are not meritorious. Moore v. Moore, 225 Ga. 340, 168 S.E.2d 318 (1969) (decided under Ga. L. 1959, p. 299, § 1).

Enactment of Ga. L. 1959, p. 299, § 1 as valid exercise of legislative power. — Power to enact Ga. L. 1959, p. 299, § 1 was undoubtedly in the General Assembly, inasmuch as the General Assembly possesses the power to provide rules of descent and distribution. Moore v. Moore, 225 Ga. 340, 168 S.E.2d 318 (1969) (decided under Ga. L. 1959, p. 299, § 1).

Purpose of section. — Primary purpose of statute is to reduce the profits of crime. National Life & Accident Ins. Co. v. Thornton, 125 Ga. App. 589, 188 S.E.2d 435 (1972) (decided under Ga. L. 1959, p. 299, § 1).

Former O.C.G.A. § 53-4-6 required the slayer's portion of victim's estate pass to alternative beneficiaries when a valid will so provides and alternative beneficiaries, who are not prohibited by law from taking from the victim, are named in the will. Bradley v. Bradley, 213 Ga. App. 68, 443 S.E.2d 863 (1994) (decided under former O.C.G.A. § 53-4-6).

Rights of those who kill by accident or negligence not impaired. — Statutes that embody the public policy of Georgia of prohibiting wrongdoers from profiting from their crimes, O.C.G.A. §§ 17-14-31, 33-25-13, and 53-1-5, only prevent those who feloniously and intentionally kill, O.C.G.A. § 53-1-5(a), or those who commit murder or voluntary manslaughter, O.C.G.A. § 33-25-13, from sharing, respectively, in the decedent's estate or insurance policy proceeds; if a public policy may be gleaned from these statutes, it is a policy that prohibits those who commit murder or voluntary manslaughter from profiting from the victim's death, but these statutes do not impair the rights of those who kill by accident or negligence, who kill in self-defense or pursuant to any other legal justification, or who kill while legally insane because simply admitting to having committed a homicide does not make one a wrongdoer

under Georgia law. Bruscato v. O'Brien, 307 Ga. App. 452, 705 S.E.2d 275 (2010).

Summary judgment. — When substantial fact issues existed as to whether an insurance policy provision transferring ownership to the insured was activated in an apparent murder/suicide case, and whether the insured had murdered his wife, the owner of the policy, it was error of the court to grant summary judgment. Bland v. Ussery, 172 Ga. App. 131, 322 S.E.2d 335 (1984) (decided under former O.C.G.A. § 53-4-6).

Cited in Butler v. Hicks, 229 Ga. 72, 189 S.E.2d 416 (1972); Edwards v. Edwards, 136 Ga. App. 668, 222 S.E.2d 169 (1975); Graham v. Youngblood, 256 Ga. 183, 345 S.E.2d 593 (1986); Edwards v. Shumate, 266 Ga. 374, 468 S.E.2d 23 (1996); Rader v. State, 300 Ga. App. 411, 685 S.E.2d 405 (2009); O'Brien v. Bruscato, 289 Ga. 739, 715 S.E.2d 120 (2011).

Applicability

1. In General

Applicability of Ga. L. 1959, p. 299, § 1 generally. — Ga. L. 1959, p. 299, § 1 applies if, by the wrongful act of the legatee, the testator dies before the legatee and the legatee by law is treated as having died before the testator. McGhee v. Banks, 115 Ga. App. 155, 154 S.E.2d 37 (1967) (decided under Ga. L. 1959, p. 299, § 1).

Victim does not become heir of murderer. — After the husband killed his wife and then committed suicide in an apparent murder/suicide, the provision of former O.C.G.A. § 53-4-6 deeming that one who kills another predeceased the victim when determining who inherits the victim's estate did not create a right of the wife's estate to inherit from the husband's estate. Keith v. Johnson, 211 Ga. App. 678, 440 S.E.2d 230 (1993) (decided under former O.C.G.A. § 53-4-6).

Conviction for voluntary manslaughter. — Son's conviction for voluntary manslaughter of his father did not establish that he acted with malice so as to prevent his inheriting from his father's estate, nor was malice established by a prior decision finding the son ineligible to receive life insurance benefits because of the manslaughter conviction. Stephens v. Adkins, 226 Ga. App. 648, 487 S.E.2d 440 (1997) (decided under former O.C.G.A. § 53-4-6).

Until judicial condemnation proceedings are finalized, property conveyed by the murderer passes good title because, by the clear and unambiguous provisions of its language, O.C.G.A. § 53-1-5(d) requires some form of judicial condemnation to divest a murderer of his or her interests from the murdered decedent's estate, either through a criminal proceeding, i.e., final judgment of conviction or a guilty plea, or through a civil proceeding establishing a felonious and intentional killing by clear and convincing evidence; upon finalization of either of the judicial condemnation proceedings provided for in § 53-1-5(d), the murderer's interest from the decedent's estate is forfeited and that forfeiture then relates back to the moment of the murder, so as to authorize recovery from the murderer of any of that interest he or she previously dispersed. Levenson v. Word, 286 Ga. 114, 686 S.E.2d 236 (2009).

Legal fees paid by spouse who killed other spouse. — In an estate administrator's conversion suit against a law firm, the trial court properly granted the law firm summary judgment with regard to the administrator attempting to recover $125,000 in legal fees the decedent's spouse had paid to the law firm as the law firm accepted the fees from the decedent's spouse in good faith since it was not determined until the spouse pled guilty to the homicide that the spouse had killed the decedent. Further, there was no evidence that the spouse did not have title to the money when the money was paid. Levenson v. Word, 294 Ga. App. 104, 668 S.E.2d 763 (2008), aff'd, 286 Ga. 114, 686 S.E.2d 236 (2009).

Court of Appeals did not err in affirming the trial court's order granting defense attorneys and the law firm summary judgment in an administrator's action alleging that the attorneys converted estate property when the attorneys accepted certain sums as payment for their services in representing a decedent's widow after the widow was indicted for the decedent's

Applicability (Cont'd)
1. In General (Cont'd)

murder because O.C.G.A. § 53-1-5 did not place possession or an immediate right to possession of the estate property in the administrator at the time the widow dispersed and appellees received the funds in issue; when the widow dispersed the finds, the widow had qualified as executor of the decedent's estate and letters testamentary had been issued to the widow, the widow had not yet pled guilty to the murder charges, no final judgment of conviction had been entered in regard to the criminal indictment, and the widow's felonious and intentional killing of the decedent had not been established by clear and convincing evidence in any judicial proceeding. Levenson v. Word, 286 Ga. 114, 686 S.E.2d 236 (2009).

No evidence spouse was involved in other spouse's kidnapping and murder. — In an action to determine whether the decedent's husband forfeited the right to take an interest in the decedent's estate or act as a personal representative, the probate court correctly granted summary judgment to the decedent's husband because there had been no criminal or civil proceeding establishing by clear and convincing evidence that the husband participated in the kidnapping and murder of the decedent. In re Estate of Barnett, 348 Ga. App. 366, 823 S.E.2d 55 (2019).

2. Life Insurance Policies

Applicability of section to life insurance policies. — Ga. L. 1959, p. 299, § 1 suggests that it refers to heritable property owned by the decedent and properly a part of the decedent's estate. While an insured is the owner of a contract of insurance on the insured's own life, this is a different sort of ownership because the insured cannot, unless the insured elects to turn the policy in for the policy's cash surrender value, make the policy's proceeds available to the insured during the insured's lifetime. National Life & Accident Ins. Co. v. Thornton, 125 Ga. App. 589, 188 S.E.2d 435 (1972) (decided under Ga. L. 1959, p. 299, § 1).

The legislative scheme under Ga. L. 1959, p. 299, § 1 is clear that unless the insured affirmatively indicates that the estate is intended as beneficiary, the policy proceeds go to the beneficiary as against the claims of creditors or personal representatives of the deceased. This is generally true even when no beneficiary is named in the policy, but a statute indicates for whose benefit the proceeds are to be used in such event. National Life & Accident Ins. Co. v. Thornton, 125 Ga. App. 589, 188 S.E.2d 435 (1972) (decided under Ga. L. 1959, p. 299, § 1).

When insured could have changed beneficiary at any time, Ga. L. 1959, p. 299, § 1 does not prohibit the payment of proceeds from life insurance policies to insured's estate where insured killed the policies' beneficiary and then himself. Willis v. Frazier, 128 Ga. App. 748, 197 S.E.2d 830 (1973) (decided under Ga. L. 1959, p. 299, § 1).

3. Vested Interest

Applicability of section to vested interest. — When wife already had a vested one-half undivided interest in the property with a remainder estate in the other one-half interest, subject to divestiture only if she predeceased the husband, the wife's interest was not forfeited even though she killed her husband. Moore v. Moore, 231 Ga. 232, 201 S.E.2d 133 (1976) (decided under Ga. L. 1959, p. 299, § 1).

Entitlement of Heirs of Disinherited Heir

Meaning of "other heirs." — By the term "other heirs" as used in this section, the legislature meant other heirs of the deceased, whether the deceased died intestate or testate. McGhee v. Banks, 115 Ga. App. 155, 154 S.E.2d 37 (1967) (decided under Ga. L. 1959, p. 299, § 1).

If the person killed is intestate and the person killing is an heir at law without issue, Ga. L. 1959, p. 299, § 1 directs that the property the heir would have taken go to all the other heirs of the deceased entitled under the laws of descent and distribution. McGhee v. Banks, 115 Ga. App. 155, 154 S.E.2d 37 (1967) (decided under Ga. L. 1959, p. 299, § 1).

Heirs of disinherited heir may be proper heirs of decedent. — Legisla-

ture explicitly provided that persons capable of inheriting from the deceased under the laws of descent and distribution through a living heir who killed the deceased are to take the property the disinherited heir would have taken. McGhee v. Banks, 115 Ga. App. 155, 154 S.E.2d 37 (1967) (decided under Ga. L. 1959, p. 299, § 1).

Ga. L. 1959, p. 259, § 1 provides that when a legatee kills a testator, the property the legatee would have received under the will shall go to the heirs of the person killed, thereby excluding the heirs of the legatee from sharing in this property unless they be also heirs of the testator. McGhee v. Banks, 115 Ga. App. 155, 154 S.E.2d 37 (1967) (decided under Ga. L. 1959, p. 299, § 1).

If the person killed is testate, the statute directs that the property the person killing would have taken under the will go (1) if the testator named none of the testator's heirs as beneficiaries, to all the persons who would have been the testator's heirs at law under the laws of descent and distribution, excluding the person killing; or (2) if the testator named some of the testator's heirs at law as beneficiaries of the testator's will, to those named beneficiaries. McGhee v. Banks, 115 Ga. App. 155, 154 S.E.2d 37 (1967) (decided under Ga. L. 1959, p. 299, § 1).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Descent and Distribution, § 41. 79 Am. Jur. 2d, Wills, §§ 154, 155.

ALR. — Constitutionality of statute precluding inheritance by one who killed decedent, 6 A.L.R. 1408.

Disqualification of heir who murdered intestate as affecting rights of others in respect of the intestate estate, 156 A.L.R. 623; 161 A.L.R. 448.

Murder of life tenant by remainderman or reversioner as affecting latter's rights to remainder or reversion, 24 A.L.R.2d 1120.

Felonious killing of one cotenant or tenant by the entireties by the other as affecting the latter's right in the property, 42 A.L.R.3d 1116.

Homicide as precluding taking under will or by intestacy, 25 A.L.R.4th 787.

53-1-6. Payment to surviving spouse of state or federal income tax overpayments.

(a) In any case in which the United States Department of the Treasury or the Department of Revenue of this state determines that there exists an overpayment of federal or state income tax and the person in whose favor the overpayment is determined to exist is deceased at the time the overpayment is to be refunded, the amount of the overpayment, if not in excess of $2,500.00, shall be the sole and separate property of the decedent's surviving spouse, if any, irrespective of whether the decedent had filed a joint or separate income tax return.

(b) The refund of the overpayment directly to the surviving spouse as provided in subsection (a) of this Code section shall operate as a complete acquittal and discharge to the payor, whether the United States or this state, of liability from any action, claim, or demand of whatever nature by any heir, beneficiary, creditor of the decedent, or other person.

(c) Refunds are authorized to be made as provided in this Code section without the necessity of administration of the estate of the

decedent, without the necessity of obtaining an order that no administration is necessary, and without the necessity of appointing a personal representative for the surviving spouse, notwithstanding any other law to the contrary.

History. — Code 1981, § 53-1-6, enacted by Ga. L. 1996, p. 504, § 10.

Cross references. — State income taxation generally, T. 48, C. 7.

Law reviews. — For article discussing nonjudicial settlement of decedent's estate, see 6 Ga. L. Rev. 74 (1971).

COMMENT

This section carries over former OCGA Sec. 53-4-7. This section prevents unnecessary administration of an estate when the tax refund is the only estate asset. Other Code sections that allow transfers of property without the necessity of formal probate or administration include: Code Sec. 40-3-34, Transfer of Motor Vehicles; Code Secs. 7-1-239, 7-1-230.1, Bank Accounts; Code Sec. 34-7-1, Payment of Wages. Code Secs. 53-2-40 through 53-2-42 allow for the dispensing of administration proceedings through a No Administration Necessary order.

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Descent and Distribution, §§ 1, 5, 6, 14, 18.

C.J.S. — 26B C.J.S., Descent and Distribution, § 6 et seq.

ALR. — Amount of allowance from decedent's estate for widow and family where not fixed by statute, 90 A.L.R.2d 687.

Right of surviving spouse to tax refund resulting from joint income tax return, 67 A.L.R.3d 1038.

Rights in decedent's estate as between lawful and putative spouses, 81 A.L.R.3d 6.

Estoppel or laches precluding lawful spouse from asserting rights in decedent's estate as against putative spouse, 81 A.L.R.3d 110.

Surviving spouse's right to marital share as affected by valid contract to convey by will, 85 A.L.R.4th 418.

53-1-7. Surviving spouse under the age of 18 years.

A surviving spouse who is under the age of 18 years is entitled to apply for, take, and hold any share in the deceased spouse's estate to which the surviving spouse is entitled by virtue of being an heir or a beneficiary or being eligible for year's support without the intervention of a guardian or other trustee.

History. — Code 1981, § 53-1-7, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section expands former OCGA Sec. 53-4-2(3) to apply to any case in which an underage surviving spouse is entitled to receive a share of the deceased spouse's estate.

53-1-8. Adopted individuals.

A decree of adoption, whether issued by a court of this state or by a court of any other jurisdiction, shall have the effect described in Code Section 19-8-19, and the adoptive parents and relatives of the adoptive parents shall likewise be entitled to inherit from and through the adopted individual under the laws of intestacy in the absence of a will and to take as parents or relatives of the parents of the adopted individual under the provisions of any instrument of testamentary gift, unless expressly excluded therefrom.

History. — Code 1981, § 53-1-8, enacted by Ga. L. 1997, p. 1352, § 2.

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

For note, "Status or Contract? A Comparative Analysis of Inheritance Rights under Equitable Adoption and Domestic Partnership Doctrines," see 39 Ga. L. Rev. 675 (2005).

53-1-9. Survival of common law and equity.

Except to the extent that the principles of common law and equity governing wills, trusts, and the administration of estates are modified by this title or another provision of law, those principles remain the law of this state.

History. — Code 1981, § 53-1-9, enacted by Ga. L. 2020, p. 377, § 1-1/HB 865.

Effective date. — This Code section became effective January 1, 2021.

ARTICLE 2

ADVANCEMENTS

53-1-10. Lifetime transfers.

(a) A lifetime transfer to a beneficiary of property that is the subject of a specific testamentary gift is treated as a satisfaction if it is shown pursuant to the provisions of subsection (c) of this Code section that the transfer is intended to satisfy the testamentary gift.

(b) A lifetime transfer of money or other property to a prospective heir or to the beneficiary of a demonstrative, general, or residuary testamentary gift is treated as an advancement if it is shown pursuant to the provisions of subsection (c) of this Code section that the transfer is intended to be a part of the share that the heir would inherit by intestacy or the beneficiary would take under the transferor's will.

(c) The intent to treat a lifetime transfer as a satisfaction or an advancement is shown only if the will provides for the deduction of the lifetime transfer or its value or if the satisfaction or advancement is

declared in a writing signed by the transferor within 30 days of making the transfer or acknowledged in a writing signed by the recipient at any time.

History. — Code 1981, § 53-1-10, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article, "The Time Gap in Wills: Shifting Assets and Shrinking Estates — Obsolescence and Testamentary Planning in Georgia," see 6 Ga. L. Rev. 649 (1972). For article discussing concept of advancements, see 10 Ga. L. Rev. 447 (1976). For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004). For annual survey of wills, trusts, guardianships, and fiduciary administration, see 57 Mercer L. Rev. 403 (2005).

COMMENT

This section replaces former OCGA Secs. 53-4-50 and 53-4-53 and portions of former OCGA Sec. 53-2-105. The section combines the treatment of lifetime transfers in both intestate and testate estates. This section clarifies that a lifetime transfer may be a satisfaction if the property transferred was the subject of a specific testamentary gift or that such a transfer may be an advancement if it represents some or all of the recipient's prospective intestate share or of a demonstrative, general, or residuary testamentary gift. (See Code Sec. 53-4-59 for a description of specific, demonstrative, general, and residuary testamentary gifts.)

This section modifies the former laws of satisfaction and advancements by requiring written evidence that an inter-vivos transfer was intended to operate as a satisfaction or an advancement against the testamentary gift or intestate share the recipient would eventually receive. The section requires either that the will specifically contemplate the treatment of the lifetime transfer as a satisfaction or advancement or a separate written expression or acknowledgement of intent. The writing may either be one signed by the transferor within 30 days of the transfer or one signed by the recipient at any time.

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 2539, former Code 1873, § 2580, former Civil Code 1895, § 3475, former Civil Code 1910, §§ 3908, 4052, and 4053, former Code 1933, §§ 113-817 and 113-1013, and former O.C.G.A. §§ 53-2-105 and 53-4-50 are included in the annotations for this Code section.

Ademption is confined to specific legacies. Kramer v. Kramer, 201 F. 248 (5th Cir. 1912), cert. denied, 231 U.S. 753, 34 S. Ct. 322, 58 L. Ed. 467 (1913); Woodall v. First Nat'l Bank, 223 Ga. 688, 157 S.E.2d 261 (1967).

Legacy is not a specific legacy, which will be adeemed when it does not bequeath a bond so labeled and sequestered as to be distinguished from another bond of a similar kind; it is a demonstrative legacy and does not fail if the subject matter is not in existence on the death of the testator. Young v. Young, 202 Ga. 694, 44 S.E.2d 659 (1947).

When a will may reasonably be construed as showing an intention of the testator to bequeath to the six legatees

something of the value of $1,000.00 each, and only three bonds remain, the will stating the $1,000.00 payments to be made from bonds, a fair and just execution of the will, as found by the trial court, would be to sell the three bonds and place the proceeds in the general assets and from that fund pay the six legatees $1,000.00 each. Young v. Young, 202 Ga. 694, 44 S.E.2d 659 (1947).

Failure by the testator to particularize the $1,000.00 bonds bequeathed to stated children, forbid their being classified as specific legacies, and, consequently they do not fail but are payable as general legacies, $1,000.00 to each legatee, out of the general assets of the estate, including the proceeds from the sale of the three bonds on hand after the payment of debts, if any, and the expenses of administration. Young v. Young, 202 Ga. 694, 44 S.E.2d 659 (1947).

Determination if transfer is an advance on inheritance. — Summary judgment, pursuant to O.C.G.A. § 9-11-56, was reversed since a genuine issue of material fact remained as to whether a transfer of money to the decedent's child before the decedent died was an advancement on the child's inheritance, and whether the child breached the fiduciary duty as a result. Walters v. Stewart, 263 Ga. App. 475, 588 S.E.2d 248 (2003).

In cases of intestacy, law favors equal distribution among intestate's heirs. There are only two ways by which the scheme of equality among the heirs may be upset. The first, of course, is by the making of a will on the part of the ancestor providing for a distribution of the ancestor's estate in a manner other than that set forth by law; and, the second is by a valid and binding contract executed between the ancestor and the heir, which clearly shows a meeting of the minds between them acknowledging on the part of the heir receipt in full for the heir's prospective share of the ancestor's estate. Such a contract when entered into is binding and enforceable. Cassedy v. Bland, 99 Ga. App. 34, 107 S.E.2d 697 (1959) (decided under former Code 1933, § 113-1013).

Advancement determined by intent of parent at time of transaction. — Deed of gift by a father-in-law to a son-in-law, accepted by the latter, which contains a provision clearly indicating that it was the intention of the grantor that the property so conveyed was to be an advancement to the daughter, the wife of the grantee, is an advancement to the daughter under the terms of the statute, notwithstanding the daughter may have been ignorant, not only of the fact that the deed contained such a provision, but even of the existence of the deed altogether. Ireland v. Dyer, 133 Ga. 851, 67 S.E. 195, 26 L.R.A. (n.s.) 1050, 18 Ann. Cas. 544 (1910) (decided under former Code 1910, § 4052).

When testator, while acting as guardian for the father of the minor in whose behalf suit was instituted, had advanced to her ward, out of the funds inherited by him, a sum of money with which to buy an aeroplane, and during the interim between his arrival at majority and his death at age 25 there was no evidence of an inclination on his part to require his mother to account for the sum so advanced to him, auditor was authorized to find a ratification on his part, and, to that extent, to deny a recovery against the executor of the testator. Kytle v. Kytle, 180 Ga. 833, 181 S.E. 81 (1935) (decided under former Code 1933, § 113-1013).

When money or property is transferred by a parent to a child, or for the child's benefit, the question whether the transfer is to be treated as an advancement depends upon the intention of the parent at the time of the transaction. Treadwell v. Everett, 185 Ga. 454, 195 S.E. 762 (1938) (decided under former Code 1933, § 113-1013).

When money or property is transferred by a parent to a child, and is accepted, the question of whether the transfer is to be treated as an advancement depends upon the intention of the parent at the time of the transaction, without regard to concurrence on the part of the child. Berry v. Berry, 208 Ga. 285, 66 S.E.2d 336 (1951) (decided under former Code 1933, § 113-1013).

Question of whether a transfer of funds between parent and child is to be treated as an advancement depends upon the intention of the parent at the time of the

General Consideration (Cont'd)

transaction. Smith v. Varner, 130 Ga. App. 484, 203 S.E.2d 717 (1973) (decided under former Code 1933, § 113-1013).

Child met the child's burden of rebutting the presumption that disbursements to the child by the child's mother during the last two years of her life were advancements by presenting clear and satisfactory evidence that her intent was to make loans or investments. Tankesley v. Thompson, 220 Ga. App. 641, 469 S.E.2d 853 (1996) (decided under former O.C.G.A. § 53-4-50).

Presumed advancement. — Conveyance of land by a father to an adult child, reciting a consideration of love and affection, is, in the absence of proof to the contrary, presumed to be an advancement. Bowen v. Holland, 184 Ga. 718, 193 S.E. 233 (1937) (decided under former Code 1933, § 113-1013).

Gift of property by a father to an adult son, who is married and does not live under the parental roof, is presumed to be an advancement. Holliday v. Wingfield, 59 Ga. 206 (1877) (decided under former Code 1873, § 2579); Howard v. Howard, 101 Ga. 224, 28 S.E. 648 (1897) (decided under former Civil Code 1895, § 3474); Kaylor v. Kaylor, 199 Ga. 516, 35 S.E.2d 1 (1945) (decided under former Code 1933, § 113-1013).

Controverted declaration in writing, which was made after the death of the father by a child, that the child was "due," or owed, the child's deceased father a stated amount for stock and money, and which as an account would on its face be barred by the statute of limitations, would, if such admission be established as true, have probative value only as to the fact that the child had received such an amount from the father, and there being no other evidence as to the nature and character of the item and there being no other proven facts or circumstances such as would support a presumption in favor of an advancement, a finding in favor of an advancement would be unsupported by the evidence. Kaylor v. Kaylor, 199 Ga. 516, 35 S.E.2d 1 (1945) (decided under former Code 1933, § 113-1013).

Method of proof of an advancement prescribed by statute is not exclusive; when there is no writing the question is for the jury on all the evidence presented. Bransford v. Crawford, 51 Ga. 20 (1874) (decided under former Code 1873, § 2580).

Endorsement on back of will by testator sufficient as memo. — Advancements are sufficiently proved by endorsements on the back of a will in the testator's handwriting made pursuant to a provision therefor in the will. Kramer v. Lyle, 197 F. 618 (N.D. Ga.), rev'd on other grounds, 201 F. 248 (5th Cir. 1912), cert. denied, 231 U.S. 753, 34 S. Ct. 322, 58 L. Ed. 467 (1913) (decided under former Civil Code 1910, § 4053).

Cited in Beall v. Blake, 16 Ga. 119 (1854); Weems v. Andrews, 22 Ga. 43 (1857); Clayton v. Akin, 38 Ga. 320, 95 Am. Dec. 393 (1868); Sims v. Sims, 39 Ga. 108, 99 Am. Dec. 450 (1869); Worrill v. Gill, 46 Ga. 482 (1872); Reed v. Reed, 68 Ga. 589 (1882); Hart v. Johnson, 81 Ga. 734, 8 S.E. 73 (1888); Holliday v. Wingfield, 59 Ga. 206 (1897); Ireland v. Dyer, 133 Ga. 851, 67 S.E. 195, 26 L.R.A. (n.s.) 1050, 18 Ann. Cas. 544 (1910); Parker v. Parker, 147 Ga. 432, 94 S.E. 543 (1917); Hobby v. Ford, 149 Ga. 176, 99 S.E. 624 (1919); Elliott v. Johnson, 178 Ga. 384, 173 S.E. 399 (1934); Beard v. Beard, 197 Ga. 487, 29 S.E.2d 595 (1944); Harrison v. Barber, 200 Ga. 225, 36 S.E.2d 662 (1946); Roberts v. Wilson, 200 Ga. 201, 36 S.E.2d 758 (1946); In re Engram, 156 F. Supp. 342 (M.D. Ga. 1957); Fuller v. Fuller, 107 Ga. App. 429, 130 S.E.2d 520 (1963); Thompson v. Mathews, 226 Ga. 347, 174 S.E.2d 916 (1970); Chandler v. Owen, 233 Ga. 25, 209 S.E.2d 618 (1974); Howard v. Estate of Howard, 249 Ga. App. 287, 548 S.E.2d 48 (2001); Cubbedge v. Cubbedge, 287 Ga. App. 149, 650 S.E.2d 805 (2007).

Ademption Rule

Meaning of ademption. — Ademption of a specific legacy is the extinction or withdrawal of it, in consequence of some act of the testator equivalent to its revocation, or clearly indicative of an intention to revoke. Kramer v. Kramer, 201 F. 248 (5th Cir. 1912), cert. denied, 231 U.S. 753, 34 S. Ct. 322, 58 L. Ed. 467 (1913) (decided under former Civil Code 1910, § 3908).

Ademption is effected by the extinction

of the thing or fund bequeathed, or by disposition of it subsequent to the will from which an intention that the legacy should fail is presumed. Kramer v. Kramer, 201 F. 248 (5th Cir. 1912), cert. denied, 231 U.S. 753, 34 S. Ct. 322, 58 L. Ed. 467 (1913) (decided under former Civil Code 1910, § 3908).

Term "ademption" is sometimes used as synonymous with satisfaction, but such use is inaccurate, as ademption operates independently of intention in case the specific thing given is, at the testator's death, no longer owned by testator. Kramer v. Kramer, 201 F. 248 (5th Cir. 1912), cert. denied, 231 U.S. 753, 34 S. Ct. 322, 58 L. Ed. 467 (1913) (decided under former Civil Code 1910, § 3908).

Ademption generally. — When a testator conveys to another specific property devised or bequeathed, and does not afterward become possessed of the property, and the will contains no provision for such contingency, the devise or legacy is adeemed, and such legal result cannot be obviated by extrinsic evidence tending to show that the testator did not intend it. Thompson v. Long, 202 Ga. 718, 44 S.E.2d 651 (1947) (decided under former Code 1933, § 113-817).

Standard for defining a "conveyance" is whether there has occurred a change in the testator's ownership sufficiently radical to manifest, as a matter of law, the testator's intention to revoke the specific devise. The term "conveyance" includes a single transaction by which a testator sells the testator's fee simple title to real estate in return for a security title to the real estate sold. Peacock v. Owens, 244 Ga. 203, 259 S.E.2d 458 (1979) (decided under former Code 1933, § 113-817).

Ademption arises upon the conveyance of the specific property covered by the legacy, and rests upon a rule of law independent of any supposed actual intent of the testator; and in the absence of any facts which would bring the case within the exceptions set forth in statute, and in the absence of any provision in the will in contemplation of such a contingency, a trial court properly held that a devise had been wholly adeemed by reason of the conveyance of the realty involved, and since the testator died intestate as to this devise, that the proceeds thereof passed into the residuum of the estate. Thompson v. Long, 202 Ga. 718, 44 S.E.2d 651 (1947) (decided under former Code 1933, § 113-817).

Devise adeemed. — When a testator conveys to another specific property devised or bequeathed, and does not afterwards become possessed of the property, and the will contains no provision for such contingency, the devise or legacy is adeemed, and such legal result cannot be obviated by extrinsic evidence tending to show that the testator did not intend it. Moncrief v. Shuman, 169 Ga. 217, 150 S.E. 98 (1929) (decided under former Civil Code 1910, § 3908).

When a testator conveys to a third party specific property devised and the will contains no provision for such a contingency, there can be no inquiry into a testator's intention in adeeming specifically bequeathed property. Woodall v. First Nat'l Bank, 223 Ga. 688, 157 S.E.2d 261 (1967) (decided under former Code 1933, § 113-817).

Devise held to be adeemed. — When wife devised one-half interest in real estate to husband by specific devise, but did not devise the proceeds of its sale to husband, the specific devise was adeemed by alienation when testator sold the fee simple title in return for a down payment, note, and security title. Powell v. Thorsen, 253 Ga. 572, 322 S.E.2d 261 (1984) (decided under former O.C.G.A. § 53-2-105).

Exceptions

Exceptions to ademption rule. — There are four exceptions to the rule that ademption occurs when a testator conveys to another the specific property bequeathed, those exceptions are: (1) where the testator afterwards becomes possessed of the same property; (2) where the attempt to convey fails; (3) where the testator exchanges the property for other of like character; and (4) where the testator merely changes the investment of a fund bequeathed. Lang v. Vaughn, 137 Ga. 671, 74 S.E. 270, 40 L.R.A. (n.s.) 542, 1913B Ann. Cas. 52 (1912) (decided under former Code 1933, § 113-817). Woodall v. First Nat'l Bank, 223 Ga. 688, 157 S.E.2d

Exceptions (Cont'd)

261 (1967) (decided under former Code 1933, § 113-817).

A specific devise is adeemed when, after the execution of the will, the testator "conveys" to another the specific property devised unless one of the following four exceptions applies: reacquisition by the testator; failure of the conveyance; receipt of like property in exchange for the devised property and mere change in the investment of a fund. Peacock v. Owens, 244 Ga. 203, 259 S.E.2d 458 (1979) (decided under former Code 1933, § 113-817).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Advancements, §§ 1, 2, 4 et seq., 26 et seq., 43, 74. 80 Am. Jur. 2d, Wills, §§ 1458 et seq., 1460, 1482.

Am. Jur. Proof of Facts. — Ademption by Satisfaction, 1 POF2d 641.

Wills: Ademption of Legacy by Satisfaction or by Extinction, 91 POF3d 277.

C.J.S. — 26B C.J.S., Descent and Distribution, §§ 95 et seq. 97 C.J.S., Wills, § 1742 et seq.

ALR. — What amounts to an ademption or abatement of a legacy of a business or professional practice, 13 A.L.R. 173; 16 A.L.R.2d 1404.

Intent as a factor in determining whether there is an advancement, 26 A.L.R. 1089.

Presumption and burden of proof with respect to advancements to children, 26 A.L.R. 1106; 31 A.L.R.2d 1036.

Applicability of doctrine of advancements to testate succession, 32 A.L.R. 730.

Ademption of bequest of chattel by change in form, 40 A.L.R. 558.

Recovery of excess of advancement over distributable share in estate, 46 A.L.R. 1428.

Items in form of account as advancements, 49 A.L.R. 574.

What included in terms "notes," "securities," etc., in a bequest, 52 A.L.R. 1097.

Ademption or failure of substituted gift made by codicil or later will as preventing revocation, or effecting revival, of original gift to the same legatee or devisee, 59 A.L.R. 1106.

Change from absolute ownership of real property to mortgage interest by way of security, or vice versa, as ademption or revocation of legacy or devise, 65 A.L.R. 632.

Option given by testator before or after execution of will as ademption of specific legacy or devise, 79 A.L.R. 268; 155 A.L.R. 571.

Applicability of doctrine of advancements in case of pretermitted child or grandchild entitled by statute to the share which he would have received if testator had died intestate, 88 A.L.R. 375.

Interest or estate remaining in testator after conveyance or transfer of less than his entire interest or estate in property as passing under previously executed will covering property in question, 117 A.L.R. 1380.

Duty and liability of executor (or administrator with will annexed) in respect of personal property specifically bequeathed, and not needed for payment of debts, 127 A.L.R. 1071.

Doctrine of "advancements" as applicable to transfer by testator to devisee or legatee after execution of will, 142 A.L.R. 524.

Burden of debts and cost of administration as between residuary legatees, and heirs or next of kin who take lapsed, adeemed, or invalid legacies, 144 A.L.R. 476.

Doctrine of election as applicable where testator after the execution of the will transferred to one beneficiary the subject of a specific devise or bequest to another, 147 A.L.R. 735.

Devise of undivided interest as affected by partition of tract subsequent to execution of will, 162 A.L.R. 146.

Will charging distributee's share with advancement to or debt owing by him as invoking doctrine of hotchpot, 165 A.L.R. 899.

Construction and effect of general legacy conditional upon ademption of specific legacy or devise to legatee, 2 A.L.R.2d 819.

Right of general legatee of stocks, bonds, or other securities, where testator

owns at time of death none such as are described in will or less than bequeathed, 22 A.L.R.2d 457.

Satisfaction or ademption of general legacy by inter vivos gift, transfer, or payment to the legatee or another, 26 A.L.R.2d 9.

Right of beneficiary as against estate of insured who borrowed on the policy, 31 A.L.R.2d 979.

Disposition of proceeds of insurance on property specifically bequeathed or devised, 35 A.L.R.2d 1056.

Ademption or revocation of specific devise or bequest by guardian, committee, or conservator of mentally or physically incompetent testator, 51 A.L.R.2d 770.

Codicil as reviving adeemed or satisfied bequest or devise, 58 A.L.R.2d 1072.

What amounts to ademption to specific legacy of corporate stock or other corporate securities, 61 A.L.R.2d 449.

Conclusiveness of testator's statement as to amount of debt or advancement to be charged against legacy or devise, 98 A.L.R.2d 273.

Ademption of bequest of proceeds of property, 45 A.L.R.3d 10.

Change in stock or corporate structure, or split or substitution of stock of corporation, as affecting bequest of stock, 46 A.L.R.3d 7.

Ademption of legacy of business or interest therein, 65 A.L.R.3d 541.

Disposition of insurance proceeds of personal property specifically bequeathed or devised, 82 A.L.R.3d 1261.

Unexplained gratuitous transfer of property from one relative to another as raising presumption of gift, 94 A.L.R.3d 608.

Liability for wrongful autopsy, 18 A.L.R.4th 858.

Ademption of bequest of debt or balance on debt, 25 A.L.R.4th 88.

Proper disposition under will providing for allocation of express percentages or proportions amounting to more or less than whole of residuary estate, 35 A.L.R.4th 788.

Ademption or revocation of specific devise or bequest by guardian, committee, conservator, or trustee of mentally or physically incompetent testator, 84 A.L.R.4th 462.

53-1-11. Value.

Every advancement shall be valued without interest at its value at the time of the transfer unless a value or an interest rate is specified in writing at the time of acceptance or in the transferor's will.

History. — Code 1981, § 53-1-11, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article, "The Time Gap in Wills: Shifting Assets and Shrinking Estates — Obsolescence and Testamentary Planning in Georgia," see 6 Ga. L. Rev. 649 (1972). For article discussing concept of advancements, see 10 Ga. L. Rev. 447 (1976).

COMMENT

This section replaces former 53-4-54. Under this section, an advancement will be valued at its value on the date of the transfer unless a different value is agreed upon in writing at the time the transfer is accepted or in the will of the transferor.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 2542, former Code 1873, § 2583, former Civil Code 1910, § 4056, and former Code 1933, § 113-1017, are included in the annotations for this Code section.

Cited in Sims v. Sims, 39 Ga. 108 (1869); Garrard v. Cody, 51 Ga. 555 (1874); Holder v. Webb, 25 Ga. App. 258, 103 S.E.

98 (1920); Barron v. Barron, 181 Ga. 505, 182 S.E. 851 (1935); Treadwell v. Everett, 185 Ga. 454, 195 S.E. 762 (1938); Cassedy v. Bland, 99 Ga. App. 34, 107 S.E.2d 697 (1959).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Advancements, § 55 et seq.

C.J.S. — 26B C.J.S., Descent and Distribution, § 106.

ALR. — Valuation of property for purposes of advancement, 26 A.L.R. 1178.

Items in form of account as advancements, 49 A.L.R. 574.

Will charging distributee's share with advancement to or debt owing by him as invoking doctrine of hotchpot, 165 A.L.R. 899.

53-1-12. Manner of taking into account.

(a) If a beneficiary has received a satisfaction, the beneficiary shall not receive any other property in replacement of the specific testamentary gift which is the subject of the satisfaction.

(b) If a beneficiary has received an advancement of all or a portion of a demonstrative or general testamentary gift, the value of the demonstrative or general testamentary gift shall be reduced by the value of the advancement.

(c) For purposes of this subsection, the term "distributable share" means the share an heir would receive under the laws of intestacy or a beneficiary would receive under the residuary clause of the transferor's will if the value of all advancements made by the transferor during life, except satisfaction of specific testamentary gifts and advancements of demonstrative or general testamentary gifts, were added to the actual value of the transferor's intestate or residuary estate at death. If a beneficiary has received an advancement of a residuary gift or an heir has received an advancement of an intestate share, the advancement shall be taken into account in the following manner:

(1) If a beneficiary or heir has received an advancement that is less than the value of that person's distributable share under the residuary clause of the transferor's will or the laws of intestacy, the share actually distributed to the beneficiary or heir shall be charged with the advancement so that the beneficiary or heir will receive only the balance remaining of the distributable share; or

(2) If a beneficiary or an heir has received an advancement that is equal to or in excess of the value of that beneficiary's or heir's distributable share, the beneficiary or heir shall receive no further share from the estate.

History. — Code 1981, § 53-1-12, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article, "The Time Gap in Wills: Shifting Assets and Shrinking Estates — Obsolescence and Testamentary Planning in Georgia," see 6 Ga.

L. Rev. 649 (1972). For article discussing concept of advancements, see 10 Ga. L. Rev. 447 (1976). For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004).

COMMENT

This section replaces former OCGA Sec. 53-4-51. Under subsection (a), in the event of the satisfaction of a specific testamentary gift, the beneficiary receives no property in replacement of that gift. (This subsection reflects the rule of ademption by satisfaction that appeared in former OCGA Sec. 53-2-105.) Under subsection (b), if the advancement is of a demonstrative or general testamentary gift, the amount of the advancement is charged against any amount the beneficiary is slated to receive under the will. Subsection (c) outlines the traditional "hotchpot" method of taking advancements into account. This method is applied in the case of a beneficiary of a residuary share of the transferor's estate or an heir. The "hotchpot" is calculated by adding to the value of the transferor's residuary or intestate estate the value of all advancements made by the transferor except advancements of demonstrative or general testamentary gifts and satisfactions. Then each recipient's "distributable share" is determined. If an advancement is less than the recipient's distributable share of the estate, the value of the advancement must be charged against any share the recipient is due to receive. For example, suppose the recipient (R) received an advancement valued at $50,000. The transferor dies intestate, survived only by three children (A, B, and R) and with an intestate estate of $250,000. The value of R's advancement will be added back to the value of the estate, bringing the value of the "hotchpot" estate to $300,000. Under the laws of intestacy, each of the children is due to receive 1/3 of the estate ("distributable shares" of $100,000 each). However, since R has already received $50,000 as an advancement, R's distributable share of $100,000 is charged with the advancement so that R receives only an additional $50,000 from the probate estate. A and B each receive $100,000. If the recipient's advancement equals or exceeds the value of the recipient's distributable share, then the advancement is ignored and the recipient receives nothing further from the estate. For example, suppose R received an advancement of $150,000 and the transferor died intestate with an estate of $180,000. The hotchpot estate would equal $330,000 ($180,000 + $150,000), thus entitling each heir to a "distributable share" of $110,000. However, since R has already received $150,000, the value of the advancement is not brought into the hotchpot estate. R receives nothing further from the estate, and A and B split the $180,000 estate evenly between themselves.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1853-54, p. 41, §§ 1, 2, former Code 1863, § 2540, former Code 1868, § 2541, former Code 1873, § 2582, former Code 1882, § 2582, former Civil Code 1895, § 3477, former Civil Code 1910, § 4055, and former Code 1933, § 113-1016, are included in the annotations for this Code section.

In cases of intestacy, law favors equal distribution among intestate's heirs. — In an accounting under this statute when the main object of the litigation is to ascertain and settle authoritatively the amount which each distributee has been advanced by the intestate, the verdict should find the several amounts specifically. The law, and not the jury, determines whether advancements shall be accounted for. Andrews v. Halliday, 63 Ga. 263 (1879) (decided under former Code 1873, § 2582).

There are only two ways by which the scheme of equality among the heirs may be upset. The first, of course, is by the making of a will on the part of the ancestor providing for a distribution of the

ancestor's estate in a manner other than that set forth by law; and, the second is by a valid and binding contract executed between the ancestor and the heir which clearly shows a meeting of the minds between them acknowledging on the part of the heir receipt in full for the heir's prospective share of the ancestor's estate. Such a contract when entered into is binding and enforceable. Cassedy v. Bland, 99 Ga. App. 34, 107 S.E.2d 697 (1959) (decided under former Code 1933, § 113-1016).

Cited in Bransford v. Crawford, 51 Ga. 20 (1874); Hobby v. Ford, 149 Ga. 176, 99 S.E. 624 (1919); Treadwell v. Everett, 185 Ga. 454, 195 S.E. 762 (1938); Beard v. Beard, 197 Ga. 487, 29 S.E.2d 595 (1944); Harrison v. Barber, 200 Ga. 225, 36 S.E.2d 662 (1946).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Advancements, § 50 et seq.

C.J.S. — 26B C.J.S., Descent and Distribution, § 105.

ALR. — Recovery of excess of advancement over distributable share in estate, 46 A.L.R. 1428.

Doctrine of "advancements" as applicable to transfer by testator to devisee or legatee after execution of will, 142 A.L.R. 524.

Will charging distributee's share with advancement to or debt owing by him as invoking doctrine of hotchpot, 165 A.L.R. 899.

Satisfaction or ademption of general legacy by inter vivos gift, transfer, or payment to the legatee or another, 26 A.L.R.2d 9.

53-1-13. Consideration of satisfaction or advancement when recipient predeceases transferor.

Unless the writing described in subsection (c) of Code Section 53-1-10 or the testator's will expressly provides otherwise, a satisfaction or an advancement is considered when computing the division and distribution of the transferor's estate even if the recipient of the satisfaction or advancement fails to survive the transferor.

History. — Code 1981, § 53-1-13, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article, "The Time Gap in Wills: Shifting Assets and Shrinking Estates — Obsolescence and Testamentary Planning in Georgia," see 6 Ga. L. Rev. 649 (1972). For article discussing concept of advancements, see 10 Ga. L. Rev. 447 (1976).

COMMENT

This section replaces former OCGA Sec. 53-4-52. Under this section, even if the recipient of the satisfaction or advancement fails to survive the transferor, the transfer will be considered when distributing the transferor's estate unless the writing or the transferor's will expressly provides otherwise.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-1015, are included in the annotations for this Code section.

Cited in Treadwell v. Everett, 185 Ga. 454, 195 S.E. 762 (1938).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Advancements, §§ 5, 8.

C.J.S. — 26B C.J.S., Descent and Distribution, § 98.

ARTICLE 3

RENUNCIATION

53-1-20. Renouncing property; procedures; relation back; abridgement; fiduciary duties.

(a) For purposes of this Code section, the term "property" includes any interest in property and any power over or right with respect to the property.

(b) Any person to whom an interest in property is transferred or who succeeds to property by contract or by operation of law may renounce the property in whole or in part as provided in this Code section. A person may renounce even if a spendthrift or similar restriction applies to the property renounced. Persons who may renounce include fiduciaries acting on behalf of an individual, such as personal representatives, trustees, conservators, or guardians, as well as duly authorized attorneys in fact, whether acting on behalf of an individual or fiduciary.

(c) A renunciation must be made by a written instrument that describes the renounced property, declares the renunciation and the extent of it, and is signed by the person making the renunciation.

(d) The written instrument must be received by the transferor of the property, the transferor's legal representative, or other holder of title to the property not later than the date which is nine months after the later of:

(1) The date of the transfer; or

(2) The day on which the person making the renunciation reaches the age of 21.

The instrument may also be filed in the probate court of the county in which proceedings concerning the transferor's estate are pending or in which they could be commenced and, in the case of real property, in the real property records of the county in which the real property is located. An instrument so filed in the probate court shall be conclusively presumed to have been received by the personal representative of the transferor's estate not later than the date of such filing, but earlier receipt may be shown.

(e) A person who has accepted property or any of its benefits may not renounce the property.

(f)(1)(A) Except as otherwise provided by the will or other governing instrument, a renunciation shall cause the renounced property to pass as if the person renouncing had predeceased the decedent or, in the case of property passing upon exercise of a power of appointment, as if the person renouncing had predeceased the holder of the power, even if the acceleration of a contingent remainder or other interest results. A will or other governing instrument may otherwise provide expressly or by implication, but the fact that a remainder or other future interest following a renounced interest is conditioned upon surviving the holder of such renounced interest shall not, without more, be sufficient to indicate that such conditioned interest should not accelerate by reason of such renunciation.

(B) Notwithstanding subparagraph (A) of this paragraph, solely for the purposes of the proviso of paragraph (5) and the proviso of paragraph (7) of subsection (c) of Code Section 53-2-1, any individual renouncing who is the only sibling or the only aunt or uncle surviving the decedent shall not be deemed to have predeceased the decedent.

(2) Renounced property that is the subject of an attempted outright gift shall be treated as an incomplete gift.

(3) A renounced power over property shall be treated as if such power had not been created with respect to the person renouncing such power.

(4) The expression in a renunciation of an intent or desire that the property pass to certain persons shall be considered merely precatory and shall have no legal effect unless specifically declared to be a condition of the renunciation.

(g) In every case a renunciation relates back for all purposes to the applicable date among the following:

(1) The date of death of the decedent;

(2) The date of the death of the holder of the power of appointment;

(3) The date the gift was attempted; or

(4) The date the power was created.

(h) This Code section does not abridge the right of any person to transfer or renounce any property under any other statute or common law. Any renunciation that is otherwise valid but fails to meet the requirements of subsections (c) and (d) of this Code section shall operate

as a transfer of the property to those persons who would have received it had the renunciation met those requirements.

(i) Nothing in this Code section alters the duties of any fiduciary to act in the best interests of the person the fiduciary represents. This subsection shall not, however, limit the power granted by this Code section to a fiduciary to renounce property.

History. — Code 1981, § 53-1-20, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 7; Ga. L. 2002, p. 1322, § 1; Ga. L. 2007, p. 210, § 1/HB 139; Ga. L. 2011, p. 752, § 53/HB 142.

Law reviews. — For annual survey of wills, trusts, and administration of estates, see 42 Mercer L. Rev. 491 (1990). For annual survey article discussing wills, trusts, and administration of estates, see 51 Mercer L. Rev. 487 (1999).

For note, "Linkous v. Candler: The Future of Acceleration of Remainders in Georgia," see 16 Ga. St. U.L. Rev. 879 (2000).

COMMENT

This subsection replaces former OCGA Sec. 53-2-115. The section mirrors the requirements of Internal Revenue Code section 2518 and related United States Treasury Regulations. The section is not intended to preempt other common law or statutory forms of renunciation but rather to provide a mechanism whereby persons may make renunciations that constitute "qualified disclaimers" under that Internal Revenue Code section.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-2-115 are included in the annotations for this Code section.

Term "encumbrance" in paragraph (d)(1) of former O.C.G.A. § 53-2-115 referred to an encumbrance placed on the property by the disclaimant, not an encumbrance existing at the time of the decedent's death. Brown v. Momar, Inc., 201 Ga. App. 542, 411 S.E.2d 718 (1991) (decided under former O.C.G.A. § 53-2-115).

"Acceptance". — Heir's acceptance of $460 from decedent's accounts for use in purchasing personal clothing did not constitute the type of "acceptance" sufficient to preclude the heir's timely renunciation of the heir's testamentary interest. Jordan v. Trower, 208 Ga. App. 552, 431 S.E.2d 160 (1993) (decided under former O.C.G.A. § 53-2-115).

Acceleration "otherwise indicated" by testator. — When, under the will, no wife or child of the testator's sons would have the right of possession to trust property prior to the death of the sons, the inter vivos renunciation of their immediate interests by the sons did not accelerate the remainder interests. Wetherbee v. First State Bank & Trust Co., 266 Ga. 364, 466 S.E.2d 835 (1996) (decided under former O.C.G.A. § 53-2-115).

Acceleration prohibited when class could not be ascertained. — Trust agreement prohibited acceleration when the class of remaindermen consisted of living grandchildren of the settlor and beneficiary, so that the class could not be ascertained until the death of the settlor's and beneficiary's last child. Linkous v. Candler, 270 Ga. 284, 508 S.E.2d 657 (1998) (decided under former O.C.G.A. § 53-2-115).

Effect of renunciation on Medicaid benefits. — While a Medicaid claimant was entitled under O.C.G.A. § 53-1-20 to renounce an inheritance under the will of the claimant's spouse, this did not insulate that choice from the application of Medicaid's eligibility regulations. Thus,

the Georgia Department of Community Health properly denied Medicaid vendor benefits to the claimant. Ga. Dep't of Cmty. Health v. Medders, 292 Ga. App. 439, 664 S.E.2d 832 (2008).

Under O.C.G.A. § 53-1-20(g), a beneficiary's renunciation of a devise or bequest relates back to the date of death. However, nothing in § 53-1-20 requires the Georgia Department of Community Health to ignore the date a Medicaid claimant files a renunciation in applying its transfer-of-resource policies. Ga. Dep't of Cmty. Health v. Medders, 292 Ga. App. 439, 664 S.E.2d 832 (2008).

RESEARCH REFERENCES

ALR. — Relinquishment of interest by life beneficiary in possession as accelerating remainder of which there is substitutional gift in case primary remainderman does not survive life beneficiary, 7 A.L.R.4th 1084.

Creditor's right to prevent debtor's renunciation of benefit under will or debtor's election to take under will, 39 A.L.R.4th 633.

CHAPTER 2

DESCENT AND DISTRIBUTION

Article 1

General Provisions

Sec.
53-2-1. Rules of inheritance when decedent dies without will; effect of abandonment of child.
53-2-2. Effect of decree of adoption [Repealed].
53-2-3. Inheritance by children born out of wedlock.
53-2-4. Inheritance from children born out of wedlock.
53-2-5. Children conceived by artificial insemination.
53-2-6. Individual related to decedent through two or more lines of relationship.
53-2-7. Vesting of title to property; right to possession.
53-2-8. Death intestate, and without ascertainable heirs, of spouse of intestate decedent.

Article 2

Judicial Determination of Heirs and Interests

53-2-20. Jurisdiction of probate or superior court.
53-2-21. Filing of petition.
53-2-22. Petition by person claiming to be heir or distributee.
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53-2-23. Superior court procedure.
53-2-24. Probate court procedure.
53-2-25. Intervention by person claiming to be heir or distributee.
53-2-26. Effect of findings of court.
53-2-27. DNA testing for kinship; procedure; costs.

Article 3

Distribution of Estate in Kind

53-2-30. Authority of administrator; method of distribution provided for in will.
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Article 4

Dispensing with Administration

53-2-40. Petition.
53-2-41. Issuance of citation and order; objections.
53-2-42. Right of action by creditor.

Article 5

Escheat

53-2-50. Definition.
53-2-51. Procedure.

Cross references. — Payment of outstanding wages to surviving spouse or minor children upon death of employee, § 34-7-4. Manner of payment of workers' compensation benefits of deceased employee, § 34-9-13. Escheat of estate when intestate leaves no heirs, T. 53, C. 2, A. 5.

Editor's notes. — This chapter was effective January 1, 1998, to the extent that no vested rights of title, year's support, succession, or inheritance are impaired, as provided by the version of Code Section 53-1-1 enacted by Ga. L. 1996, p. 504, § 10, as amended by Ga. L. 1997, p. 1352, § 1.

Ga. L. 1996, p. 504, § 10, effective January 1, 1998, repealed the Code sections formerly codified at this chapter, and enacted the current chapter. The former chapter consisted of §§ 53-2-1 through 53-2-10 (Article 1); 53-2-20 through 53-2-26 (Article 2); 53-2-40, 53-2-40.1, and 53-2-41 through 53-2-51 (Article 3); 53-2-70 through 53-2-77 (Article 4); and 53-2-90 through 53-2-117 (Article 5), and was based on Laws 1677, Cobb's 1851

Digest, p. 1129; Laws 1834, Cobb's 1851 Digest, p. 347; Laws 1836, Cobb's 1851 Digest, p. 348; Ga. L. 1851-52, p. 104, § 1; Orig. Code 1863, §§ 2215, 2362 through 2377, 2379, 2381 through 2388, 2419 through 2448, 2450, 3093 through 3095; Code 1868, §§ 2210, 2359 through 2364 through 2374, 2376 through 2384, 2415 through 2444, 2446, 3105 through 3107; Ga. L. 1869, p. 163, § 1; Code 1873, §§ 2236, 2394 through 2409, 2411 through 2419, 2446, 2451 through 2480, 2482, 3162 through 3164; Code 1882, §§ 2236, 2394 through 2409, 2411 through 2419, 2446, 2451 through 2480, 2482, 3162 through 3164; Civil Code 1895, §§ 3067, 3253 through 3277, 3314, 3319 through 3350, 3352, 4013 through 4015; Civil Code 1910, §§ 3643, 3827 through 3851, 3890, 3895 through 3926, 3928, 4610 through 4612; Code 1933, §§ 37-502 through 37-504, 113-101 through 113-109, 113-201 through 113-210, 113-301 through 113-306, 113-401 through 113-409, 113-501 through 113-504, 113-801 through 113-824; Ga. L. 1937, p. 430, § 1; Ga. L. 1952, p. 196, § 1; Ga. L. 1958, p. 657, §§ 1-3, 10; Ga. L. 1964, Ex. Sess., p. 16, §§ 1-3; Ga. L. 1967, p. 718, § 1; Ga. L. 1968, p. 1070, § 1; Code 1933, § 113-824, enacted by Ga. L. 1972, p. 452, § 1; Ga. L. 1979, p. 1292, § 1; Ga. L. 1984, p. 834, § 1; Code 1981, § 53-2-40.1, enacted by Ga. L. 1984, p. 834, § 2; Ga. L. 1988, p. 1359, § 1; Ga. L. 1990, p. 299, § 1; Ga. L. 1990, p. 372, § 1; Ga. L. 1993, p. 1057, § 1.

Law reviews. — For note, "Not Just For Kids: Why Georgia's Statutory Disinheritance of Deadbeat Parents Should Extend to Intestate Adults," see 43 Ga. L. Rev. 867 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 34 Am. Jur. 2d, Federal Taxation, § 2700 et seq. 42 Am. Jur. 2d, Inheritance, Estate, and Gift Taxes, § 170.

Am. Jur. Trials. — Decisionmaking at the End of Life, 63 Am. Jur. Trials 1.

ALR. — Statutory or constitutional provision allowing widow but not widower to take against will and receive dower interests, allowances, homestead rights, or the like as denial of equal protection of law, 18 A.L.R.4th 910.

Attorney's delay in handling decedent's estate as ground for disciplinary action, 21 A.L.R.4th 75.

What passes under terms "furniture" or "furnishings" in will, 21 A.L.R.4th 383.

Sufficiency of evidence to support grant of summary judgment in will probate or contest proceedings, 53 A.L.R.4th 561.

What passes under term "personal property" in will, 31 A.L.R.5th 499.

ARTICLE 1

GENERAL PROVISIONS

Law reviews. — For note, "Vesting Title in a Murderer: Where is the Equity in the Georgia Supreme Court's Interpretation of the Slayer Statute in Levenson?," see 45 Ga. L. Rev. 877 (2011).

53-2-1. Rules of inheritance when decedent dies without will; effect of abandonment of child.

(a) As used in this Code section, the term:

(1) "Abandon" means that a parent of a minor child, without justifiable cause, fails to communicate with the minor child, care for the minor child, and provide for the minor child's support as required

by law or judicial decree for a period of at least one year immediately prior to the date of the death of the minor.

(2) "Abandonment" means the act of abandoning.

(3) "Minor child" means a person who is less than 18 years of age.

(b) For purposes of this Code section:

(1) Children of the decedent who are born after the decedent's death are considered children in being at the decedent's death, provided they were conceived prior to the decedent's death, were born within ten months of the decedent's death, and survived 120 hours or more after birth; and

(2) The half-blood, whether on the maternal or paternal side, are considered equally with the whole-blood, so that the children of any common parent are treated as brothers and sisters to each other.

(c) Except as provided in subsection (d) of this Code section, when a decedent died without a will, the following rules shall determine such decedent's heirs:

(1) Upon the death of an individual who is survived by a spouse but not by any child or other descendant, the spouse is the sole heir. If the decedent is also survived by any child or other descendant, the spouse shall share equally with the children, with the descendants of any deceased child taking that child's share, per stirpes; provided, however, that the spouse's portion shall not be less than a one-third share;

(2) If the decedent is not survived by a spouse, the heirs shall be those relatives, as provided in this Code section, who are in the nearest degree to the decedent in which there is any survivor;

(3) Children of the decedent are in the first degree, and those who survive the decedent shall share the estate equally, with the descendants of any deceased child taking, per stirpes, the share that child would have taken if in life;

(4) Parents of the decedent are in the second degree, and those who survive the decedent shall share the estate equally;

(5) Siblings of the decedent are in the third degree, and those who survive the decedent shall share the estate equally, with the descendants of any deceased sibling taking, per stirpes, the share that sibling would have taken if in life; provided, however, that, subject to the provisions of paragraph (1) of subsection (f) of Code Section 53-1-20, if no sibling survives the decedent, the nieces and nephews who survive the decedent shall take the estate in equal shares, with the descendants of any deceased niece or nephew taking, per stirpes, the share that niece or nephew would have taken if in life;

(6) Grandparents of the decedent are in the fourth degree, and those who survive the decedent shall share the estate equally;

(7) Uncles and aunts of the decedent are in the fifth degree, and those who survive the decedent shall share the estate equally, with the children of any deceased uncle or aunt taking, per stirpes, the share that uncle or aunt would have taken if in life; provided, however, that, subject to the provisions of paragraph (1) of subsection (f) of Code Section 53-1-20, if no uncle or aunt of the decedent survives the decedent, the first cousins who survive the decedent shall share the estate equally; and

(8) The more remote degrees of kinship shall be determined by counting the number of steps in the chain from the relative to the closest common ancestor of the relative and decedent and the number of steps in the chain from the common ancestor to the decedent. The sum of the steps in the two chains shall be the degree of kinship, and the surviving relatives with the lowest sum shall be in the nearest degree and shall share the estate equally.

(d) Except as provided in Code Sections 19-7-1 and 51-4-4 for the right of recovery for the wrongful death of a child, when a minor child dies without a will, a parent who willfully abandoned his or her minor child and has maintained such abandonment shall lose all right to intestate succession to the minor child's estate and shall not have the right to administer the minor child's estate. A parent who has been deprived of the custody of his or her minor child under an order of a court of competent jurisdiction and who has substantially complied with the support requirements of the order shall not be barred from inheriting from the minor child's estate.

(e) For cases in which abandonment is alleged, the moving party shall file a motion with the probate court requesting the judge to determine the issue of abandonment and shall serve all parties as set forth in subsection (f) of this Code section. A hearing shall be conducted and all parties shall have the opportunity to present evidence regarding the party's relationship with the decedent. The burden of proof to show an abandonment is on the person asserting the abandonment by clear and convincing evidence.

(f) All parties to a motion filed pursuant to subsection (e) of this Code section shall be served in accordance with Chapter 11 of this title. If a party cannot be personally served and the party's interest in an estate is subject to forfeiture pursuant to subsection (d) of this Code section, the judge shall appoint a guardian ad litem for the party. If a party cannot be personally served, the citation shall also be published in the newspaper in which sheriff's advertisements are published in the county where the party was last known to reside.

(g) In the event that a parent is disqualified from taking a distributive share in the estate of a decedent under subsection (d) of this Code section, the estate of such decedent shall be distributed in accordance with subsection (c) of this Code section as though the parent had predeceased the decedent.

History. — Code 1981, § 53-2-1, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 8; Ga. L. 2007, p. 210, § 2/HB 139; Ga. L. 2008, p. 324, § 53/SB 455.

Law reviews. — For article surveying wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982). For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004). For annual survey of wills, trusts, guardianships, and fiduciary administration, see 57 Mercer L. Rev. 403 (2005). For annual survey of wills, trusts, guardianships, and fiduciary administration, see 58 Mercer L. Rev. 423 (2006). For survey article on wills, trusts, guardianships, and fiduciary administration, see 59 Mercer L. Rev. 447 (2007). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 64 Mercer L. Rev. 325 (2012). For article, "Marriage, Death and Taxes: The Estate Planning Impact of Windsor and Obergefell on Georgia's Same Sex Spouses," see 21 Ga. St. Bar. J. 9 (Oct. 2015).

For note, "Status or Contract? A Comparative Analysis of Inheritance Rights under Equitable Adoption and Domestic Partnership Doctrines," see 39 Ga. L. Rev. 675 (2005). For note, "Not Just For Kids: Why Georgia's Statutory Disinheritance of Deadbeat Parents Should Extend to Intestate Adults," see 43 Ga. L. Rev. 867 (2009). For note, "Vesting Title in a Murderer: Where is the Equity in the Georgia Supreme Court's Interpretation of the Slayer Statute in Levenson?," see 45 Ga. L. Rev. 877 (2011).

COMMENT

Subsection (a) carries forward the second sentences of former OCGA Sec. 53-4-2(4) and Sec. 53-4-2(5). Paragraph (a)(1) adds the requirement that a child of the decedent be conceived prior to the decedent's death, be born within ten months of the decedent's death, and survive birth by at least 120 hours or more to be considered an heir.

Subsection (b) replaces former OCGA Secs. 53-4-1 through 53-4-3 and differs from those Code sections in the treatment of the surviving spouse, parents of the decedent, and descendants of the siblings of the decedent. A surviving spouse is guaranteed at least one-third of the decedent's intestate estate, as opposed to one-fourth of the estate under former Sec. 53-4-2(2). While former OCGA Sec. 53-4-2(6) included a decedent's parents in the same degree as the decedent's siblings, the new Code section puts parents in a degree superior to that of siblings. Former Sec. 53-4-2(5) included in the second degree only children or grandchildren of the decedent's siblings; the new Section includes all descendants of the decedent's siblings.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Laws 1841, Cobb's 1851 Digest, p. 296, former Laws 1845, Cobb's 1851 Digest, p. 297, former Code 1868, §§ 1752 and 2448, former Code 1873, §§ 1762 and 2484, former Civil Code 1910, § 3931, and former O.C.G.A. §§ 53-4-1 and 53-4-2 are included in the annotations for this Code section.

Posthumous child qualified as decedent's child. — Decedent's posthu-

mous, out-of-wedlock child was entitled to pursue a wrongful death claim under O.C.G.A. § 51-4-2 to the exclusion of the decedent's parents. Under the statute pertaining to descent and distribution, O.C.G.A. § 53-2-1(a)(1), the posthumous child qualified as the decedent's child and to ignore the laws of descent and distribution would run counter to the essence of a wrongful death claim; simply because the decedent's parents wished to share in any award did not render an inequitable result in light of the priority ordinarily given to children by O.C.G.A. § 19-7-1(c)(2). deVente v. Flora, 300 Ga. App. 10, 684 S.E.2d 91 (2009).

Must be an interested person to have standing to offer will to probate. — Trial court erred by denying two children's motion to dismiss the petition to probate filed by the decedent's brother because the brother lacked standing to offer the will to probate under O.C.G.A. § 53-5-2 because the brother was not an interested person as the brother was not a judgment creditor of an heir of the decedent, a purchaser from an heir, a person claiming under an earlier will, or an administrator appointed for the decedent before discovery of the will. Ray v. Stevens, 295 Ga. 895, 764 S.E.2d 809 (2014).

Damages. — Trial court erred in finding that a stepfather's heirs had a purchase money resulting trust in a homeplace as the stepfather's heirs failed to rebut the presumption that the homeplace was a gift to a decedent mother from the stepfather; the matter was remanded to the trial court to determine damages to be awarded to the mother's children under O.C.G.A. § 53-2-1(b)(1). In re Estate of Thornton, 275 Ga. App. 202, 620 S.E.2d 410 (2005).

Impact of parent's cruel treatment of decedent's child. — Despite evidence of a parent's cruel treatment of the parent's decedent child, the trial court erred in finding that the parent forfeited parental rights, and thus lost the status as a parent and, in so doing, lost the right to recover as an heir of the decedent's estate, as the loss of parental power did not necessarily result in a parent's loss of a right to inherit as an heir from the estate of that parent's child, short of having the parent's rights terminated prior to the child's death; hence, summary judgment against the parent on the issue was reversed. Blackstone v. Blackstone, 282 Ga. App. 515, 639 S.E.2d 369 (2006).

Cousins stand in equal degree. Redd v. Clopton, 17 Ga. 230 (1855) (decided under Laws 1845, Cobb's 1851 Digest, p. 297).

Degrees of kinship generally. — Degree of kinship is counted from the intestate up to the common ancestor, one degree for each generation, thence down the collateral line to the contestant. The number of degrees in the longer of these two lines is the degree of kindred between the intestate and the claimant. Wetter v. Habersham, 60 Ga. 193 (1878) (decided under former Code 1873, §§ 1762, 2484).

As between a living uncle of the intestate and children of such uncle and a child of a predeceased aunt and the children of another predeceased aunt, the distribution shall be per capita among all of the parties in the case. Weinman v. Scarborough, 154 Ga. 431, 114 S.E. 712 (1922) (decided under former Civil Code 1910, § 3931).

Term "uncle" as used in former O.C.G.A. § 53-4-2 was limited to those persons who have a common ancestor with the niece or nephew. Hill v. Newman, 254 Ga. 57, 325 S.E.2d 767 (1985) (decided under former O.C.G.A. § 53-4-2).

By statute changing the English rule, the wife is expressly made an "heir" of her husband. Gibbon v. Gibbon, 40 Ga. 562 (1869) (decided under former Code 1868, §§ 1752, 2448).

Posthumous children inherit as though born at the time of the intestate's death. Morrow v. Scott, 7 Ga. 535 (1849) (decided under Laws 1841, Cobb's 1851 Digest, p. 296).

Paternal and maternal half blood inherits equally with whole blood. — When a widow dies intestate leaving one child by one marriage and two children and the children of a third child, deceased, by a second marriage, her estate descends in four equal parts, one each to the living children per capita, and one per stirpes to be divided among the children of the deceased child. Odam v. Caruthers, 6 Ga. 39 (1849) (decided under Laws 1841, Cobb's

1851 Digest, p. 296); Reed v. Norman, 157 Ga. 183, 121 S.E. 310 (1924) (decided under former Civil Code 1910, § 3731).

Legitimates and illegitimates inherit equally from the mother. Houston v. Davidson, 45 Ga. 574 (1872) (decided under former Civil Code 1910, § 3731).

An illegitimate half-niece would not take under this statute by representation from a legitimate half-uncle on her maternal side when the latter's property came through the latter's father, not the latter's mother. Rhodes v. Williams, 143 Ga. 342, 85 S.E. 105 (1915) (decided under former Civil Code 1910, § 3731).

Virtual adoption. — Trial court erred by granting a biological son's motion for partial summary judgment on the issue of virtual adoption asserted by the purported adopted daughter because the court clearly erred by misinterpreting the requirement of partial performance of the agreement to adopt and erroneously concluded that an established virtual adoption can be undone by showing that the purported adopted daughter formed a relationship with the child's natural father after learning of his existence when a teenager. Sanders v. Riley, 296 Ga. 693, 770 S.E.2d 570 (2015).

Cited in Houston v. Davidson, 45 Ga. 574 (1872); Wetter v. Habersham, 60 Ga. 193 (1878); Ector v. Grant, 112 Ga. 557, 37 S.E. 984, 53 L.R.A. 723 (1901); Raburn v. Bradshaw, 124 Ga. 552, 52 S.E. 922 (1905); Rhodes v. Williams, 143 Ga. 342, 85 S.E. 105 (1915); Pylant v. Burns, 153 Ga. 529, 112 S.E. 455, 28 A.L.R. 423 (1922); B.B. ex rel. A.L.B. v. Schweiker, 643 F.2d 1069 (5th Cir. 1981); Burnett v. Schweiker, 643 F.2d 1168 (5th Cir. 1981); Chapman v. McClelland, 248 Ga. 725, 286 S.E.2d 290 (1982); Cain v. Cain, 176 Ga. App. 671, 337 S.E.2d 377 (1985); Wilson v. James, 260 Ga. 234, 392 S.E.2d 5 (1990); McClinton v. Sullivan, 208 Ga. App. 411, 430 S.E.2d 794 (1993); In re Last Will of Lewis, 263 Ga. 349, 434 S.E.2d 472 (1993); McClinton v. Sullivan, 263 Ga. 711, 438 S.E.2d 71 (1994); Bacon v. Smith, 222 Ga. App. 542, 474 S.E.2d 728 (1996); Haley v. Regions Bank, 277 Ga. 85, 586 S.E.2d 633 (2003); Progressive Classic Ins. Co. v. Nationwide Mut. Fire Ins. Co., 294 Ga. App. 787, 670 S.E.2d 497 (2008).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 10 Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 700.

14 Am. Jur. Pleading and Practice Forms, Inheritance, Estate, and Gift Taxes, § 2.

ALR. — Applicability of doctrine of advancements to testate succession, 32 A.L.R. 730.

Extent of rights of surviving spouse who elects to take against will in profits of or increase in value of estate accruing after testator's death, 7 A.L.R.4th 989.

Prior institution of annulment proceedings or other attack on validity of one's marriage as barring or estopping one from entitlement to property rights as surviving spouse, 31 A.L.R.4th 1190.

Descent and distribution: rights of inheritance as between kindred of whole and half blood, 47 A.L.R.4th 561.

53-2-2. Effect of decree of adoption.

Reserved. Repealed by Ga. L. 1997, p. 1352, § 3, effective January 1, 1998.

Editor's notes. — This Code section, enacted by Ga. L. 1996, p. 504, § 10, was to become effective January 1, 1998, but was repealed and reserved by Ga. L. 1997, p. 1352, § 3.

Law reviews. — For article commenting on the 1997 repeal of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

53-2-3. Inheritance by children born out of wedlock.

The rights of inheritance of a child born out of wedlock shall be as follows:

(1) A child born out of wedlock may inherit in the same manner as though legitimate from or through the child's mother, the other children of the mother, and any other maternal kin;

(2)(A) A child born out of wedlock may not inherit from or through the child's father, the other children of the father, or any paternal kin by reason of the paternal kinship, unless:

(i) A court of competent jurisdiction has entered an order declaring the child to be legitimate, under the authority of Code Section 19-7-22 or such other authority as may be provided by law;

(ii) A court of competent jurisdiction has otherwise entered a court order establishing paternity;

(iii) The father has executed a sworn statement signed by him attesting to the parent-child relationship;

(iv) The father has signed the birth certificate of the child; or

(v) There is other clear and convincing evidence that the child is the child of the father.

(B)(i) Subparagraph (A) of this paragraph notwithstanding, a child born out of wedlock may inherit from or through the father, other children of the father, or any paternal kin by reason of the paternal kinship if evidence of the rebuttable presumption of paternity described in this subparagraph is filed with the court before which proceedings on the estate are pending and the presumption is not overcome to the satisfaction of the trier of fact by clear and convincing evidence.

(ii) There shall exist a rebuttable presumption of paternity of a child born out of wedlock if parentage-determination genetic testing establishes at least a 97 percent probability of paternity. Parentage-determination genetic testing shall include, but not be limited to, red cell antigen, human leucocyte antigen (HLA), red cell enzyme, and serum protein electrophoresis tests or testing by deoxyribonucleic acid (DNA) probes.

(C) If any one of the requirements of divisions (i) through (v) of subparagraph (A) of this paragraph is fulfilled, or if the presumption of paternity set forth in subparagraph (B) of this paragraph shall have been established and shall not have been rebutted by clear and convincing evidence, a child born out of wedlock may

inherit in the same manner as though legitimate from and through the child's father, the other children of his or her father, and any other paternal kin;

(3) In distributions under this Code section, the children of a deceased child born out of wedlock shall represent that deceased child.

History. — Code 1981, § 53-2-3, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 4.

Law reviews. — For article surveying wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982). For article surveying 1982 Eleventh Circuit cases involving constitutional civil law, see 34 Mercer L. Rev. 1221 (1983). For annual survey of law of domestic relations, see 38 Mercer L. Rev. 179 (1986). For annual survey of law of wills, trusts, and administration of estates, see 38 Mercer L. Rev. 417 (1986). For article, "Georgia Inheritance Rights of Children Born Out of Wedlock," see 23 Ga. St. B.J. 28 (1986). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997). For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004). For annual survey of wills, trusts, guardianships, and fiduciary administration, see 57 Mercer L. Rev. 403 (2005). For survey article on wills, trusts, guardianships, and fiduciary administration, see 60 Mercer L. Rev. 417 (2008). For annual survey of law on wills, trusts, guardianships, and fiduciary administration, see 62 Mercer L. Rev. 365 (2010). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 67 Mercer L. Rev. 273 (2015).

For note on the role of a judicial determination of paternity in the inheritance rights of illegitimate children in Georgia, see 16 Ga. L. Rev. 170 (1981). For note on 1991 amendment of former O.C.G.A. § 53-4-4, see 8 Ga. St. U.L. Rev. 197 (1992).

For comment on equitable adoption, equitable legitimation, and inheritance in extralegal family arrangements, see 48 Emory L.J. 943 (1999).

COMMENT

This Code section carries over the concepts of former OCGA Sec. 53-4-4. Subsection (a) of the former Code section is eliminated as unnecessary. Subsection 2(A)(v) of the current law modifies the former law by requiring clear and convincing evidence of the paternity and the existence of a de facto parent-child relationship, or proof that such relationship would have existed if the father had not died before the child was born. This replaces the requirement of former law that it be shown that the father intended the child to share in the father's estate in the same manner as if the child were legitimate.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1882, § 1800, former Civil Code 1910, § 3029, and former O.C.G.A. § 53-4-4 are included in the annotations for this Code section.

Constitutionality. — Georgia's pre-1980 intestacy scheme concerning illegitimate children (formerly Code 1933, § 113-904) was unconstitutional as a violation of the equal protection clause of the Fourteenth Amendment, because the statute excluded significant categories of illegitimates whose inheritance rights could be recognized without jeopardizing the orderly administration of estates. Poulos v. McMahan, 250 Ga. 354, 297 S.E.2d 451 (1982) (decided under former

O.C.G.A. § 53-4-4); Hill v. Newman, 254 Ga. 57, 325 S.E.2d 767 (1985) (decided under former O.C.G.A. § 53-4-4).

Sufficient evidence of right to inherit. — Right to inherit under O.C.G.A. § 53-2-3 was established notwithstanding the fact that decedent never took steps to legitimate petitioner where decedent acknowledged petitioner as his biological child and acknowledged petitioner's son as his grandchild. There was a rebuttable presumption that the man who was married to claimant's mother at the time of claimant's birth was the biological father. In re Estate of Slaughter, 246 Ga. App. 314, 540 S.E.2d 269 (2000).

Born-out-of-wedlock claimant was entitled to a rebuttable presumption under O.C.G.A. § 53-2-3(2)(B) that a decedent was the claimant's father, and that the claimant was entitled to inherit from the estate because the claimant produced parentage-determinative genetic testing, which established at least a 97% probability that the decedent was the claimant's father. In re Estate of Warren, 300 Ga. App. 408, 685 S.E.2d 411 (2009).

No retrospective operation. — The 1991 amendment of former O.C.G.A. § 53-4-4 to provide additional conditions under which a child born out of wedlock may inherit from or through a father would not be given retrospective effect. Sardy v. Hodge, 264 Ga. 548, 448 S.E.2d 355 (1994), cert. denied, 513 U.S. 1191, 115 S. Ct. 1255, 131 L. Ed. 2d 135 (1995) (decided under former O.C.G.A. § 53-4-4).

Discussion of United States Supreme Court decisions. — See Poulos v. McMahan, 250 Ga. 354, 297 S.E.2d 451 (1982) (decided under former O.C.G.A. § 53-4-4).

Use of section by federal Social Security Act held unconstitutional. — As applied to this case, the incorporation by the federal Social Security Act, 42 U.S.C. § 402(d), of the Georgia intestacy scheme to require a child seeking survivors benefits to establish paternity within two and one-half years violated equal protection. Daniels ex rel. Daniels v. Sullivan, 979 F.2d 1516 (11th Cir. 1992) (decided under former O.C.G.A. § 53-4-4).

"Clear and convincing," as applied to evidence under former O.C.G.A. § 53-4-4, is a more stringent standard than "preponderating" and requires a greater quantum and high quality of proof in plaintiff's favor. In re Estate of Burton, 265 Ga. 122, 453 S.E.2d 16 (1995) (decided under former O.C.G.A. § 53-4-4).

Effect of doctrine of virtual legitimation. — Doctrine of virtual or equitable legitimation will allow an illegitimate child to inherit from the child's intestate father's estate when the evidence is clear and convincing. Prince v. Black, 256 Ga. 79, 344 S.E.2d 411 (1986), rev'g, 176 Ga. App. 465, 336 S.E.2d 318 (1985) (decided under former O.C.G.A. § 53-4-4).

Child born out of wedlock is not required to prove by clear and convincing evidence that the child's natural father intended the child to share in his estate as prescribed by the rules of descent and distribution, just that he intended that the child take from his estate. Varner v. Sharp, 219 Ga. App. 125, 464 S.E.2d 388 (1995) (decided under former O.C.G.A. § 53-4-4).

If a child born out of wedlock does prove that decedent was the child's father and that he intended for the child to take from the estate, the court must determine, based upon the rules of intestate succession, the amount to which the child is entitled; the burden of proving such amount does not rest with the child. Varner v. Sharp, 219 Ga. App. 125, 464 S.E.2d 388 (1995) (decided under former O.C.G.A. § 53-4-4).

Doctrine of virtual legitimation applied. — When decedent's actions indicated that decedent was in the process of taking all the necessary steps to ensure that the child whom he and his cohabitant had conceived would be born into a legitimate family environment, and everything necessary for his divorce from his estranged wife was complete except for the final decree, there was clear and convincing evidence that decedent intended for his unborn child to be born into a legitimate family environment, and his unexpected death would not defeat the claim of the child, who could inherit under the doctrine of virtual legitimation. Simpson v. King, 259 Ga. 420, 383 S.E.2d 120 (1989) (decided under former O.C.G.A. § 53-4-4).

Doctrine of virtual legitimation not applied retroactively. — Alleged illegitimate children were not entitled to inherit from father's estate since the children could not produce an order establishing parentage, and the doctrine of virtual legitimation did not apply since inheritance had been settled. Tolbert v. Whatley, 223 Ga. App. 508, 478 S.E.2d 587 (1996) (decided under former O.C.G.A. § 53-4-4).

Only illegitimate child through maternal line obtained interest in property. — When the owner of a tract of land died in 1926 and the owner's sole surviving heirs were a nephew and niece who died in 1942 and 1947, respectively, each of whom was survived by an illegitimate son, the son of the niece inherited sole title to the property through the maternal line of descent, although he and the son of the nephew have since operated under the assumption that they were co-owners. Carter v. Becton, 250 Ga. 617, 300 S.E.2d 152 (1983) (decided under former O.C.G.A. § 53-4-4).

Right of minor child for 12 months' support is not controlled by former O.C.G.A. § 53-4-4 and therefore that law could not be the basis of a caveat in the probate court. Woodes v. Morris, 247 Ga. 771, 279 S.E.2d 704 (1981) (decided under former O.C.G.A. § 53-4-4).

Paternity order insufficient for inheritance. — Court order finding deceased to be the illegitimate child's father for the purpose of a liability action does not suffice as a court order establishing paternity since the order would not have existed had deceased lived. In re Adventure Bound Sports, Inc., 858 F. Supp. 1192 (S.D. Ga. 1994) (decided under former O.C.G.A. § 53-4-4).

Decedent's intent that illegitimate daughter inherit. — Despite conflicting evidence, the trial court was authorized under the evidence presented to find clear and convincing proof of decedent's intent that his daughter born out of wedlock inherit from the estate. Sharp v. Varner, 226 Ga. App. 570, 486 S.E.2d 701 (1997) (decided under former O.C.G.A. § 53-4-4).

Cited in Langmade v. Tuggle, 78 Ga. 770, 3 S.E. 666 (1887); Curlew v. Jones, 146 Ga. 367, 91 S.E. 115 (1917); Pair v. Pair, 147 Ga. 754, 99 S.E. 295 (1918); Wilson v. James, 260 Ga. 234, 392 S.E.2d 5 (1990); Youmans v. Ormandy, 206 Ga. App. 255, 424 S.E.2d 828 (1992).

RESEARCH REFERENCES

ALR. — Right of illegitimate grandchildren to take under testamentary gift to "grandchildren," 17 A.L.R.4th 1292.

Adopted child as subject to protection of statute regarding rights of children pretermitted by will, or statute preventing disinheritance of child, 43 A.L.R.4th 947.

Eligibility of illegitimate child for survivor's benefits under Social Security Act, pursuant to § 216(h)(2)(A) of Act (42 USCS § 416(h)(2)(A)), where state intestacy law denying inheritance right, or application of that state law to § 216(h)(2)(A), may violate child's right to equal protection of laws, 116 A.L.R. Fed. 121.

53-2-4. Inheritance from children born out of wedlock.

(a) The mother of a child born out of wedlock, the other children of the mother, and other maternal kin may inherit from and through the child born out of wedlock in the same manner as though the child were legitimate.

(b) The father of a child born out of wedlock, the other children of the father, and other paternal kin may inherit from and through the child born out of wedlock in the same manner as if the child were legitimate if:

(1) A court of competent jurisdiction has entered an order declaring the child to be legitimate under the authority of Code Section 19-7-22 or such other authority as may be provided by law;

(2) A court of competent jurisdiction has otherwise entered a court order establishing paternity;

(3) The father has, during the lifetime of the child, executed a sworn statement signed by the father attesting to the parent-child relationship; provided, however, that when the court determines by clear and convincing evidence that the father caused his child to be conceived as a result of having nonconsensual sexual intercourse with the mother of his child or when the mother is less than ten years of age, such sworn statement shall be insufficient for purposes of this subsection;

(4) The father has, during the lifetime of the child, signed the birth certificate of the child; or

(5) The presumption of paternity described in division (2)(B)(ii) of Code Section 53-2-3 has been established and has not been rebutted by clear and convincing evidence.

History. — Code 1981, § 53-2-4, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2002, p. 1316, § 1; Ga. L. 2016, p. 219, § 5/SB 331.

Law reviews. — For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004). For annual survey of wills, trusts, guardianships, and fiduciary administration, see 57 Mercer L. Rev. 403 (2005). For survey article on wills, trusts, guardianships, and fiduciary administration, see 60 Mercer L. Rev. 417 (2008). For article on the 2016 amendment of this Code section, see 33 Georgia St. U. L. Rev. 127 (2016).

For note, "Rainey v. Chever: Expanding a Natural Father's Right to Inherit from His Illegitimate Child," see 51 Mercer L. Rev. 761 (2000). For note, "Deadbeat Dads: Undeserving of the Right to Inherit from Their Illegitimate Children and Undeserving of Equal Protection," see 34 Ga. L. Rev. 1773 (2000).

For comment on equitable adoption, equitable legitimation, and inheritance in extralegal family arrangements, see 48 Emory L.J. 943 (1999).

COMMENT

This Code section carries over former OCGA Sec. 53-4-5.

JUDICIAL DECISIONS

Gender-based classification unconstitutional. — Paragraph (b)(2) of O.C.G.A. § 53-2-4 creates a gender-based classification in violation of the equal protection clauses of both the United States and Georgia constitutions; it provides that a father of a child born out of wedlock cannot inherit from his child if he failed or refused to openly treat the child as his own, but that a mother who acts in the same manner can inherit from the child, and there is no legitimate state interest achieved by not subjecting mothers of illegitimate children to the same standards of conduct. Rainey v. Chever, 270 Ga. 519, 510 S.E.2d 823 (1999), cert. denied, 527 U.S. 1044, 119 S. Ct. 2411, 144 L. Ed. 2d 808 (1999).

Compliance with section during child's lifetime required. — Paragraph (b)(1) of O.C.G.A. § 53-2-4 requires that the father judicially establish paternity prior to the death of the child. In re Estate of Garrett, 244 Ga. App. 65, 534 S.E.2d 843 (2000).

53-2-5. Children conceived by artificial insemination.

An individual conceived by artificial insemination and presumed legitimate in accordance with Code Section 19-7-21 shall be considered a child of the parents and entitled to inherit under the laws of intestacy from the parents and from relatives of the parents, and the parents and relatives of the parents shall likewise be entitled to inherit as heirs from and through such individual.

History. — Code 1981, § 53-2-5, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For note, "A New Era of Dead-Beat Dads: Determining Social Security Survivor Benefits for Children Who Are Posthumously Conceived," see 56 Mercer L. Rev. 759 (2005).

COMMENT

This section clarifies that the rules of inheritance by, from and through biological children apply equally to children who have been conceived by artificial insemination provided they are deemed legitimate in accordance with OCGA Sec. 19-7-21.

53-2-6. Individual related to decedent through two or more lines of relationship.

An individual who is related to the decedent through two or more lines of relationship is entitled to only a single share based on the relationship entitling that individual to the largest share under the laws of intestacy.

History. — Code 1981, § 53-2-6, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section is modeled after Uniform Probate Code Sec. 2-113. This section had no counterpart in former OCGA Title 53.

53-2-7. Vesting of title to property; right to possession.

(a) Upon the death of an intestate decedent who is the owner of any interest in real property, the title to any such interest which survives the intestate decedent shall vest immediately in the decedent's heirs at law, subject to divestment by the appointment of an administrator of the estate.

(b) The title to all other property owned by an intestate decedent shall vest in the administrator of the estate for the benefit of the decedent's heirs and creditors.

(c) Upon the appointment of an administrator, the title to any interest in real property which survives the intestate decedent shall vest in the administrator for the benefit of the heirs and creditors of the decedent, and title to such property shall not revest in the heirs until the administrator assents to such revesting. For purposes of this Code section, the assent of the administrator shall be proved in the manner set out in Code Section 53-8-15.

(d) Upon the appointment of an administrator, the right to the possession of the whole estate is in the administrator, and, as long as administration continues, the right to recover possession of the estate from all other persons is solely in the administrator. The administrator may recover possession of any part of the estate from the heirs at law or purchasers from them; but, in order to recover real property, it is necessary for the administrator to show, upon the trial, either that the property which is the subject of the action has been in the administrator's possession and without the administrator's consent is held by the defendant at the time of bringing the action or that it is necessary for the administrator to have possession for the purpose of paying the debts, making a proper distribution, or for other purposes provided for by law. An order for sale or distribution, granted by the judge of the probate court after notice to the defendant, shall be conclusive evidence of either fact.

(e) If an order has been entered under Code Section 53-2-41 that no administration is necessary, or if the administrator has assented to the vesting of title in the heirs, the heirs may take possession of the property or may sue for possession of the property in their own right.

History. — Code 1981, § 53-2-7, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 9; Ga. L. 2000, p. 1335, § 1.

Cross references. — Admissible evidence for determining parent and child relationship, § 19-7-46. DNA analysis upon conviction of certain sex offenses, § 35-3-160 et seq. Genetic testing, T. 33, C. 54.

Law reviews. — For article advocating uniform treatment of the devolution of title, and abolition of distinctions based on the form of wealth or the fact of intestacy, see 10 Ga. L. Rev. 447 (1976). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 64 Mercer L. Rev. 325 (2012).

For note on 2000 amendment of this Code section, see 17 Ga. St. U.L. Rev. 320 (2000).

COMMENT

This section replaces and changes the rule of former OCGA Secs. 53-4-8 through 53-4-10 by providing that title to both real and personal property vests in the administrator, rather than providing that title to real property vests in the heirs, and by providing that title to both real and personal property vests in the heirs if

no administrator is appointed within five years or if an order that no administration is necessary is entered.

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, §§ 2246, 2483, 2485, and 2486, former Code 1882, §§ 2246, 2483, 2485, and 2486, former Civil Code 1895, §§ 3081, 3353, 3357, and 3358, former Civil Code 1910, §§ 3657, 3929, 3933, and 3934, former Code 1933, §§ 113-901, 113-907, and 113-908, and former O.C.G.A. §§ 53-4-8, 53-4-9, and 53-4-10 are included in the annotations for this Code section.

Construing former Civil Code 1895, §§ 3081, 3353, and 3357 together, the statutes give the administrator primary right to use and recover the estate, the heir having such right only in case of the heir's consent or where there is none, therefore, since the plaintiff in ejectment must show right to recover, plaintiffs in this case must show either lack of administrator or the administrator's consent for them to sue. Greenfield v. McIntyre, 112 Ga. 691, 38 S.E. 44 (1901) (decided under former Civil Code 1895, §§ 3081 and 3353). See Hall v. Ewing, 149 Ga. 693, 101 S.E. 807 (1920) (decided under former Civil Code 1910, §§ 3657 and 3929); Collins v. Henry, 155 Ga. 886, 118 S.E. 729 (1923) (decided under former Civil Code 1910, §§ 3657 and 3929).

Effect of section on fee-simple incidents. — Statute makes no changes in the definition or the incidents of an absolute or fee-simple estate. Ewing v. Shropshire, 80 Ga. 374, 7 S.E. 554 (1888) (decided under former Code 1882, §§ 2246 and 2483).

Application of amendment to statute. — When claimants asserted interests as heirs of the debtor's late, former husband in stock, amendment of O.C.G.A. § 53-2-7 in 2000 applied to the estate of the husband who died prior to 2000 because there were no vested rights of title, years support, succession or inheritance in the claimants that were impaired by the amendment. Barker v. Whittington (In re Barker), No. 07-70036-WLH, 2010 Bankr. LEXIS 4005 (Bankr. N.D. Ga. Oct. 26, 2010).

Disinterested person as administrator. — Person entitled to an estate may select a disinterested person as administrator. Roe v. Pitts, 82 Ga. App. 770, 62 S.E.2d 387 (1950) (decided under former Code 1933, § 113-901).

Until an administrator is appointed, distribution of the estate's assets is improper. Epps v. Epps, 141 Ga. App. 659, 234 S.E.2d 140 (1977) (decided under former Code 1933, § 113-901).

Administrator stands as the representative of the estate as against persons preferring claims against the estate and its interests, for and on account of heirs at law and all other creditors. Davenport v. Idlett, 234 Ga. 864, 218 S.E.2d 577 (1975) (decided under former Code 1933, § 113-901).

Estate administrator had right to

General Consideration (Cont'd)

inspect. — Order granting an estate administrator of a deceased shareholder the right to inspect the defendant's corporate books and denying the defendant's motions to compel and stay pending arbitration was affirmed because the statutes governing the transfer of stock to the estate vested ownership of the shares in the administrator of the estate and the probate court's order granted the adminstrator trustee's powers over those shares. Regal Nissan, Inc. v. Scott, 348 Ga. App. 91, 821 S.E.2d 561 (2018).

Appointment of administrator. — Subsequently-enacted legislation which stated that if an administrator was not appointed within five years after the death of an intestate, then the estate property would be vested in decedent's heirs and did not mention anything about divestment of the estate property did not apply to prevent the probate court from granting the estate administrator's petition to distribute decedent's property even though the estate administrator was not appointed for nearly four decades after the death of the decedent as the law in effect at the time the estate administrator was appointed had no time limit for the appointment and the subsequently-enacted legislation did not apply to prohibit the estate administrator from being appointed and distributing the property. Williams v. Williams, 259 Ga. App. 888, 578 S.E.2d 582 (2003).

An executor of an estate is an indispensable party in a suit against the estate. Estate of Thurman v. Dodaro, 169 Ga. App. 531, 313 S.E.2d 722 (1984) (decided under former O.C.G.A. § 53-4-8).

Heir lacked standing to sue to recover estate assets. — Though a decedent's child argued in a brief that the child had presented evidence of collusion, embezzlement, fraud, elder abuse, and the administrator's unwillingness to pursue certain claims, as the child failed to support these arguments with citations to the record as required by Ga. Ct. App. R. 25(c)(2)(i), the trial court's ruling that under former O.C.G.A. § 53-4-8(b), the child lacked standing to sue a sibling for allegedly misappropriating estate assets was affirmed. Peden v. Peden, 293 Ga. App. 483, 667 S.E.2d 650 (2008) (decided under former O.C.G.A. § 53-4-8).

Standing to pursue claim for undelivered stock. — Heirs of a debtor's late, former husband's estate lacked standing to assert a claim for undelivered stock because, pursuant to the 2000 amendment to O.C.G.A. § 53-2-7, claims for personalty had to be brought by an administrator unless the heirs had received an order from the appropriate court that no administration was necessary. Barker v. Whittington (In re Barker), No. 07-70036-WLH, 2010 Bankr. LEXIS 4005 (Bankr. N.D. Ga. Oct. 26, 2010).

Executor's power to distribute assets. — Probate court's approval of the estate administrator's proposed sale of property was not improper as it did not impair the objecting heirs' vested interest in property; rather, the property vested in the objecting heirs at the time of decedent's death, subject to the estate administrator's right to distribute it, and, thus, the probate court was authorized to allow the estate administrator to distribute it. Williams v. Williams, 259 Ga. App. 888, 578 S.E.2d 582 (2003) (decided under former O.C.G.A. § 53-4-8).

Title to property remains in the executor until the executor assents to the devise. After such assent is given the land is no longer a part of the estate. State Hwy. Dep't v. Stewart, 104 Ga. App. 178, 121 S.E.2d 278 (1961) (decided under former Code 1933, § 113-907).

Temporary administrator is custodian of the estate, and the administrator's powers are strictly limited by statute; the administrator cannot sue for realty. Arnold v. Freeman, 181 Ga. 654, 183 S.E. 811 (1935) (decided under former Code 1933, § 113-907).

Temporary administrator takes no interest in land of the estate, and cannot bring an action for its recovery or consent to such an action being brought. Bowman v. Bowman, 206 Ga. 262, 56 S.E.2d 497 (1949) (decided under former Code 1933, § 113-907).

Administrator can eject an heir at law. Jones v. Wilson, 227 Ga. 360, 180 S.E.2d 727 (1971) (decided under former Code 1933, § 113-908).

Probate court jurisdiction. — Probate court does not have the jurisdiction to adjudicate conflicting claims of title to property; thus, when decedent's widow asserted an ownership interest in property sought by the executor of the estate, an order of the probate court giving possession of such property to the executor was void, and the widow could not be found in contempt for noncompliance with the order. In re Estate of Adamson, 215 Ga. App. 613, 451 S.E.2d 501 (1994) (decided under former O.C.G.A. § 53-4-10).

Cited in Goodtitle v. Roe, 20 Ga. 135 (1856); Davis v. Howard, 56 Ga. 430 (1876); Keaton v. Tift, 56 Ga. 446 (1876); Knapp v. Harris, 60 Ga. 398 (1878); Miller v. Speight, 61 Ga. 460 (1878); Edwards v. Kilpatrick, 70 Ga. 328 (1883); Head v. Driver, 79 Ga. 179, 3 S.E. 621 (1887); Jones v. Lamar, 34 F. 454 (C.C.S.D. Ga. 1888); Gibson v. Carreker, 82 Ga. 46, 9 S.E. 124 (1889); Ellsworth v. McCoy, 95 Ga. 44, 22 S.E. 39 (1894); Mayor of Chauncey v. Brown, 99 Ga. 766, 26 S.E. 763 (1896); Burke v. Huff, 103 Ga. 598, 30 S.E. 546 (1898); Juhan v. Juhan, 104 Ga. 253, 30 S.E. 779 (1898); Dixon v. Rodgers, 110 Ga. 509, 35 S.E. 781 (1900); Greenfield v. McIntyre, 112 Ga. 691, 38 S.E. 44 (1901); Doris v. Story, 122 Ga. 611, 50 S.E. 348 (1905); Queen Ins. Co. v. Peters, 10 Ga. App. 289, 73 S.E. 536 (1912); Gornto v. Wilson, 141 Ga. 597, 81 S.E. 860 (1914); Strickland v. Fender, 142 Ga. 132, 82 S.E. 561 (1914); Harris v. Black, 143 Ga. 497, 85 S.E. 742 (1915); Purvis v. Askew, 148 Ga. 79, 95 S.E. 964 (1918); Wimberly v. Ross, 152 Ga. 258, 109 S.E. 500 (1921); Weldon v. Weldon, 152 Ga. 550, 110 S.E. 273 (1922); Brown v. Glover, 156 Ga. 640, 119 S.E. 607 (1923); Reed v. Norman, 157 Ga. 183, 121 S.E. 310 (1924); Warren v. Federal Land Bank, 157 Ga. 464, 122 S.E. 40, 33 A.L.R. 45 (1924); Stone v. Edwards, 32 Ga. App. 479, 124 S.E. 54 (1924); Bryan v. Bryan, 170 Ga. 472, 153 S.E. 188 (1930); Pullen v. Johnson, 173 Ga. 581, 160 S.E. 785 (1931); Smith v. Fischer, 52 Ga. App. 598, 184 S.E. 406 (1936); Ewing v. Tanner, 184 Ga. 773, 193 S.E. 243 (1937); Dorsey v. Dorsey, 189 Ga. 662, 7 S.E.2d 273 (1940); Mize v. Harber, 189 Ga. 737, 8 S.E.2d 1 (1940); Zeagler v. Zeagler, 190 Ga. 220, 9 S.E.2d 263 (1940); Metropolitan Life Ins. Co. v. Hall, 191 Ga. 294, 12 S.E.2d 53 (1940); Wilcox v. Thomas, 191 Ga. 319, 12 S.E.2d 343 (1940); Bacon v. Federal Land Bank, 109 F.2d 285 (5th Cir. 1940); Hines v. Farkas, 109 F.2d 289 (5th Cir. 1940); Hadaway v. Hadaway, 192 Ga. 265, 14 S.E.2d 874 (1941); Roberts v. McBrayer, 194 Ga. 606, 22 S.E.2d 165 (1942); Robinson v. Murray, 198 Ga. 690, 32 S.E.2d 496 (1944); Crews v. Russell, 199 Ga. 732, 35 S.E.2d 444 (1945); Pope v. Beasley, 200 Ga. 656, 38 S.E.2d 300 (1946); Kelley v. Cromer, 201 Ga. 375, 39 S.E.2d 880 (1946); Higdon v. Dixon, 203 Ga. 67, 45 S.E.2d 423 (1947); Hamrick v. Hamrick, 206 Ga. 564, 58 S.E.2d 145 (1950); Physioc v. Beavers, 210 Ga. 246, 78 S.E.2d 795 (1953); Smith v. Smith, 210 Ga. 354, 80 S.E.2d 196 (1954); Tillman v. Byrd, 211 Ga. 918, 89 S.E.2d 479 (1955); Turner v. Kelley, 212 Ga. 175, 91 S.E.2d 356 (1956); Myers v. Grant, 212 Ga. 677, 95 S.E.2d 9 (1956); In re Engram, 156 F. Supp. 342 (M.D. Ga. 1957); Warren v. Warren, 104 Ga. App. 184, 121 S.E.2d 343 (1961); Bell v. Liberty Mut. Ins. Co., 108 Ga. App. 173, 132 S.E.2d 538 (1963); Dukes v. Cairo Banking Co., 220 Ga. 507, 140 S.E.2d 182 (1964); Lanier v. Dyer, 222 Ga. 30, 148 S.E.2d 432 (1966); Shelnutt v. Bank of Hancock County, 223 Ga. 74, 153 S.E.2d 442 (1967); Jones v. Congdon, 223 Ga. 284, 154 S.E.2d 612 (1967); Outlaw v. Outlaw, 121 Ga. App. 284, 173 S.E.2d 459 (1970); Butler v. Hicks, 229 Ga. 72, 189 S.E.2d 416 (1972); Young v. Bozeman, 229 Ga. 195, 190 S.E.2d 523 (1972); Ireland v. Matthews, 129 Ga. App. 592, 200 S.E.2d 318 (1973); DeLong v. DeLong, 134 Ga. App. 635, 215 S.E.2d 531 (1975); Gaskins v. Vickery, 234 Ga. 833, 218 S.E.2d 617 (1975); Allan v. Allan, 236 Ga. 199, 223 S.E.2d 445 (1976); Epps v. Epps, 141 Ga. App. 659, 234 S.E.2d 140 (1977); Freeman v. Saxton, 240 Ga. 309, 240 S.E.2d 708 (1977); Davison v. Strickland, 145 Ga. App. 420, 243 S.E.2d 705 (1978); Deller v. Smith, 250 Ga. 157, 296 S.E.2d 49 (1982); Tarbutton v. All That Tract or Parcel of Land Known as Carter Place, 641 F. Supp. 521 (M.D. Ga. 1986); In re Estate of Adamson, 215 Ga. App. 613, 451 S.E.2d 501 (1994).

Vesting and Recovery of Real Property

When the owner of real property dies, title vests immediately in the owner's heirs at law, "subject to be administered by the legal representative, if there is one, for the payment of debts, or the purpose of distribution …" Evans v. Little, 246 Ga. 219, 271 S.E.2d 138 (1980) (decided under former Code 1933, § 113-901).

Realty descends directly to the heirs at law, subject to administration by the legal representative, if there be one, for the payment of debts and the purpose of distribution; if there be a legal representative, the right to recover is in the representative; if there be none, the heirs may sue in the heirs' own name, and, if there be no administrator, the heirs may be sued to cancel a deed on the ground of fraud in the deed's procurement. Greenwood v. Starr, 174 Ga. 503, 163 S.E. 500 (1932) (decided under former Civil Code 1910, §§ 3657, 3929); Morrison v. Stewart, 243 Ga. 456, 254 S.E.2d 840 (1979) (decided under former Code 1933, § 113-901).

Administrator selling real estate must comply with former O.C.G.A. § 53-8-23. — Upon the death of the realty owner intestate, title vests directly in the heirs, subject to administration for payment of debts and distribution. Administrators can only sell real estate for these purposes after complying with former O.C.G.A. § 53-8-23, receiving leave to sell from the probate court, and proper advertisement. Horn v. Wright, 157 Ga. App. 408, 278 S.E.2d 66 (1981) (decided under former O.C.G.A. § 53-4-8).

Trial court properly denied an estate administrator's petition for leave to recover and sell the estate's property as the administrator failed to publish notice of the petition and proposed sale, as required by former O.C.G.A. § 53-8-23, and personal service on the heirs in another proceeding to recover the real property did not satisfy the publication requirement. Huggins v. Powell, 293 Ga. App. 436, 667 S.E.2d 219 (2008) (decided under former O.C.G.A. § 53-4-8).

Title to realty is immediately vested in the heirs of an intestate upon his or her death. However, if there be a legal representative, the right to recover for the benefit of the heirs is in such representative. If there be no representative, the heirs may sue in their own names to clear title to land. City of Griffin v. McKneely, 101 Ga. App. 811, 115 S.E.2d 463 (1960) (decided under former Code 1933, § 113-901).

Realty descends directly to the heirs, subject to be administered by the legal representative for the payment of debts of the estate, and the purpose of distribution only. Davie v. McDaniel, 47 Ga. 195 (1872) (decided under former Code 1868, §§ 2220 and 2447); Jones v. Lamar, 34 F. 454 (C.C.S.D. Ga. 1888), appeal dismissed, 149 U.S. 777, 13 S. Ct. 1048, 37 L. Ed. 958 (1892) (decided under former Code 1887, §§ 2246 and 2483).

On the death of the owner, the title to land vests immediately in the owner's heirs at law, and, on the appointment of an administrator, the right to the possession of the whole estate is in the administrator; but, insofar as real estate is concerned, this is a qualified right solely for the purpose of paying debts and for distribution, when necessary. Smith v. Fischer, 52 Ga. App. 598, 184 S.E. 406 (1936) (decided under former Code 1933, § 113-901).

After the grantor in a security deed had died intestate before the date of the sale, the equity of redemption descended by inheritance to the sole heir at law, with the same right to affirm or disaffirm an unlawful sale thereafter made which the grantor personally would have had if the grantor had not died. Delray, Inc. v. Reddick, 194 Ga. 676, 22 S.E.2d 599 (1942) (decided under former Code 1933, § 113-901).

When an administrator is granted leave to sell the land of the estate for the purpose of paying debts and distribution, the administrator may collect rents accruing afterwards, and the administrator and the administrator's sureties may be held liable therefor on the administrator's bond. Whether the same would be true as to rents accruing after the intestate's death, but before the order granting leave to sell, it does not appear that rents for any such period would be involved. Jones v. Wilson,

195 Ga. 310, 24 S.E.2d 34 (1943) (decided under former Code 1933, § 113-901).

Petition by the widow and sole heir at law of a named person who died intestate with no administration on his estate, alleging that before her husband's death, he had purchased a tract of land, paid the purchase money, and entered into possession of the land, and that since his death other claimants had entered into possession thereof, where the plaintiff merely sought to recover the land with mesne profits, and the suit was filed in the county where the land lay, stated a cause of action. Strickland v. Jenkins, 198 Ga. 15, 31 S.E.2d 18 (1944) (decided under former Code 1933, § 113-901).

Petition, filed by the widow and sole heir at law of a landowner, stating that he died intestate and that there was no administration on his estate, presented a case wherein whatever right or title he might have had descended to her, with the right to sue therefor in her own name. Strickland v. Jenkins, 198 Ga. 15, 31 S.E.2d 18 (1944) (decided under former Code 1933, § 113-901).

Upon the death of the owner of any estate in realty, the title vests immediately in the owner's heirs at law and hence the plaintiffs were entitled to the immediate possession of the deceased's property upon the owner's death intestate. Chalker v. Beasley, 72 Ga. App. 652, 34 S.E.2d 658 (1945) (decided under former Code 1933, § 113-901).

Upon the death of the owner of any estate in realty, which estate survives the descendent, title vests immediately in the descendent's heirs at law, subject to administration by the legal representative, if there be one, and the right of recovery is in the legal representative, if one; if none, the heirs may sue in the heirs' own name. Slade v. Barber, 200 Ga. 405, 37 S.E.2d 143 (1946) (decided under former Code 1933, § 113-901).

When the father of the plaintiff died intestate, holding possession of lands under a bond for title with a part of the purchase price paid, the owner had a beneficial interest or equitable estate therein which descended to the owner's heirs at law, and the plaintiff as the sole heir at law could bring an equitable action on the bond for title. Gay v. Radford, 207 Ga. 38, 59 S.E.2d 915 (1950) (decided under former Code 1933, § 113-901).

When one owning real estate dies, the title to the real estate passes to the heirs, and it is not the duty of the administrator, as such, to collect rents accruing after the death of the intestate; and if the administrator does so, it is not in the administrator's capacity as administrator, and the administrator is not liable to the heirs for the amount of the rents, as administrator, nor is the surety on the administrator's bond as administrator liable. Ray v. Dooley, 208 Ga. 811, 69 S.E.2d 766 (1952) (decided under former Code 1933, § 113-901).

Upon the death of a husband intestate, leaving children and descendants of deceased children, title to realty owned by the husband vests in such children. Kenner v. Kenner, 214 Ga. 381, 104 S.E.2d 896 (1958) (decided under former Code 1933, § 113-901); Keen v. Thomas, 214 Ga. 362, 104 S.E.2d 903 (1958) (decided under former Code 1933, § 113-901).

Since upon the death of the owner of realty, which estate survives the owner, the title vests immediately in the owner's heirs at law, subject to the payment of debts, where the heirs make a settlement of the estate without an administrator, they should make conveyances pursuant to the settlement in order to divest themselves of the legal title of the intestate's estate. Clark v. Perrin, 224 Ga. 307, 161 S.E.2d 874 (1968) (decided under former Code 1933, § 113-901).

When an examination of the contested will discloses no manifest intention of the testator which would be contrary to a vesting of the testator's great-great niece's interest at the time of the testator's death; and since her interest was vested in both the corpus and income of the trust estate, this interest was vested immediately in her husband upon her death; and upon his death, his interest passed by will to his three children who consequently have a vested interest in the corpus and income of the trust. Wood v. Roberts, 244 Ga. 507, 260 S.E.2d 890 (1979) (decided under former Code 1933, § 113-901).

Administrator holds the estate for the purpose of paying debts and dis-

Vesting and Recovery of Real Property (Cont'd)

tribution. Roe v. Pitts, 82 Ga. App. 770, 62 S.E.2d 387 (1950) (decided under former Code 1933, § 113-901).

Heirs take real property subject to preexisting burdens. — Heir at law inherits land subject to any burden or duty that existed with respect to it against the intestate, or that may later arise against the administrator, when an administrator is appointed. Veal v. Veal, 192 Ga. 503, 15 S.E.2d 725 (1941) (decided under former Code 1933, § 113-901).

Administrator has a qualified right to lands in the possession of heirs at law to pay debts and to make legal distribution. Smith v. Fischer, 52 Ga. App. 598, 184 S.E. 406 (1936) (decided under former Code 1933, § 113-901).

Statute establishes the threshold requirement that an administrator may exercise powers as administrator of real property only when it is necessary to pay outstanding debts of the estate or to distribute the estate among the heirs. Evans v. Little, 246 Ga. 219, 271 S.E.2d 138 (1980) (decided under former Code 1933, § 113-901).

Administrator's right to maintain action. — As against one not an heir, an administrator may maintain an action for the recovery of land belonging to the estate of one's intestate without showing a necessity to administer the land for the purpose of paying debts. Nixon v. Nixon, 192 Ga. 629, 15 S.E.2d 883 (1941) (decided under former Code 1933, § 113-901).

Administrator cannot recover land from widow by merely proving title in husband at his death. Green v. Underwood, 108 Ga. 354, 33 S.E. 1009 (1899) (decided under former Civil Code 1895, §§ 3081, 3353).

Procedure for recovery of land by heirs at law. — When there was an administration of the estate of the defendant's grantor, the administrator could have sued to recover land for the benefit of the heir at law, on alleged reversion by the terms of the grantor's conveyance; and the right of action was not limited to their heir at law. Atlantic Coast Line R.R. v. Sweat, 177 Ga. 698, 171 S.E. 123 (1933) (decided under former Code 1933, § 113-901).

Before heirs at law of an intestate can recover land, the heirs must allege and prove that there is no administration upon the heirs' estate, or, if there is an administrator, that the administrator has consented to their bringing the suit. Bowman v. Bowman, 206 Ga. 262, 56 S.E.2d 497 (1949), later appeal, 207 Ga. 226, 60 S.E.2d 242 (1950) (decided under former Code 1933, § 113-901).

When the administrator makes a collusive conveyance for the purpose of defrauding those interested in the estate and obtaining a benefit to the administrator, and refuses to give consent for the heirs to sue, they may bring an equitable action against the administrator and the persons charged with being in collusion with the administrator, for the purpose of protecting their rights. Bowman v. Bowman, 206 Ga. 262, 56 S.E.2d 497 (1949) (decided under former Code 1933, § 113-901).

While an heir may bring an action to recover property of heir's intestate where there is no administrator, or where the administrator consents to the action, the law plainly gives the administrator the right to recover property held adversely to the estate of the intestate. Andrews v. Walden, 208 Ga. 340, 66 S.E.2d 801 (1951) (decided under former Code 1933, § 113-901).

An heir at law seeking to recover in one's own name all or a part of the estate of a decedent must allege and prove that there was no administration of the estate in this state, or that the administrator was discharged before suit, or that the administrator had consented to the suit. Crawley v. Selby, 208 Ga. 530, 67 S.E.2d 775 (1951) (decided under former Code 1933, § 113-901).

Temporary administrator takes no interest in land of the estate, and cannot bring an action for its recovery or consent to such an action being brought. Bowman v. Bowman, 206 Ga. 262, 56 S.E.2d 497 (1949) (decided under former Code 1933, § 113-901).

Courts favor disposition in kind. — As real estate descends to the heirs in this state, it would seem to be the policy of the courts to favor the heirs by a division of the lands in kind, and they will not be

sold, unless it be necessary to pay debts or to have a distribution. McCook v. Pond, 72 Ga. 150 (1883) (decided under former Code 1882, §§ 2246, 2483).

Effect of bankruptcy automatic stay. — Under Georgia law, when the debtor's mother died intestate, title to the mother's real property automatically vested in the heirs at law which included the debtor and, thus, at the time the debtor filed the debtor's bankruptcy case, the debtor held an interest in the property and the debtor's interest as heir became property of the estate. Because under Georgia law, the appointment of an administrator divested the heirs of their ownership interests directly in the property, a petition for appointment of an administrator was an act to obtain possession of property of the estate in violation of the automatic stay and, further, because it was commenced against the debtor as an heir of the estate, it violated the stay as the commencement of a judicial proceeding against the debtor. In re Holyfield, No. 16-67309, 2019 Bankr. LEXIS 1729 (Bankr. N.D. Ga. June 3, 2019).

Vesting and Recovery of Personal Property

Administration according to law of domicile. — All personalty of a deceased person passes and is administered according to the law of the deceased's domicile. Fenn v. Castelanna, 196 Ga. 22, 25 S.E.2d 796 (1943) (decided under former Code 1933, § 113-901).

Distribution according to law of jus domicilii. — It is a part of the law prevailing in Georgia that personal property should be distributed according to the jus domicilii. Squire v. Vazquez, 52 Ga. App. 215, 183 S.E. 127 (1935) (decided under former Code 1933, § 113-901).

If the owner of personal property dies, it is not necessarily the law of the country in which the property is or in which the owner thereof dies, but the law of the country or state of the domicile of the deceased that will regulate the disposition, transmission, or succession of such property. Squire v. Vazquez, 52 Ga. App. 215, 183 S.E. 127 (1935) (decided under former Code 1933, § 113-901).

Title to personal property vests in personal representative. — Title to personal property, including choses in action, upon the death of the owner, passes to the owner's personal representative, and not to the owner's heirs at law. Life & Cas. Ins. Co. v. Marks, 72 Ga. App. 640, 34 S.E.2d 633 (1945) (decided under former Code 1933, § 113-901).

Upon the death of a person intestate, choses in action in the deceased's favor pass to the deceased's administrator; and the deceased's heirs at law can take no more than an equitable interest therein, except through the intermediation of the administrator. Life & Cas. Ins. Co. v. Marks, 72 Ga. App. 640, 34 S.E.2d 633 (1945) (decided under former Code 1933, § 113-901).

Action to recover personal property must be instituted by personal representative. — When the beneficiary of a war risk insurance certificate (under the World War Veterans' Act of 1924, § 303 as amended, see now 38 U.S.C. § 750), survives the insured but dies before receiving all of the installments which were payable and applicable, the estate of the insured is wholly substituted as the payee, and all of such payments become assets of the estate of the insured upon the instant of the insured's death, to be distributed to the heirs of the insured in accordance with the intestacy laws of the state of the insured's residence; such heirs to be determined as of the date of the insured's death, and not as of the date of the death of the beneficiary. White v. Roper, 176 Ga. 180, 167 S.E. 177 (1932) (decided under former Code 1933, § 113-901).

Suit cannot be maintained by the distributees of an estate to recover personal property belonging to such estate, except through the legal representative in the absence of special circumstances authorizing such a proceeding in equity. Jones v. Gann, 184 Ga. 722, 193 S.E. 174 (1937) (decided under former Code 1933, § 113-901).

Title to personal property, such as promissory notes, owned by one who dies intestate vests in the intestate's administrator for the benefit of heirs and creditors. McMullen v. Carlton, 192 Ga. 282, 14

Vesting and Recovery of Personal Property (Cont'd)

S.E.2d 719 (1941) (decided under former Code 1933, §§ 113-901 and 113-907).

When insurer agreed to pay to the insured in the event of the insured's becoming disabled from sickness and confined to the insured's bed weekly benefits and the insured became disabled from sickness, and the company refused to pay some of the weekly benefits, any right to recover the weekly benefits was in the insured until the insured's death and if any right to recover them survived the insured's death, it would be in the insured's administrator if the insured died intestate. Bailey v. Bankers Health & Life Ins. Co., 69 Ga. App. 71, 24 S.E.2d 740 (1943) (decided under former Code 1933, §§ 113-901 and 113-907).

Heirs, although all of the heirs are sui juris and of full age, cannot maintain an action at law upon a chose in action in favor of the intestate, notwithstanding there is no administrator and all debts due by the intestate have been paid. Life & Cas. Ins. Co. v. Marks, 72 Ga. App. 640, 34 S.E.2d 633 (1945) (decided under former Code 1933, § 113-901).

When under a will an executor assents to a devise or legacy of a promissory note, the property is no longer part of the estate since by assenting the executor loses all control and interest in the property and the right to sue on the note passes to the devisee or legatee. Hemphill v. Simmons, 120 Ga. App. 823, 172 S.E.2d 178 (1969) (decided under former Code 1933, § 113-901).

Administrator, not the heir, should bring suit on a promissory note unless it is shown that the note was endorsed or assigned by the administrator or was set apart to the heir by adjudication of the ordinary (now probate judge). Hemphill v. Simmons, 120 Ga. App. 823, 172 S.E.2d 178 (1969) (decided under former Code 1933, § 113-901).

Right to Possession

1. Real Property

Title to land vests in heirs subject to right of administrator to recover. — On the death of the owner, the title to land vests immediately in the owner's heirs at law, and, on the appointment of an administrator, the right to the possession of the whole estate is in the administrator; but, insofar as real estate is concerned, this is a qualified right solely for the purpose of paying debts and for distribution when necessary. Smith v. Fischer, 52 Ga. App. 598, 184 S.E. 406 (1936) (decided under former Code 1933, § 113-907).

Administrator, who was also estate creditor, still required to publish notice of sale. — Trial court properly denied an estate administrator's petition for leave to recover and sell the estate's property as the administrator failed to publish notice of the petition and proposed sale, as required by O.C.G.A. § 53-8-23, and personal service on the heirs in another proceeding to recover the real property did not satisfy the publication requirement. Huggins v. Powell, 293 Ga. App. 436, 667 S.E.2d 219 (2008) (decided under former O.C.G.A. § 53-4-9).

Right to Recovery

1. Recovery by Administrator

Administrator has exclusive right to bring actions on behalf of estate. — In order for a widow to be the personal representative of her deceased husband, who died intestate leaving no lineal descendants, in the sense that she may sue as the representative of the estate to cancel a deed, it is essential that at the time the suit is instituted there be no outstanding debts against the estate. Hardin v. Council, 200 Ga. 822, 38 S.E.2d 549 (1946) (decided under former Code 1933, § 113-907).

An estate is not a legal entity which can be a party plaintiff to legal proceedings because the exclusive right to bring actions on behalf of an estate (including attachment and garnishment proceedings) is in the legal representative, executor, or administrator, of the estate. Orange County Trust Co. v. Takowsky, 119 Ga. App. 366, 166 S.E.2d 913 (1969) (decided under former Code 1933, § 113-907).

Administrator need not allege necessity to recover against one not an

heir. — As against one not an heir, an administrator may maintain an action for the recovery of land belonging to the estate of one's intestate without showing a necessity to administer the land for the purpose of paying debts. Morris v. Mobley, 171 Ga. 224, 155 S.E. 8 (1930) (decided under former Civil Code 1910, § 3933); Nixon v. Nixon, 192 Ga. 629, 15 S.E.2d 883 (1941) (decided under former Code 1933, § 113-907).

When a suit is brought by an administrator of a decedent against a stranger for the recovery of land belonging to intestate's estate, no proof is necessary, except that the property belonged to the administrator's intestate, and that it is being withheld from the administrator by the defendant. Paris v. Treadaway, 173 Ga. 639, 160 S.E. 797 (1931) (decided under former Civil Code 1910, § 3933).

Administrator has exclusive right to sue for recovery of personal property. — Suit in equity cannot be maintained, at the instance of distributees of an estate, to recover personal property thereof, except through the legal representative of the estate, unless there be collusion, insolvency, unwillingness to collect the assets, or some other like special circumstances. Holt v. Industrial Life & Health Ins. Co., 182 Ga. 563, 186 S.E. 193 (1936) (decided under former Code 1933, § 113-907).

Suit cannot be maintained by the distributees of an estate to recover personal property belonging to such estate, except through the legal representative, in the absence of special circumstances authorizing such a proceeding in equity. Jones v. Gann, 184 Ga. 722, 193 S.E. 174 (1937) (decided under former Code 1933, § 113-907).

Upon the death of a person intestate, choses in action in the deceased's favor pass to the administrator; and the deceased's heirs at law can take no more than an equitable interest therein, except through the intermediation of the administrator. Life & Cas. Ins. Co. v. Marks, 72 Ga. App. 640, 34 S.E.2d 633 (1945) (decided under former Code 1933, § 113-907).

Heirs, although all of them are sui juris and of full age, cannot maintain an action at law upon a chose in action in favor of the intestate, notwithstanding there is no administrator and all debts due by the intestate have been paid. Life & Cas. Ins. Co. v. Marks, 72 Ga. App. 640, 34 S.E.2d 633 (1945) (decided under former Code 1933, § 113-907).

If personal property is held adversely to an estate which has no legal representative, the only legal way to recover it is to have an administrator appointed and have the administrator bring suit in the administrator's name as such representative. Epps v. Epps, 141 Ga. App. 659, 234 S.E.2d 140 (1977) (decided under former Code 1933, § 113-907).

2. Recovery by Heirs at Law

Right of heirs to sue in their own names generally. — Literal application of former Code 1933, §§ 113-907 and 113-1512 would lead to the inevitable conclusion that the heirs would under no circumstances be allowed to sue in their own name when there was an administrator unless the administrator consented thereto. But the Supreme Court has broadened the meaning of former Code 1933, § 113-1521 to include a situation where the administrator refuses, and especially where this refusal is fraudulent or collusive, and in such a situation this right of action in the heir exists in the same manner and to the same extent only as it does in the administrator, thus if it exists in the same manner and to the same extent, then it should be given the same effect. Estes v. Collum, 91 Ga. App. 186, 85 S.E.2d 561 (1954) (decided under former Code 1933, § 113-907).

When there is no administration, the heirs at law can sue to recover realty of an estate in their own right. Arnold v. Freeman, 181 Ga. 654, 183 S.E. 811 (1935) (decided under former Code 1933, § 113-907).

Right of heir to recover requires proof of lack of administration or consent of administrator. — If there is no administrator the heirs may sue for realty; or the administrator may consent to a suit for realty by the heirs, or may assign a claim to a creditor or distributee, if the administrator be unwilling to sue; but without some special reason, a suit in

Right to Recovery (Cont'd)
2. Recovery by Heirs at Law (Cont'd)

equity cannot be maintained by creditors, distributees, or legatees for the recovery of property of the decedent from a third person. Mason v. Atlanta Fire Co. No. 1, 70 Ga. 604, 48 Am. R. 585 (1883) (decided under former Code 1982, § 2485).

While an administrator is entitled to the possession of the lands for the purpose of paying debts and division, yet when there is no administration or if the administrator consents thereto, the heirs at law may take possession of the lands or may sue for them in their own right, and in such a suit by the heirs, it is necessary that the petition allege that there was no administration or that the administrator has been discharged before the suit was filed or that the administrator consented to the bringing of such action by the heirs, but it is not required in such an action that the petitioners allege that there are no debts against the estate. Shirley v. Mulligan, 202 Ga. 746, 44 S.E.2d 796 (1947) (decided under former Code 1933, § 113-907).

An heir at law seeking to recover in the heir's own name all or a part of the estate of a decedent must allege and prove that there was no administration of the estate in this state or that the administrator was discharged before suit, or that the administrator had consented to the suit. Bowman v. Bowman, 206 Ga. 262, 56 S.E.2d 497 (1949) (decided under former Code 1933, § 113-907); Crawley v. Selby, 208 Ga. 530, 67 S.E.2d 775 (1951) (decided under former Code 1933, § 113-907).

Proof of collusion or fraud by administrator. — When the administrator makes a collusive conveyance for the purpose of defrauding those interested in the estate and obtaining a benefit personally, and refuses to give consent for the heirs to sue, the heirs may bring an equitable action against the administrator and the persons charged with being in collusion with the administrator for the purpose of protecting their rights. Bowman v. Bowman, 206 Ga. 262, 56 S.E.2d 497 (1949) (decided under former Code 1933, § 113-907).

When an administrator is insolvent, unwilling to collect assets, or is in collusion with others to defraud the estate and refuses to sue, the heirs may sue in their own name and make the administrator a party defendant; this is an exception to or modification of the general rule that heirs may sue only if there is no administrator or if the administrator assents thereto as provided by statute. Harrison v. Holsenbeck, 208 Ga. 410, 67 S.E.2d 311 (1951) (decided under former Code 1933, § 113-907).

Petition by the widow and sole heir at law of a named person who died intestate with no administration on his estate, alleging that before her husband's death, he had purchased a tract of land, paid the purchase money, and entered into possession of the land, and that since his death other claimants had entered into possession thereof, as the plaintiff merely sought to recover the land with mesne profits, and the suit was filed in the county where the land lay, stated a cause of action. Strickland v. Jenkins, 198 Ga. 15, 31 S.E.2d 18 (1944) (decided under former Code 1933, § 113-907).

Petition, filed by the widow and sole heir at law of a landowner, stating that he died intestate and that there was no administration on his estate, presented a case wherein whatever right or title he might have had descended to her with the right to sue therefor in her own name. Strickland v. Jenkins, 198 Ga. 15, 31 S.E.2d 18 (1944) (decided under former Code 1933, § 113-907).

Two destitute orphan girls were entitled in equity to maintain a suit in their own names for the amount alleged to be due them as heirs of a beneficiary under an insurance policy, in the absence of an administration of the beneficiary's estate, where administration would involve an expense almost equal to the sum sued for. Holt v. Industrial Life & Health Ins. Co., 182 Ga. 563, 186 S.E. 193 (1936) (decided under former Code 1933, § 113-907).

When, in a suit by heirs at law to cancel a deed, the petition alleges that there is an administrator, but does not allege the assent of the administrator for the heirs to bring the suit, and does not charge fraud or collusion on the part of the administrator, the petition sets forth no right of

action. Clark v. Woody, 197 Ga. 683, 30 S.E.2d 181 (1944) (decided under former Code 1933, § 113-907).

In an action for trespass to real estate of an intestate, committed after the intestate's death, when it did not appear that an administrator had been appointed at the time of the trespass and had taken possession to pay debts and for distribution, and it appeared that the plaintiff was the sole heir at law of the intestate and was in possession as such at the time of the trespass, and when the plaintiff otherwise made a prima facie case, it was error to grant a nonsuit. Smith v. Fischer, 52 Ga. App. 598, 184 S.E. 406 (1936) (decided under former Code 1933, § 113-907).

Equity will not intervene on behalf of a creditor, distributee, or legatee for the recovery of an intestate's property from a third person, except when the special circumstances shown are the collusion or insolvency of the administrator or the administrator's failure or unwillingness to collect assets. Morgan v. Woods, 69 Ga. 599 (1882) (decided under former Code 1882, § 2485); Mason v. Atlanta Fire Co. No. 1, 70 Ga. 604, 48 Am. R. 585 (1883) (decided under former Code 1882, § 2485); Moughon v. Masterson, 140 Ga. 699, 79 S.E. 561 (1913) (decided under former Civil Code 1910, § 3933). See also Jones v. McLeod, 61 Ga. 602 (1878) (decided under former Code 1873, § 2485).

Creditors may not sue when the administrator is solvent. Jordan v. Jordan, 16 Ga. 446 (1854) (decided under former law).

Best method of proving that no administration was ever had upon a particular estate is to introduce the evidence of the ordinary (now judge of probate court), or of another who has examined the records in the court of ordinary (now probate court) where letters of administration should have been granted, that no such letters are shown by those records. Crawley v. Selby, 208 Ga. 530, 67 S.E.2d 775 (1951) (decided under former Code 1933, § 113-907).

Evidence was not sufficient to prove that there had been no administration at all upon nonresident's estate in Georgia since there was no evidence as to whether or not the deceased had property in this state in a county or counties other than the one county in which the deceased proved no administration was had. Crawley v. Selby, 208 Ga. 530, 67 S.E.2d 775 (1951) (decided under former Code 1933, § 113-907).

Presumed assent. — Even in the absence of express assent to a transfer of real property to the beneficiaries, a co-executor's participation in a prior settlement which resulted in the transfer, in the co-executor's individual capacity as a beneficiary, was conduct which showed the co-executor's assent by presumption or implication to the decree of title to the property in the beneficiaries. Baggett v. Baggett, 270 Ga. App. 619, 608 S.E.2d 688 (2004) (decided under former O.C.G.A. § 53-4-9).

Recovery of Estate

1. In General

Right of administrator to recover lands held by heirs for payment of debts. — Heirs at law are entitled to the possession of lands owned by an intestate at the time of death, until those lands are needed for the purpose of administration; that is, when necessary, the administrator has a qualified right thereto to pay debts and to make legal distribution. Smith v. Fischer, 52 Ga. App. 598, 184 S.E. 406 (1936) (decided under former Code 1933, § 113-908).

While an heir may bring an action to recover property of an intestate when there is no administrator, or when the administrator consents to the action, the law plainly gives the administrator the right to recover property held adversely to the estate of an intestate. Andrews v. Walden, 208 Ga. 340, 66 S.E.2d 801 (1951) (decided under former Code 1933, § 113-908).

When an administrator sues for land, the administrator makes out a prima facie case for the land's recovery upon proof that the administrator's intestate died seized thereof, and that the estate owes debts, which makes it necessary for the personal representative to administer the land for the payment thereof, the administrator having obtained leave to sell the

Recovery of Estate (Cont'd)
1. In General (Cont'd)

land, and such prima facie case, the suit being against the heirs at law of a deceased son of the intestate, is not overcome by evidence that the deceased son had made declarations that in his lifetime there had been between the heirs a division in kind of the lands formerly owned by the intestate and that the portion sued for had by such division been set apart to him. Hortman v. Vissage, 193 Ga. 596, 19 S.E.2d 523 (1942) (decided under former Code 1933, § 113-908).

Administrator, who was also estate creditor, still had to publish notice of proposed sale. — Trial court properly denied an estate administrator's petition for leave to recover and sell the estate's property as the administrator failed to publish notice of the petition and proposed sale, as required by former O.C.G.A. § 53-8-23, and personal service on the heirs in another proceeding to recover the real property did not satisfy the publication requirement. Huggins v. Powell, 293 Ga. App. 436, 667 S.E.2d 219 (2008) (decided under former O.C.G.A. § 53-4-10).

Proof required to defeat right of administrator to recover land for distribution. — In order to defeat the right of an administrator to recover the land for distribution, it is necessary for the heir in possession not only to show that the land can be divided in kind, but that it is the purpose and intention and desire of all the heirs that the land shall be so divided. Jones v. Wilson, 227 Ga. 360, 180 S.E.2d 727 (1971) (decided under former Code 1933, § 113-908).

2. Order of Sale

Application for order of sale must allege necessity. — When an administrator applies for leave to sell the land of an intestate, it is essential that the administrator should allege that the sale is necessary for the purpose either of paying debts or making distribution; the ordinary (now judge of probate court) has no authority whatever to grant an administrator leave to sell land, unless it is necessary for one or the other of these purposes. Patterson v. Fidelity & Deposit Co., 181 Ga. 61, 181 S.E. 776 (1935) (decided under former Code 1933, § 113-908).

Order authorizing sale by administrator as conclusive proof of necessity of sale. — Order granting leave to the administrator to sell the lot on which the dwelling was located is conclusive on the defendants as to the necessity of such sale by the administrator. City of Griffin v. McKneely, 101 Ga. App. 811, 115 S.E.2d 463 (1960) (decided under former Code 1933, § 113-908).

Order of sale not binding upon heir unless personal notice given. — Such an order for sale or distribution is not "conclusive evidence of either fact" unless personal notice has been given an heir in possession. Jones v. Wilson, 227 Ga. 360, 180 S.E.2d 727 (1971) (decided under former Code 1933, § 113-908).

When it is sought to use the order as conclusive evidence against the heir in such a proceeding, the heir is entitled, under the statute as construed by this court, to personal notice of the application. Unless this character of notice is given, the court is without jurisdiction to render a conclusive judgment, and the heir is at liberty to attack the judgment. The order is, however, in any event prima facie evidence against the heir. But the prima facie showing made against the heir by the order may be overcome, in a proper case, by any competent evidence showing that there is no necessity for a sale. Jones v. Wilson, 227 Ga. 360, 180 S.E.2d 727 (1971) (decided under former Code 1933, § 113-908).

Administrator liable for rents accruing after grant of order to sell. — When an administrator is granted leave to sell the land of the estate for the purpose of paying debts and distribution, the administrator may collect rents accruing afterwards, and the administrator and the administrator's sureties may be held liable therefor on the administrator's bond. Whether the same would be true as to rents accruing after the intestate's death, but before the order granting leave to sell, it does not appear that rents for any such period would be involved. Jones v. Wilson, 195 Ga. 310, 24 S.E.2d 34 (1943) (decided under former Code 1933, § 113-908).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 113-901, are included in the annotations for this Code section.

Notes given for purchase price of land are personalty and are subject to administration when holder dies intestate. 1962 Op. Att'y Gen. p. 609 (decided under former Code 1933, § 113-901).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Descent and Distribution, §§ 5 et seq., 12, 14 et seq. 31 Am. Jur. 2d, Executors and Administrators, §§ 243 et seq., 337, 366, 367, 391, 392, 436, 463, 464, 490, 504, 535, 540, 542, 678 et seq., 688, 725, 728, 730, 731, 732, 744 et seq., 799 et seq., 803, 877, 964 et seq., 1124, 1126, 1133, 1136, 1141, 1145, 1168, 1169.

C.J.S. — 26B C.J.S., Descent and Distribution, §§ 1 et seq., 9 et seq., 73 et seq. 33 C.J.S., Executors and Administrators, § 133 et seq. 34 C.J.S., Executors and Administrators, §§ 172, 219 et seq., 321 et seq., 332 et seq., 396, 397, 398, 401, 664, 659, 667, 677, 679, 690, 702, 766, 770, 773, 828, 903.

ALR. — "Descendants" as a word of purchase or of limitation within rule in Shelley's Case, 13 A.L.R. 392.

Decree directing distribution of estate to person who is dead, 25 A.L.R. 1563.

Release to ancestor by heir expectant, 28 A.L.R. 427.

Who entitled to rent on death of landlord, 31 A.L.R. 4.

Does right of grantor to maintain a suit in equity to set aside his conveyance for cause survive to his heir, 33 A.L.R. 51.

Validity and effect of transfer of expectancy by prospective heir, 44 A.L.R. 1465; 121 A.L.R. 450.

Real property in other state, or its value, as a factor in computation of the interest of husband or wife in other's estate, 66 A.L.R. 733.

Remarriage as affecting one's status as a "widow" or "widower" for purposes of statute of descent and distribution or other statute employing such term, 72 A.L.R. 1324.

Inheritable quality of possibility of reverter, 77 A.L.R. 344.

Governing law as to rights of spouse in estate of deceased spouse, 88 A.L.R. 861.

Rights as between surviving spouse and holder of leasehold interest under a lease from deceased spouse in respect of improvements made pursuant to provisions of lease, 92 A.L.R. 1382.

Adopted child as within term "issue" in statute relating to decedents' estates, 98 A.L.R. 190.

Treatment of real property acquired by executor or administrator upon foreclosure or other enforcement of mortgage or other lien against it in favor of decedent, as personal property for purposes of administration, 110 A.L.R. 1397.

Validity and effect of transfer of expectancy by prospective heir, 121 A.L.R. 450.

Time as of which members of class described as testator's "heirs," "next of kin," "relations," etc., to whom a future gift is made are to be ascertained, 127 A.L.R. 602; 169 A.L.R. 207.

Term "heirs" or "heirs at law" employed in will to designate beneficiaries of a single gift of both real and personal property, as applicable to the personal property, 147 A.L.R. 497.

Husband or wife as heir within provision of will or trust, 157 A.L.R. 347; 79 A.L.R.2d 1438.

Respective rights and obligations of testamentary trustee and one whom will permits to occupy property, 172 A.L.R. 1283.

Personal liability of executor or administrator for interest on legacies or distributive shares where payment is delayed, 18 A.L.R.2d 1384.

Death or divorce of blood relative as affecting relationship by affinity for purposes of inheritance, succession, or estate tax, 26 A.L.R.2d 271.

Time of ascertainment of settlor's heirs and distributees who take on failure of the trust, 27 A.L.R.2d 691.

Time within which personal representa-

tive must commence action for refund of legacy or distribution, 29 A.L.R.2d 1248.

Accountability of personal representative of his use of decedent's real estate, 31 A.L.R.2d 243.

Validity, construction, and effect of provisions in life or accident policy in relation to military service, 36 A.L.R.2d 1018.

Construction, application, and effect of statutes providing for descent of property of surviving spouse which had been derived from earlier deceased spouse, 49 A.L.R.2d 391.

Statutes dealing with existing intestate administration, upon discovery of will, 65 A.L.R.2d 1201.

Power and responsibility of executor or administrator as to compromise or settlement of action or cause of action for death, 72 A.L.R.2d 285.

Rights as between designated beneficiary and heirs or legatees of deceased employee covered by private pension or retirement plan, 72 A.L.R.2d 924.

Rights in growing, unmatured annual crops as between personal representatives of decedent's estate and heirs or devisees, 92 A.L.R.2d 1373.

Who may exercise voting power of corporate stock pending settlement of estate of deceased owner, 7 A.L.R.3d 629.

To whom does title to burial lot pass on testator's death, in absence of specific provision in his will, 26 A.L.R.3d 1425.

Right of adopted child to inherit from intestate natural grandparent, 60 A.L.R.3d 631.

Oil and gas royalty as real or personal property, 56 A.L.R.4th 539.

53-2-8. Death intestate, and without ascertainable heirs, of spouse of intestate decedent.

(a) When the spouse of an intestate decedent dies intestate and without ascertainable heirs within six months of the decedent's death, any undistributed property of the decedent to which the spouse had been entitled prior to the spouse's death shall not escheat but shall be distributed to the heirs of the decedent who would have inherited the property under the intestacy laws if the spouse had predeceased the decedent.

(b) The nonexistence of heirs of the spouse may be determined by publication as provided in Code Section 53-2-51. If no heir of the spouse appears, the property, less the expenses of the proceedings to determine the nonexistence of heirs, shall be paid over as provided in subsection (a) of this Code section.

History. — Code 1981, § 53-2-8, enacted by Ga. L. 1996, p. 504, § 10.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, "Code Section" was substituted for "Code section" in the first sentence in subsection (b).

COMMENT

This section is a modification of former OCGA Sec. 44-5-199. The purpose of this section is to provide an alternative intestacy rule to prevent the escheat of certain property of a decedent if the decedent's spouse dies intestate within six months without ascertainable heirs. Under this section, any property of the first decedent to which the spouse is entitled but which has not yet been distributed to the spouse will instead be distributed to the heirs of the first decedent as if the spouse had predeceased the decedent. The law relating to escheat is codified at Code Sec. 53-2-50.

ARTICLE 2

JUDICIAL DETERMINATION OF HEIRS AND INTERESTS

53-2-20. Jurisdiction of probate or superior court.

The identity or interest of any heir may be resolved judicially upon application to the probate court that has jurisdiction by virtue of a pending administration or that would have jurisdiction in the event of an administration of the estate of the decedent. Alternatively, the petition may be filed in the superior court of the county where the probate court having jurisdiction, as defined in this Code section, is located; provided, however, that, if the petition is filed in connection with a contested proceeding to determine a purported heir's entitlement to a year's support from the decedent's estate pursuant to Chapter 3 of this title, such petition must be filed in the probate court having jurisdiction. The proceedings for the determination of such questions shall conform to the requirements set forth in this article.

History. — Code 1981, § 53-2-20, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-2/HB 865.

The 2020 amendment, effective January 1, 2021, added the proviso at the end of the second sentence.

COMMENT

This section carries over former OCGA Sec. 53-4-30.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1958, p. 361, § 1, are included in the annotations for this Code section.

Probate court lacks jurisdiction to enforce contract to adopt. — Court of ordinary (now probate court) is without jurisdiction to entertain an action to enforce an alleged contract of a decedent to adopt the plaintiff, and to declare the plaintiff to be an heir of the decedent. Lackey v. Lackey, 216 Ga. 177, 115 S.E.2d 565 (1960) (decided under Ga. L. 1958, p. 361, § 1).

Cited in Fuller v. Fuller, 107 Ga. App. 429, 130 S.E.2d 520 (1963); Waters v. Roberts, 116 Ga. App. 620, 158 S.E.2d 428 (1967); Kilgo v. Keaton, 227 Ga. 563, 181 S.E.2d 821 (1971); Stanton v. Dickson, 240 Ga. 15, 239 S.E.2d 741 (1977); Lambert v. Allen, 146 Ga. App. 617, 247 S.E.2d 200 (1978); Carr v. Kupfer, 250 Ga. 106, 296 S.E.2d 560 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Descent and Distribution, § 116.

C.J.S. — 26B C.J.S., Descent and Distribution, §§ 82, 87, 88.

ALR. — Questions regarding rights of inheritance or other rights in respect of another's estate after death as proper subject of declaratory action before latter's death, 139 A.L.R. 1239.

Right of executor or administrator to appeal from order granting or denying distribution, 16 A.L.R.3d 1274.

Conflict of laws as to pretermission of heirs, 99 A.L.R.3d 724.

53-2-21. Filing of petition.

Any personal representative, guardian, conservator, committee, trustee, fiduciary, or other person having a status which by operation of law or written instrument devolves upon such person a duty of distributing property to heirs may file a petition for determination of heirship as provided in Code Section 53-2-20. The petition shall allege the names, addresses, ages, and relationship, so far as known to the petitioner, of all parties at interest other than creditors and the nature and character of such interests. The petition shall further allege whether the petitioner has reason to apprehend that there may be others entitled to participate in the distribution whose names are unknown to the petitioner.

History. — Code 1981, § 53-2-21, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries over former OCGA Sec. 53-4-31. For general provisions on the filing of petitions in the probate court, see Chapter 11 of this Title.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1958, p. 361, § 2, are included in the annotations for this Code section.

Cited in Waters v. Roberts, 116 Ga. App. 620, 158 S.E.2d 428 (1967); Stanton v. Dickson, 240 Ga. 15, 239 S.E.2d 741 (1977); Lambert v. Allen, 146 Ga. App. 617, 247 S.E.2d 200 (1978).

RESEARCH REFERENCES

C.J.S. — 26B C.J.S., Descent and Distribution, §§ 83, 84.

ALR. — Form and sufficiency of allegations of heirship, 110 A.L.R. 1239.

Questions regarding rights of inheritance or other rights in respect of another's estate after death as proper subject of declaratory action before latter's death, 139 A.L.R. 1239.

53-2-22. Petition by person claiming to be heir or distributee.

Any individual claiming to be an heir or any person in any way interested as a distributee in any property under the laws of intestacy may apply to either the probate court or the superior court specified in Code Section 53-2-20 to have the claim of heirship and quantity of interest established. The petition in such a case shall contain the same averments as to all parties at interest required of persons filing under Code Section 53-2-21 with the person charged with the duty of distribution being named as a party.

History. — Code 1981, § 53-2-22, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries over former OCGA Sec. 53-4-32. For general provisions on the filing of petitions in the probate court, see Chapter 11 of this Title.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1958, p. 361, § 3, are included in the annotations for this Code section.

Action to determine heirship to be brought against all interested parties. — An action by one who deems oneself to be an heir or to be interested as a distributee must be brought against the person charged with the duty of distribution and against all other known parties at interest except creditors of the estate. Pike v. Armburst, 117 Ga. App. 756, 161 S.E.2d 896 (1968) (decided under Ga. L. 1958, p. 361, § 3).

Cited in Stanton v. Dickson, 240 Ga. 15, 239 S.E.2d 741 (1977).

RESEARCH REFERENCES

C.J.S. — 26B C.J.S., Descent and Distribution, §§ 83, 84.

ALR. — Form and sufficiency of allegations of heirship, 110 A.L.R. 1239.

Time as of which members of class described as grantor's or settler's "heirs," "next of kin," "relations," and the like to whom a future gift is made, are to be ascertained, 38 A.L.R.2d 327.

Validity and enforceability of provision of will or trust instrument for forfeiture or reduction of share of contesting beneficiary, 23 A.L.R.4th 369.

53-2-23. Superior court procedure.

Upon the filing in a superior court of a petition described in Code Section 53-2-21 or 53-2-22, service on the parties in interest shall be effected in the same manner as prescribed in cases in which equitable relief is sought; and the case shall thereafter proceed to judgment in the manner provided for such cases by the rules of practice in the superior courts.

History. — Code 1981, § 53-2-23, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-4-33.

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Descent and Distribution, § 115. 27A Am. Jur. 2d, Equity, § 13 et seq.

C.J.S. — 26B C.J.S., Descent and Distribution, § 82.

53-2-24. Probate court procedure.

Upon the filing in a probate court of a petition described in Code Section 53-2-21 or 53-2-22, a citation shall be issued and parties in interest shall be served as provided in Chapter 11 of this title.

History. — Code 1981, § 53-2-24, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section replaces former OCGA Secs. 53-4-34 and 53-4-35.

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Descent and Distribution, § 114 et seq.

C.J.S. — 26B C.J.S., Descent and Distribution, § 83 et seq.

ALR. — Necessity that newspaper be published in English language to satisfy requirements regarding publication of legal or official notice, 90 A.L.R. 500.

Concealment of or failure to disclose existence of person interested in estate as extrinsic fraud which will support attack on judgment in probate proceedings, 113 A.L.R. 1235.

53-2-25. Intervention by person claiming to be heir or distributee.

Any individual claiming to be an heir or any person in any way interested as a distributee and who is not named as such in any petition filed and pending under this article may file a motion to intervene in the proceeding.

History. — Code 1981, § 53-2-25, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-4-36. The procedure for filing a motion to intervene appears in the Georgia Civil Practice Act at OCGA Secs. 9-11-5 and 9-11-24.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-4-36 are included in the annotations for this Code section.

Cited in O'Regan v. Brennan, 204 Ga. App. 50, 418 S.E.2d 389 (1992).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Descent and Distribution, § 114 et seq.

C.J.S. — 26B C.J.S., Descent and Distribution, § 83 et seq.

53-2-26. Effect of findings of court.

In the absence of fraud, the findings of the superior court or the probate court shall be binding and conclusive as to every person and as to every issue decided.

History. — Code 1981, § 53-2-26, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries over paragraph (a) of OCGA Sec. 53-4-37.

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Descent and Distribution, § 115.

C.J.S. — 26B C.J.S., Descent and Distribution, §§ 87, 88.

ALR. — Concealment of or failure to disclose existence of person interested in estate as extrinsic fraud which will support attack on judgment in probate proceedings, 113 A.L.R. 1235.

Judgment denying validity of will because of undue influence, lack of mental capacity, or the like, as res judicata as to validity of another will, deed, or other instrument, 25 A.L.R.2d 657.

53-2-27. DNA testing for kinship; procedure; costs.

(a) When the kinship of any party in interest to a decedent is in controversy in any proceeding under this article, a probate court or superior court may order the removal and testing of deoxyribonucleic acid (DNA) samples from the remains of the decedent and from any party in interest whose kinship to the decedent is in controversy for purposes of comparison and determination of the statistical likelihood of such kinship. The court may order the disinterment of the decedent's remains if reasonably necessary to obtain such samples.

(b) The order may be made only on motion for good cause shown and upon notice to all parties in interest and shall specify the time, place, manner, conditions, and scope of the removal and testing of samples, and the person or persons by whom it is to be made. Such motion, when made by a party in interest, shall be supported by affidavit setting forth:

(1) The factual basis for a reasonable belief that the party in interest whose kinship to the decedent is in controversy is or is not so related; and

(2) If disinterment of the decedent's remains is sought, the factual basis for a reasonable belief that reliable DNA samples from the

decedent are not otherwise reasonably available from any other source.

(c) Upon request, the movant shall deliver to all parties in interest a copy of a detailed written report of the tester and of any other expert involved in the determination of such statistical likelihood setting out his or her findings, including the results of all tests made and conclusions or opinions based thereon.

(d) The costs of obtaining and testing of such samples, including the costs of disinterment and reinterment of the remains of the decedent, if necessary, as well as the costs of providing the report, shall be assessed against and paid by the moving party.

History. — Code 1981, § 53-2-27, enacted by Ga. L. 2002, p. 1081, § 1; Ga. L. 2020, p. 377, § 1-3/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (a), inserted "probate court or" in the first sentence, deleted "superior" preceding "court" in the second sentence, and deleted the last sentence which read: "If the proceedings are pending in the probate court, the motion shall be transferred to the superior court for determination."

Law reviews. — For annual survey of law on wills, trusts, guardianships, and fiduciary administration, see 62 Mercer L. Rev. 365 (2010).

For note on the 2002 enactment of this Code section, see 19 Ga. St. U.L. Rev. 347 (2002).

ARTICLE 3

DISTRIBUTION OF ESTATE IN KIND

53-2-30. Authority of administrator; method of distribution provided for in will.

(a) An administrator may distribute all or a portion of an intestate estate in kind in a distribution that is pro rata as to each asset.

(b) An administrator may distribute all or a portion of an intestate estate in kind in a distribution that is not pro rata as to each asset only upon the written consent of all the heirs or upon an order of the probate court made pursuant to a petition filed by an heir or the administrator.

(c) Nothing in this Code section shall be construed as limiting or restricting the method of distribution provided for in a will or as requiring the approval of the probate court for a distribution or division in kind made pursuant to the directions in a will. In all cases where the will directs or authorizes a distribution or division in kind but fails to direct specifically how or by whom the distribution or division in kind is to be made, it shall be the duty and authority of the executor or administrator with the will annexed to make the distribution or division in kind.

History. — Code 1981, § 53-2-30, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section replaces former OCGA Sec. 53-4-11. Subsection (c) carries forward the provisions of former OCGA Sec. 53-4-11(b). Two options for distributions in kind are available under this section. The administrator may make the distribution in kind without the consent of the heirs or a court order if the distribution is made pro rata as to each asset. If the distribution in kind is to be made in a manner that is not pro rata as to each asset, the administrator may do so only if all the heirs consent or pursuant to an order from the probate court. The procedure for filing a petition for such order is described in the subsequent Code sections.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Laws 1812, Cobb's 1851 Digest, p. 292, Code 1863, § 2542, Code 1868, § 2543, Code 1873, § 2584, Code 1882, § 2584, Civil Code 1895, § 3479, Civil Code 1910, § 4057, Code 1933, § 113-1018, and former O.C.G.A. § 53-4-11 are included in the annotations for this Code section.

Sections which carry provisions into effect. — Former Code 1933, §§ 1019 and 1020 provided the machinery for carrying into effect the provisions of former Code 1933, § 113-1018. Kaiser v. Kaiser, 178 Ga. 355, 173 S.E. 688 (1934) (decided under former Code 1933, § 113-1018).

Two features of former Code 1933, § 113-1018 were especially to be noted: (1) the application may be made by the "representative" of the estate — it is clearly intended to embrace executors as well as administrators; and (2) the statute contemplates a proceeding for the distribution of the estate. Kaiser v. Kaiser, 178 Ga. 355, 173 S.E. 688 (1934) (decided under former Code 1933, § 113-1018).

This statutory proceeding is really a legal substitute for the final division and final settlement of accounts by an administrator or an executor. It constitutes the last step in winding up an estate with the stamp of judicial approval on the distribution of the estate as made by the representative. Kaiser v. Kaiser, 178 Ga. 355, 173 S.E. 688 (1934) (decided under former Code 1933, § 113-1018).

Proceedings under this statute were not in the nature of a partition of specific property, but contemplated a final and complete distribution of the assets of the estate. The devisees and legatees are to receive their share, and all of their share of the estate not previously delivered to them. Kaiser v. Kaiser, 178 Ga. 355, 173 S.E. 688 (1934) (decided under former Code 1933, § 113-1018).

Cited in Cunningham v. Schley, 34 Ga. 395 (1866); Southwestern R.R. v. Thomason, 40 Ga. 408 (1869); Hooper v. Howell, 50 Ga. 165 (1873); Rogers v. Dickey, 117 Ga. 819, 45 S.E. 71 (1903); Alaculsey Lumber Co. v. Flemister, 146 Ga. 310, 91 S.E. 104 (1916); Robinson v. Georgia Sav. Bank & Trust Co., 106 F.2d 944 (5th Cir. 1939); McMullen v. Carlton, 192 Ga. 282, 14 S.E.2d 719 (1941); Matson v. Crowe, 193 Ga. 578, 19 S.E.2d 288 (1942); Ashford v. Van Horne, 276 Ga. 636, 580 S.E.2d 201 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Descent and Distribution, §§ 1, 2, 13. 31 Am. Jur. 2d, Executors and Administrators, §§ 914, 945, 946, 972, 979, 985 et seq.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 600, 605, 611, 614, 628, 644.

ALR. — Partition: division of building, 28 A.L.R. 727.

Probate of will as condition precedent to

suit for partition by devises, 141 A.L.R. 1311.

Right to partial distribution of estate or distribution of particular assets, prior to final closing, 18 A.L.R.3d 1173.

Lack of final settlement of intestate's estate as affecting heir's right to partition of realty, 92 A.L.R.3d 473.

53-2-31. Petition in probate court; distribution in kind not pro rata.

An heir or the administrator may petition the probate court for an order allowing a distribution in kind that is not pro rata as to each asset. The petition shall set forth the names and addresses of all the heirs and the requested distribution of the assets. Upon the filing of the petition, a citation shall be issued and parties in interest shall be served as provided in Chapter 11 of this title.

History. — Code 1981, § 53-2-31, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section replaces former OCGA Sec. 53-4-11(a).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Laws 1812, Cobb's 1851 Digest, p. 292, Code 1863, § 2542, Code 1868, § 2543, Code 1873, § 2584, Code 1882, § 2584, Civil Code 1895, § 3479, Civil Code 1910, § 4057, Code 1933, § 113-1018, and former O.C.G.A. § 53-4-11 are included in the annotations for this Code section.

Sections which carry provisions into effect. — Former Code 1933, §§ 1019 and 1020 provided the machinery for carrying into effect the provisions of former Code 1933, § 113-1018. Kaiser v. Kaiser, 178 Ga. 355, 173 S.E. 688 (1934) (decided under former Code 1933, § 113-1018).

Two features of former Code 1933, § 113-1018 were especially to be noted: (1) the application may be made by the "representative" of the estate — it is clearly intended to embrace executors as well as administrators; and (2) the statute contemplates a proceeding for the distribution of the estate. Kaiser v. Kaiser, 178 Ga. 355, 173 S.E. 688 (1934) (decided under former Code 1933, § 113-1018).

This statutory proceeding is really a legal substitute for the final division and final settlement of accounts by an administrator or an executor. It constitutes the last step in winding up an estate with the stamp of judicial approval on the distribution of the estate as made by the representative. Kaiser v. Kaiser, 178 Ga. 355, 173 S.E. 688 (1934) (decided under former Code 1933, § 113-1018).

Distribution in kind. — A proceeding under this statute differs from a final approval and settlement of an administrator's account after the division of an estate only in that the statute permits the delivery of the assets in kind and relieves the administrator from the necessity of reducing the assets to the form of cash. Kaiser v. Kaiser, 178 Ga. 355, 173 S.E. 688 (1934) (decided under former Code 1933, § 113-1018).

If it was practicable, the ordinary (now probate judge) can order a distribution in kind on the application of the administrator or any distributee of the estate provided all the distributees should agree to such a division; for any one of them would have the right to insist upon a sale of the

estate and a distribution of the proceeds. Patterson v. Fidelity & Deposit Co., 181 Ga. 61, 181 S.E. 776 (1935) (decided under former Code 1933, § 113-1018).

Judgment of probate court presumed fair and competent. — Probate court by express statute being clothed with jurisdiction generally to divide the property of decedents in kind, and being a court of original and competent jurisdiction for that purpose, it must be conclusively presumed that the court had before it all necessary and competent evidence to authorize the judgment. In these circumstances, the courts are always extremely loath to enter upon an investigation de novo. Kaiser v. Kaiser, 178 Ga. 355, 173 S.E. 688 (1934) (decided under former Code 1933, § 113-1018).

Equitable claims between cotenants. — Probate court is without jurisdiction to resolve a dispute which involves equitable claims asserted by cotenants. Evans v. Little, 246 Ga. 219, 271 S.E.2d 138 (1980) (decided under former Code 1933, § 113-1018).

Jurisdiction of superior court to interpret will. — Though it is the rule that a direct proceeding to construe a will must be brought in a court of equity, when the construction of a will is incidentally involved in a proceeding over which the probate court has jurisdiction, this court has jurisdiction under such conditions to interpret the will so far as may be necessary in the proceeding before it. Kaiser v. Kaiser, 178 Ga. 355, 173 S.E. 688 (1934) (decided under former Code 1933, § 113-1018).

Where devisee brings equitable petition against coexecutors of an estate seeking a partition of the property of the estate through a sale by the receiver, and alleging that more than 20 years had elapsed since the executors had qualified, that all the debts of the estate had been paid, and that executors were in possession of all real and personal property belonging to the estate, the allegations are insufficient to authorize the grant of the prayers for equitable petition between the devisees because plaintiff devisee has a full and adequate remedy under the law in the court of ordinary (now probate court) to require executors to distribute the estate by division or partition. Salter v. Salter, 209 Ga. 511, 74 S.E.2d 241 (1953) (decided under former Code 1933, § 113-1018).

Exercise by the superior court of the court's equity jurisdiction in order to fully and adequately resolve all issues between tenants in common would not be an interference with the orderly administration of an estate. Evans v. Little, 246 Ga. 219, 271 S.E.2d 138 (1980) (decided under former Code 1933, § 113-1018).

Partition action by tenant. — Existence or nonexistence of administration of the estate does not preclude the bringing of a partition action by a tenant in common. Evans v. Little, 246 Ga. 219, 271 S.E.2d 138 (1980) (decided under former Code 1933, § 113-1018).

Effect of order of probate court setting apart portion of estate to beneficiary. — An order of the probate court, setting apart a given portion to a beneficiary necessarily constitutes a double-barreled adjudication that such beneficiary is entitled to the amount of property awarded, and that the beneficiary is not entitled to more than that awarded the beneficiary. Kaiser v. Kaiser, 178 Ga. 355, 173 S.E. 688 (1934) (decided under former Code 1933, § 113-1018).

Cited in Cunningham v. Schley, 34 Ga. 395 (1866); Southwestern R.R. v. Thomason, 40 Ga. 408 (1869); Hooper v. Howell, 50 Ga. 165 (1873); Rogers v. Dickey, 117 Ga. 819, 45 S.E. 71 (1903); Alaculsey Lumber Co. v. Flemister, 146 Ga. 310, 91 S.E. 104 (1916); Robinson v. Georgia Sav. Bank & Trust Co., 106 F.2d 944 (5th Cir. 1939); McMullen v. Carlton, 192 Ga. 282, 14 S.E.2d 719 (1941); Matson v. Crowe, 193 Ga. 578, 19 S.E.2d 288 (1942); Ashford v. Van Horne, 276 Ga. 636, 580 S.E.2d 201 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Descent and Distribution, §§ 1, 2, 13. 31 Am. Jur. 2d, Executors and Administrators, §§ 914, 945, 946, 972 et seq., 979, 985 et seq.

C.J.S. — 34 C.J.S., Executors and Ad-

ministrators, §§ 482, 487, 493, 496, 515, 519.

ALR. — Partition: division of building, 28 A.L.R. 727.

Probate of will as condition precedent to suit for partition by devises, 141 A.L.R. 1311.

Right to partial distribution of estate or distribution of particular assets, prior to final closing, 18 A.L.R.3d 1173.

Lack of final settlement of intestate's estate as affecting heir's right to partition of realty, 92 A.L.R.3d 473.

53-2-32. Order of probate court.

If no objection is made to the petition, the probate court shall order the administrator to distribute the assets in the manner requested in the petition. If objection is made, upon the evidence submitted, the probate court shall divide the assets in kind in shares that are pro rata or are not pro rata as to each asset and order the administrator to distribute the shares accordingly.

History. — Code 1981, § 53-2-32, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004).

COMMENT

This section replaces former OCGA Secs. 53-4-12 and 53-4-13. The section eliminates the use of three appraisers and instead has the probate court order the administrator to distribute assets in kind in accordance with the petition unless an objection to the petition is made. If an objection is made, the court is to hear the petition and then, in the court's discretion, order a distribution in kind that is or is not pro rata as to each asset.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 113-1019 and 113-1020, are included in the annotations for this Code section.

Effecting provisions. — Former Code 1933, §§ 1019 and 1020 provide the machinery for carrying into effect the provisions of former Code 1933, § 113-1018. Kaiser v. Kaiser, 178 Ga. 355, 173 S.E. 688 (1934) (decided under former Code 1933, § 113-1019).

Judgment of probate court presumed fair and proper. — Probate court by express statute being clothed with jurisdiction generally to divide the property of decedents in kind, and being a court of original and competent jurisdiction for that purpose, it must be conclusively presumed that the court had before it all necessary and competent evidence to authorize the judgment. In these circumstances, the courts are always extremely loath to enter upon an investigation de novo. Kaiser v. Kaiser, 178 Ga. 355, 173 S.E. 688 (1934) (decided under former Code 1933, § 113-1020).

When parties holding as heirs an undivided interest in lands have abandoned, without formally dismissing, a proceeding instituted in the superior court for partition, and agreed among themselves to institute such a proceeding in the court of ordinary (now probate court) to bring about a partition of the same lands, and this is done by appropriate proceeding in that court, resulting in a judgment confining the assignment of the various parcels by the appraisers, no objection being filed or appeal taken, they are bound by such judgment. They will not subsequently be permitted to disregard such judgment, and seek, by amendment to the original petition in superior court, another parti-

tioning of such lands. Zeagler v. Zeagler, 192 Ga. 453, 15 S.E.2d 478 (1941) (decided under former Code 1933, § 113-1020).

When devisee brings equitable petition against coexecutors of an estate seeking a partition of the property of the estate through a sale by the receiver, and alleging that more than 20 years had elapsed since the executors had qualified, that all the debts of the estate had been paid, and that executors were in possession of all real and personal property belonging to the estate, the allegations are insufficient to authorize the grant of the prayers for equitable petition between the devisees because plaintiff devisee has a full and adequate remedy under the law in the court of ordinary (now probate court) to require executors to distribute the estate by division or partition. Salter v. Salter, 209 Ga. 511, 74 S.E.2d 241 (1953) (decided under former Code 1933, § 113-1020).

Cited in McMullen v. Carlton, 192 Ga. 282, 14 S.E.2d 719 (1941); Beard v. Beard, 197 Ga. 487, 29 S.E.2d 595 (1944); Bell v. Cone, 208 Ga. 467, 67 S.E.2d 558 (1951).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 488 et seq., 972, 976 et seq., 982, 985 et seq., 987.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 634, 635, 637, 648 et seq.

ALR. — Partition: division of building, 28 A.L.R. 727.

Failure of decree or order of distribution of decedent's estate to describe specifically the property or property interests involved, or misdescription thereof, 120 A.L.R. 630.

Conclusiveness of statement or decision of accountant or similar third person under contract between others requiring property to be valued by him, 50 A.L.R.2d 1268.

Lack of final settlement of intestate's estate as affecting heir's right to partition of realty, 92 A.L.R.3d 473.

ARTICLE 4

DISPENSING WITH ADMINISTRATION

53-2-40. Petition.

(a) When an individual has died intestate and there has been no personal representative appointed in this state, any heir of the decedent may file a petition praying for an order that no administration is necessary. The petition shall be filed in the probate court of the county of the domicile of the decedent, if the decedent was domiciled in this state, or in the county in which real property is located, if the decedent was not domiciled in this state.

(b) The petition shall show: the name and domicile of the decedent; the names, ages or majority status, and domicile of the heirs of the decedent; a description of the property in this state owned by the decedent; that the estate owes no debts or that there are known debts and all creditors have consented or will be served as provided in Chapter 11 of this title; and that the heirs have agreed upon a division of the estate among themselves. The agreement containing original signatures of all the heirs, attested to by a clerk of the probate court or a notary public, shall be attached to the petition. Property subject to an outstanding security deed or agreement may be subject to this proceed-

ing only if the holder of the security deed consents or is served and makes no objection.

(c) The personal representative of a deceased heir is authorized to agree to the division on behalf of that heir.

(d) In any case involving the approval of a petition for an order that no administration is necessary, where there is an interest in real property, the court shall file, within 30 days of granting such petition, a certified copy of the order granting the petition that no administration is necessary in each county in this state in which the deceased owned real property, to be recorded in the deed records of the county and indexed under the name of the deceased in the grantor index. Such order shall be accompanied by the same fee for filing deeds with the clerk of the superior court. The filing fee and any fee for the recording of such order shall be taxed as costs to the estate. The certified copy of the order granting the petition that no administration is necessary shall set forth:

(1) The date of the order granting such petition;

(2) The name and address of the deceased;

(3) The interest in the property acquired by each party; and

(4) The name and address of all parties that take title to the real property pursuant to the order issued by the court.

History. — Code 1981, § 53-2-40, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 5; Ga. L. 1998, p. 1586, § 10; Ga. L. 2008, p. 715, § 8/SB 508.

Law reviews. — For article discussing methods of summary distribution and settlement of decedent's estate, see 6 Ga. L. Rev. 74 (1971). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

COMMENT

This section carries over former OCGA Sec. 53-10-1 with the modifications that the petition must include a copy of the agreement for division of property and must state either that the estate owes no debts or that there are known debts and all the creditors have consented or will be served. The petition must be filed in the county of the decedent's domicile rather than the county of residence as required under former OCGA Sec. 53-10-1. Subsection (c) allows the personal representative of a deceased heir to agree to the division on behalf of that heir. (See Code section 53-11-2, which authorizes the guardian of an heir to consent on behalf of the heir.)

JUDICIAL DECISIONS

Analysis

General Consideration
Order Dispensing with Administration Generally
Petition
Jurisdiction

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1958, p. 355, § 1, and former O.C.G.A. § 53-10-1 are included in the annotations for this Code section.

Counteraffidavit. — Duty of an heir opposing a petition for an order dispensing with administration to file a counteraffidavit in opposition to a motion for summary judgment on the petition arises only after the movant has made a prima facie showing of entitlement to judgment. Echols v. Hudson, 189 Ga. App. 780, 377 S.E.2d 542 (1989) (decided under former O.C.G.A. § 53-10-1).

Fact questions preclude summary judgment. — Fact questions, precluding summary judgment on a petition for an order dispensing with administration, existed when the record showed only that there was an estate consisting of a checking account and unidentified household furnishings, that there were debts owed by the decedent, and that the heirs had not agreed amicably to a division of the assets. Echols v. Hudson, 189 Ga. App. 780, 377 S.E.2d 542 (1989) (decided under former O.C.G.A. § 53-10-1).

Cited in Bell v. Liberty Mut. Ins. Co., 108 Ga. App. 173, 132 S.E.2d 538 (1963); Clark v. Perrin, 224 Ga. 307, 161 S.E.2d 874 (1968); Babb v. Potts, 183 Ga. App. 785, 360 S.E.2d 44 (1987).

Order Dispensing with Administration Generally

Outstanding order dispensing with administration of decedent's estate would not be bar to probate of decedent's will. Roughton v. Jones, 225 Ga. 774, 171 S.E.2d 536 (1969) (decided under Ga. L. 1958, p. 355, § 1).

Cannot support plea of res judicata. — Probate court's order on petition for no administration necessary cannot support plea of res judicata because it is subject to trial de novo in the superior court; i.e., the probate court's order is not final. Hurst v. Gray, 251 Ga. 856, 310 S.E.2d 524 (1984) (decided under former O.C.G.A. § 53-10-1).

Party who has previously applied for and obtained order dispensing with administration of an estate, an essential condition precedent being "that the estate of the decedent owes no debts," is thereafter precluded from asserting any claim the party may have had against the estate for debts which the party voluntarily paid. Shaw v. Davis, 119 Ga. App. 801, 168 S.E.2d 853 (1969) (decided under Ga. L. 1958, p. 355, § 1).

Petition

Omissions or mistakes cured by amendment. — Statutory requirements that the petition allege the names, ages, and residences of the heirs, and the existence of an agreement for division, are matters which may be cured by amendment if they are omitted or improperly stated. Saturday v. Saturday, 113 Ga. App. 251, 147 S.E.2d 798 (1966) (decided under Ga. L. 1958, p. 355, § 1).

Presumption of agreement for amicable division. — Bringing of a petition under this statute by those who allege themselves to be all of the heirs at law of a deceased gives rise to a presumption that they have reached an agreement for an amicable division of the estate among themselves, whether it be alleged in the petition or not. Saturday v. Saturday, 113 Ga. App. 251, 147 S.E.2d 798 (1966) (decided under Ga. L. 1958, p. 355, § 1).

Jurisdiction

Basis for proceeding in probate court. — Intestacy of a deceased person and the fact that no permanent administration in this state has been had upon the estate are the bases for the proceeding in the court of ordinary (now probate court) to dispense with the administration of an estate. Roughton v. Jones, 225 Ga. 774, 171 S.E.2d 536 (1969) (decided under Ga. L. 1958, p. 355, § 1).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 6, 8 et seq.

Am. Jur. Pleading and Practice Forms. — 10A Am. Jur. Pleading and

Practice Forms, Executors and Administrators, § 925.

C.J.S. — 26B C.J.S., Descent and Distribution, § 78. 33 C.J.S., Executors and Administrators, §§ 7, 8, 11, 13.

53-2-41. Issuance of citation and order; objections.

(a) Upon the filing of a petition that states that there are known creditors of the estate who are to be served, a citation shall be issued and any creditors of the estate shall be served as provided in Chapter 11 of this title.

(b) If any creditor, whether the debt is due or not, objects to the granting of the order, the court shall refuse to grant an order finding that no administration is necessary so long as such objection is not withdrawn.

(c) In the event no creditor files objection to the granting of the order or if all objections are withdrawn, the probate court shall ascertain the heirs of the decedent and whether they are all of age and suffering under no disability or are represented by a guardian or a personal representative. If the court finds that all the heirs have consented and that the estate of the decedent owes no debts or that all creditors have consented or withdrawn any objection, the court shall then enter an order in the proceedings finding that no administration is necessary. Should property described in the petition be located in a county other than the county in which the petition is filed, a certified copy of the proceedings, including any agreement filed pursuant to Code Section 53-2-40, and the order of the probate court thereon may be entered in the office of the clerk of the superior court of the county in which the property is located.

(d) An order finding that no administration is necessary shall confirm the vesting of title to the decedent's property in the heirs in the amounts and portions described in Code Section 53-2-1, or, if different, in the agreement filed by the heirs in accordance with Code Section 53-2-40.

(e) Property thereafter sold or encumbered by the heirs of the decedent to a purchaser or lender who acts in good faith reliance upon the order shall be discharged from all claims and rights of the creditors of the deceased owner, except such claims, liens, judgments, security deeds, mortgages, or encumbrances as have been filed for record in the manner required by law so as to constitute notice thereof at the time of such sale or encumbrance by the heirs.

(f) Nothing in this chapter shall be deemed to apply to or adversely affect liens for taxes or liens arising from the giving or signing of the bond of a public official.

History. — Code 1981, § 53-2-41, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article discussing methods of summary distribution and settlement of decedent's estate, see 6 Ga. L. Rev. 74 (1971).

COMMENT

This section carries over the paragraphs (b) through (e) of former OCGA Sec. 53-10-2 and Sec. 53-10-3. Paragraph (a) of OCGA Sec. 53-10-2 is now encompassed in Chapter 11 of this Title. The remaining paragraphs of former OCGA Sec. 53-10-2 have been modified to reflect that the heirs for whom a guardian or a personal representative has been appointed may consent to an order dispensing with administration and to clarify that the order dispensing with administration has the effect of vesting title in the heirs in accordance with the state's laws of intestate distribution or, if different, the agreement set forth by the heirs as a part of their petition.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1959, p. 111, § 1, and former O.C.G.A. § 53-10-2 are included in the annotations for this Code section.

Ordinary (now probate judge) is not required to make finding as to agreement for division or to incorporate any reference to it in the ordinary's order. Saturday v. Saturday, 113 Ga. App. 251, 147 S.E.2d 798 (1966) (decided under Ga. L. 1959, p. 111, § 1).

Counteraffidavit. — Duty of an heir opposing a petition for an order dispensing with administration to file a counteraffidavit in opposition to a motion for summary judgment on the petition arises only after the movant has made a prima facie showing of entitlement to judgment. Echols v. Hudson, 189 Ga. App. 780, 377 S.E.2d 542 (1989) (decided under former O.C.G.A. § 53-10-2).

Fact questions preclude summary judgment. — Fact questions, precluding summary judgment on a petition for an order dispensing with administration, existed since the record showed only that there was an estate consisting of a checking account and unidentified household furnishings, that there were debts owed by the decedent, and that the heirs had not agreed amicably to a division of the assets. Echols v. Hudson, 189 Ga. App. 780, 377 S.E.2d 542 (1989) (decided under former O.C.G.A. § 53-10-2).

Cited in Michael v. Poss, 209 Ga. 559, 74 S.E.2d 742 (1953); Shadburn v. Tapp, 209 Ga. 887, 77 S.E.2d 7 (1953); Robbins v. Riales, 221 Ga. 225, 144 S.E.2d 80 (1965); Hayes v. Strickland, 112 Ga. App. 567, 145 S.E.2d 728 (1965); Babb v. Potts, 183 Ga. App. 785, 360 S.E.2d 44 (1987).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under Ga. L. 1959, p. 111, § 1, are included in the annotations for this Code section.

Taxes are debts for purposes of this statute. 1971 Op. Att'y Gen. No. U71-58 (decided under Ga. L. 1959, p. 111, § 1).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 1, 11 et seq., 21, 48.

C.J.S. — 26B C.J.S., Descent and Distribution, §§ 74, 75, 78, 81, 112 et seq. 33 C.J.S., Executors and Administrators, §§ 7, 8, 11, 13.

53-2-42. Right of action by creditor.

After the granting of an order by the probate court that no administration is necessary, any creditor of the decedent shall have a right of action on the unsatisfied debts against the heirs, to the extent of the value of property received by the heirs.

History. — Code 1981, § 53-2-42, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries over former OCGA 53-10-4 with modifications to reflect the changes made in the previous Code sections.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1958, p. 355, § 7 are included in the annotations for this Code section.

Cited in Hayes v. Strickland, 112 Ga. App. 567, 145 S.E.2d 728 (1965).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Descent and Distribution, §§ 133, 134, 136, 138, 143 et seq.

C.J.S. — 26B C.J.S., Descent and Distribution, §§ 71, 112 et seq.

ALR. — Jurisdiction and power of equity to subject legacy, devise, or distributive share in estate to claim of creditor of legatee, devisee, or distributee, 123 A.L.R. 1293.

ARTICLE 5

ESCHEAT

Law reviews. — For comment, "Unwrapping Escheat: Unclaimed Property Laws and Gift Cards," see 60 Emory L.J. 971 (2011).

53-2-50. Definition.

As used in this article, the term "escheat" is the reversion of property to the state upon a failure of heirs of a decedent to appear and make claim for or against property owned by the decedent at death for which no other disposition was provided either by will or otherwise.

History. — Code 1981, § 53-2-50, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

Former Title 53 contained no definition of the term "escheat".

RESEARCH REFERENCES

Am. Jur. 2d. — 27A Am. Jur. 2d, Escheat, §§ 1 et seq., 10 et seq., 20 et seq., 40 et seq.

C.J.S. — 33 C.J.S., Executors and Administrators, § 7. 34 C.J.S., Executors and Administrators, § 503.

ALR. — Amendment of claim against decedent's estate after expiration of time for filing claims, 56 A.L.R.2d 627.

Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period, 79 A.L.R.2d 1080.

Statute of limitations: effect of delay in appointing administrator or other representative on cause of action accruing at or after death of person in whose favor it would have accrued, 28 A.L.R.3d 1141.

Settlement negotiations as estopping reliance on statute of limitations, 39 A.L.R.3d 127.

53-2-51. Procedure.

(a) If no person has appeared and claimed to be an heir within four years from the date letters of any kind on an intestate decedent's estate were granted, the personal representative shall petition the probate court of the county in which the letters were granted for determination that property has escheated to the state. Such a petition shall set forth the full name of the decedent, the date of death, the fact that no person has appeared and claimed to be an heir, and the property of the estate which may have escheated to the state.

(b) Upon filing of the petition, the probate court shall issue a citation as provided Chapter 11 of this title, requiring the heirs, if any, to file any objection to the petition by a date that is at least 60 days from the date of the citation, and shall order notice by publication to all heirs of the decedent as provided in Code Section 53-11-4.

(c) If no individual files objection as an heir who is entitled to the property on or before the date set in the citation, the court shall order the property to be paid over and distributed to the county board of education to become a part of the educational fund.

(d) If an individual files objection as an heir who is entitled to property, such claim shall be tried as other actions before the court. In such case, no property shall be paid over or distributed to the county board of education until the claim is determined in such manner as to establish that any individual making the claim is not entitled to the property.

(e) When property is paid over or distributed to a county board of education, the administration of the estate shall be terminated following a final return and the granting of a petition for discharge.

(f) The proceedings shall be conclusive upon and shall bind all the heirs of the estate.

(g) All expenses incurred in the administration of such proceedings shall be paid from the property or proceeds of the estate.

History. — Code 1981, § 53-2-51, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 11.

COMMENT

The sections in this Chapter replace former OCGA Secs. 44-5-190 through 44-5-198. The sections provide that an escheat may occur after four years from the date letters of administration are granted, rather than five years, as provided under former OCGA Sec. 44-5-191. These sections also provide that, once it has been determined in the appropriate manner that an escheat has occurred, the determination shall be binding on all heirs. Under former OCGA Sec. 44-5-194, an heir could file a claim up to three years following the escheat of property to the County Board of Education. OCGA Sec. 44-5-199, which deals with the distribution of property if spouses die intestate within six months of each other, has been modified and appears at Code Sec. 53-2-8.

JUDICIAL DECISIONS

No express statement found. — Because the only references to mutuality in a joint will under O.C.G.A. § 53-4-31 were in the title of the instrument and in the attestation clause, those references were insufficient to constitute either an "express statement" required by O.C.G.A. § 53-2-51, or an express written "contract" requirement of O.C.G.A. § 53-4-30, and there was no clear and definite agreement so as to trigger the fraud exception; accordingly, the surviving wife's deed of gift of real property to a nephew was not precluded, and the will was revocable because there was no express-written contract to the contrary. Hodges v. Callaway, 279 Ga. 789, 621 S.E.2d 428 (2005).

CHAPTER 3

YEAR'S SUPPORT

Sec.
53-3-1. Preference and entitlement.
53-3-2. Events barring right to support.
53-3-3. Provision in will in lieu of support; election.
53-3-4. "Homestead" defined; taxes and tax liens.
53-3-5. Filing of petition.
53-3-6. Issuance of citation and publication of notice; mailing of petition to tax commissioner.
53-3-7. Hearing and determination.
53-3-8. Minor children by individuals other than surviving spouse.
53-3-9. Vesting of title to property set apart.
53-3-10. Property inside or outside county.
53-3-11. Awarding interest in real property.
53-3-12. Fees.
53-3-13. Sale or conveyance of property by personal representative or temporary administrator prior to award.
53-3-14. Real property subject to option to purchase or contract to sell.
53-3-15. Conveyance, contract, or lien made by surviving spouse or guardian.
53-3-16. Real property subject to purchase money mortgage.
53-3-17. Personal property subject to mortgage or other security interest.
53-3-18. Landlord's lien on crops.
53-3-19. Conveyance or encumbrance by surviving spouse of property set aside; effect.
53-3-20. Conveyance or encumbrance by surviving spouse of property set aside; approval of probate court.
53-3-21. Appointment of temporary administrator.

Cross references. — Prosecution by surviving spouse, children, and others of action concerning chose in action assigned by deceased plaintiff to spouse, children, and others as part of year's support, § 9-2-30.

Editor's notes. — This chapter was effective January 1, 1998, to the extent that no vested rights of title, year's support, succession, or inheritance are impaired, as provided by the version of Code Section 53-1-1 enacted by Ga. L. 1996, p. 504, § 10, as amended by Ga. L. 1997, p. 1352, § 1.

Ga. L. 1996, p. 504, § 10, effective January 1, 1998, repealed the Code sections formerly codified at this chapter, and enacted the current chapter. The former chapter consisted of §§ 53-3-1 through 53-3-80, and was based on Laws 1792, Cobb's 1851 Digest, p. 307; Laws 1805, Cobb's 1851 Digest, p. 283; Laws 1807, Cobb's 1851 Digest, pp. 315, 1129; Laws 1810, Cobb's 1851 Digest, pp. 284, 316; Laws 1838, Cobb's 1851 Digest, p. 285; Laws 1845, Cobb's 1851 Digest, p. 348; Ga. L. 1855-56, p. 233, § 14; Ga. L. 1859, p. 33, §§ 3-5; Orig. Code 1863, §§ 2390-2404, 2406, 2448, 2449; Ga. L. 1866, p. 66, § 1; Code 1868, §§ 2386-2400, 2402, 2444, 2445; Code 1873, §§ 2421-2435, 2437, 2480, 2481; Ga. L. 1878-79, p. 146, § 1; Code 1882, §§ 2421-2426, 2428-2435a, 2437, 2480; Ga. L. 1894, p. 102, §§ 1, 4-9; Civil Code 1895, §§ 3279-3292, 3294, 3296-3306, 3350, 3351; Ga. L. 1908, p. 85, §§ 1, 2; Civil Code 1910, §§ 3853-3866, 3868, 3870-3882, 3926, 3927; Code 1933, §§ 113-601 through 113-618, 113-620.1, 113-701 through 113-710; Ga. L. 1943, p. 423, § 1; Ga. L. 1945, p. 142, § 2; Ga. L. 1945, p. 401, § 1; Ga. L. 1946, p. 83, § 1; Ga. L. 1953, Jan.-Feb. Sess., p. 535, § 1; Ga. L. 1955, p. 217, § 1; Ga. L. 1958, p. 657, §§ 4-9; Ga. L. 1959, p. 136, §§ 2-4;

Ga. L. 1961, p. 558, §§ 1, 3, 4; Ga. L. 1966, p. 455, §§ 1, 2; Ga. L. 1967, p. 28, §§ 1-5; Ga. L. 1975, p. 764, § 1; Ga. L. 1976, p. 640, § 1; Ga. L. 1978, p. 1605, § 1; Ga. L. 1983, p. 511, § 1; Ga. L. 1984, p. 658, § 1; Ga. L. 1984, p. 681, § 1; Ga. L. 1984, p. 834, §§ 3, 4; Ga. L. 1985, p. 149, § 53; Ga. L. 1985, p. 1650, §§ 1, 2; Ga. L. 1986, p. 436, § 1; Ga. L. 1986, p. 982, §§ 18, 19; Ga. L. 1990, p. 350, § 1.1; Ga. L. 1991, p. 394, §§ 1, 2; Ga. L. 1993, p. 1081, § 1; Ga. L. 1995, p. 10, § 53.

Law reviews. — For annual survey of law of wills, trusts, and administration of estates, see 38 Mercer L. Rev. 417 (1986). For annual survey of wills, trusts, and administration of estates law, see 41 Mercer L. Rev. 411 (1989).

For note, "Determining Eligibility for Year's Support in Georgia: The Tension Between Status and Dependence Requirements," see 22 Ga. L. Rev. 1167 (1988).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. T. 53, Ch. 5 are included in the annotations for this Code section.

Former O.C.G.A. T. 53, Ch. 5 was not unconstitutional, since a 1979 amendment to this chapter removed gender classification for year's support eligibility, and since the year's support statute when first adopted was not violative of the Constitution under court interpretations of that period. Adams v. Adams, 249 Ga. 477, 291 S.E.2d 518 (1982) (decided under former O.C.G.A. Ch. 5, T. 53).

Applicability of Civil Practice Act. — O.C.G.A. § 9-11-55(a), a provision of the Civil Practice Act regarding the opening of default judgments, governs an application for year's support and caveat filed in probate court. Greene v. Woodard, 198 Ga. App. 427, 401 S.E.2d 617 (1991) (decided under former O.C.G.A. Ch. 5, T. 53).

53-3-1. Preference and entitlement.

(a) As used in this chapter, the terms "child" or "children" mean any minor child who would be entitled to inherit if the child's parent died intestate.

(b) Among the necessary expenses of administration and to be preferred before all other debts or demands, except as specifically provided otherwise in this chapter and notwithstanding any other provision of law to the contrary, is the provision of year's support for the family.

(c) The surviving spouse and minor children of a testate or intestate decedent are entitled to year's support in the form of property for their support and maintenance for the period of 12 months from the date of the decedent's death.

History. — Code 1981, § 53-3-1, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-4/HB 865.

The 2020 amendment, effective January 1, 2021, inserted "or demands" and "and notwithstanding any other provision of law to the contrary" in subsection (b).

Law reviews. — For article discussing decisions involving the year's support provision of the Georgia Code, see 3 Ga. St. B.J. 427 (1967). For article surveying recent legislative and judicial developments in Georgia's real property laws, see 31 Mercer L. Rev. 187 (1979). For article surveying legislative and judicial developments in Georgia's will, trusts, and estate

laws, see 31 Mercer L. Rev. 281 (1979). For article surveying Georgia cases in the area of wills, trusts, and administration of estates from June 1979 through May 1980, see 32 Mercer L. Rev. 249 (1980). For annual survey of law of real property, see 38 Mercer L. Rev. 319 (1986). For annual survey article discussing wills, trusts, and administration of estates, see 51 Mercer L. Rev. 487 (1999). For survey article on wills, trusts, guardianships, and fiduciary administration for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003). For annual survey of wills, trusts, guardianships, and fiduciary administration, see 58 Mercer L. Rev. 423 (2006).

For note, "Preventing Spousal Disinheritance in Georgia," see 19 Ga. L. Rev. 427 (1984). For note on 1991 amendment of former O.C.G.A. § 53-5-2, see 8 Ga. St. U.L. Rev. 216 (1992). For note on 1993 enactment of former O.C.G.A. § 53-5-1.1, see 10 Ga. St. U.L. Rev. 236 (1993).

COMMENT

Subsection (a) carries forward subsection (a) of former OCGA Sec. 53-5-2. Subsection (b) carries forward former OCGA Sec. 53-5-1 and omits the 1979 effective date of the application of the year's support statute to widowers. This subsection also clarifies that both the spouse and the surviving minor children are entitled to year's support and uses the definition of year's support that appeared in former OCGA Sec. 53-5-2. The word "money" from that definition is omitted because the word is subsumed in the word "property". The omission is not intended to signal that money cannot be awarded. Subsection (c) carries forward former OCGA Sec. 53-5-1.1.

JUDICIAL DECISIONS

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1. In General
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3. Vesting of Title
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5. Lack of Administration No Bar to Vesting
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1. Duties
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Character of Award
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Management and Control

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Laws 1838, Cobb's 1851 Digest, p. 296, former Laws 1850, Cobb's 1851 Digest, p. 297, former Code 1863, § 2531, former Code 1868, § 2530, former Code 1873, § 2751, former Code 1882, § 2571, former Civil Code 1895, § 3465, former Civil Code 1910, § 4041, former Code 1933, § 113-1002, and former O.C.G.A. §§ 53-5-1 and 53-5-2 are included in the annotations for this Code section.

Former O.C.G.A. Ch. 5, T. 53 was not unconstitutional, since former O.C.G.A. § 53-5-1 removed gender classification for

General Consideration (Cont'd)

year's support eligibility, and since the year's support statute when first adopted was not violative of the Constitution under court interpretations of that period. Adams v. Adams, 249 Ga. 477, 291 S.E.2d 518 (1982) (decided under former O.C.G.A. § 53-5-1).

Purpose. — Prime purpose of this statute is to provide a suitable support and maintenance for the widow and minor children, if any, of a father who has died. The state gives the year's support a priority over all debts, even though reduced to judgment, and a priority over the taxes due the sovereign state. Beddingfield v. Old Nat'l Bank & Trust Co., 175 Ga. 172, 165 S.E. 61 (1932) (decided under former Code 1933, § 113-1002).

Statute has for its purpose the joint support and maintenance of the widow and the minor children. It is based on considerations of public policy; and as the provisions of the statutes in reference thereto are to be construed in favor of the beneficiaries entitled to support, proceedings thereunder are to be construed in favor of the intended beneficiaries of the law. Farmers Bank v. Williams, 188 Ga. 789, 5 S.E.2d 195 (1939) (decided under former Code 1933, § 113-1002); Ennis v. Ennis, 207 Ga. 665, 63 S.E.2d 887 (1951) (decided under former Code 1933, § 113-1002).

Beneficent purpose of the provision for a year's support is to see that the widow and minor children, upon the death of the husband and father, shall not be cut adrift, but shall have immediate relief by having set apart funds or property to carry them through the period of a year, taking into consideration the circumstances and standing of the family previous to the death of the husband, and also keeping in view the solvency of the estate. Tilley v. King, 193 Ga. 602, 19 S.E.2d 281 (1942) (decided under former Code 1933, § 113-1002).

Purpose of this statute is to provide a support for a limited period for those members of the family whom the deceased was, while in life, legally bound to support. Woodes v. Morris, 247 Ga. 771, 279 S.E.2d 704 (1981) (decided under former Code 1933, § 113-1002).

An award entered after the 1979 amendment of year's support statute, but from an estate of a decedent who died before the amendment, is valid. Lawrence v. Lawrence, 254 Ga. 692, 333 S.E.2d 610 (1985) (decided under former O.C.G.A. § 53-5-1).

When property is set apart to a widow and the widow's minor children the property is intended to be used for their joint support and maintenance. Tribble v. Knight, 238 Ga. 84, 231 S.E.2d 68 (1976) (decided under former Code 1933, § 113-1002).

Entitlement to a year's support award is a matter of status, and is established by demonstrating that the applicant belongs within one of the classes of intended beneficiaries codified in subsection (b) of former O.C.G.A. § 53-5-2. Gentry v. Black, 256 Ga. 569, 351 S.E.2d 188 (1987) (decided under former O.C.G.A. § 53-5-2); Driskell v. Crisler, 237 Ga. App. 408, 515 S.E.2d 416 (1999) (decided under former O.C.G.A. § 53-5-2).

When one establishes that he or she is the spouse of the deceased, eligibility for year's support is also established. Gentry v. Black, 256 Ga. 569, 351 S.E.2d 188 (1987) (decided under former O.C.G.A. § 53-5-2).

Entitlement to the right to a year's support is a matter of status. It vests upon the death of the spouse. Wigley v. Hambrick, 193 Ga. App. 903, 389 S.E.2d 763 (1989), cert. denied, 193 Ga. App. 911, 389 S.E.2d 763 (1990) (decided under former O.C.G.A. § 53-5-2).

Year's support is designed to care for widow during the first year following her husband's death. Davis v. Birdsong, 275 F.2d 113 (5th Cir. 1960) (decided under former Code 1933, § 113-1002).

Award of property continues after the expiration of the year, so long as the property lasts, to be used for the support of the widow during her life and the children until the children are married or reach majority. Tribble v. Knight, 238 Ga. 84, 231 S.E.2d 68 (1976) (decided under former Code 1933, § 113-1002).

Personal items from the marital residence. — Genuine issue of material fact existed as to whether certain personal

items the executor demanded to be returned from a decedent's widow were taken from the marital residence and were thus included in the year's support awarded to the widow, making summary judgment improper. Rabun v. Rabun, 341 Ga. App. 878, 802 S.E.2d 296 (2017).

Year's support reflects public policy. — Law does not require that a father provide for the support of his children after his death. Public policy, of course, favors the support of minor children by the father's estate after his death. Russell v. Fulton Nat'l Bank, 247 Ga. 556, 276 S.E.2d 641, overruled on other grounds, Dolvin v. Dolvin, 248 Ga. 439, 284 S.E.2d 254 (1981) (decided under former O.C.G.A. § 53-5-2).

Courts favor year's support. Rakestraw v. Rakestraw, 70 Ga. 806 (1883) (decided under former Code 1882, § 2571); Cheney v. Cheney, 73 Ga. 66 (1884) (decided under former Code 1882, § 2571).

A year's support is an anomaly and special favorite of legislation and jurisprudence. Rimes v. Graham, 199 Ga. 406, 34 S.E.2d 443 (1945) (decided under former Code 1933, § 113-1002).

Policy of the law is to protect this favored creature of the law and preserve the property or money set aside as a year's support for that purpose and none other. Rimes v. Graham, 199 Ga. 406, 34 S.E.2d 443 (1945) (decided under former Code 1933, § 113-1002).

Year's support proceeds on the theory that a widow is entitled to it, regardless of everything else. Clark v. Clark, 62 Ga. App. 738, 9 S.E.2d 710 (1940) (decided under former Code 1933, § 113-1002).

Widow of a deceased person is entitled to a year's support out of his estate, whether he dies testate or intestate. Clark v. Clark, 62 Ga. App. 738, 9 S.E.2d 710 (1940) (decided under former Code 1933, § 113-1002); Saxon v. Aycock, 72 Ga. App. 728, 34 S.E.2d 914 (1945) (decided under former Code 1933, § 113-1002).

Hinge upon which right of year's support hangs is legal obligation to support during lifetime of deceased. The granting of a year's support is an extension of that obligation beyond the life of the person so obligated, thereby creating a debt of the estate as a necessary expense of administration. Woodes v. Morris, 247 Ga. 771, 279 S.E.2d 704 (1981) (decided under former Code 1933, § 113-1002).

Statutes to be construed liberally. — Statutes providing for a year's support and fixing its priority are to be construed liberally in favor of the dependents. Olmstead v. Clark, 181 Ga. 478, 182 S.E. 513 (1935) (decided under former Code 1933, § 113-1002); Rimes v. Graham, 199 Ga. 406, 34 S.E.2d 443 (1945) (decided under former Code 1933, § 113-1002); Howard v. Howard, 150 Ga. App. 213, 257 S.E.2d 336 (1979) (decided under former Code 1933, § 113-1002).

Solvency of estate immaterial. — Year's support provided for by statute will be allowed whether the decedent's estate is solvent or insolvent. Hopkins v. Long, 9 Ga. 261 (1851) (decided under former Laws 1850, Cobb's 1851 Digest, p. 297); Jackson v. Corbin, 39 Ga. 102 (1869) (decided under former Code 1868, § 2530); McNair v. Rabun, 159 Ga. 401, 126 S.E. 9 (1924) (decided under former Civil Code 1910, § 4041).

On the filing of caveats the appraisers may take the question of solvency into consideration when determining the amount of support. Aiken v. Davidson, 146 Ga. 252, 91 S.E. 34 (1916) (decided under former Civil Code 1910, § 4041); McNair v. Rabun, 159 Ga. 401, 126 S.E. 9 (1924) (decided under former Civil Code 1910, § 4041).

Right to support for widow and minor children is absolute. Brown v. Joiner, 77 Ga. 232, 3 S.E. 157 (1886) (decided under former Code 1882, § 2571); Swain v. Stewart, 98 Ga. 366, 25 S.E. 831 (1896) (decided under former Civil Code 1895, § 3465); Miller v. Miller, 105 Ga. 305, 31 S.E. 186 (1898) (decided under former Civil Code 1895, § 3465); Goss v. Harris, 117 Ga. 345, 43 S.E. 734 (1903) (decided under former Civil Code 1895, § 3465); Anders v. First Nat'l Bank, 165 Ga. 682, 142 S.E. 98 (1928) (decided under former Civil Code 1910, § 4041).

Right to support cannot be divested by a contingency occurring after the right accrues. Goss v. Harris, 117 Ga. 345, 43 S.E. 734 (1903) (decided under

General Consideration (Cont'd)

former Civil Code 1895, § 3465); Knowles v. Knowles, 125 Ga. App. 642, 188 S.E.2d 800 (1972) (decided under former Code 1933, § 113-1002).

Right to support may be divested by agreement. Clark v. Emerson, 141 Ga. 612, 81 S.E. 870 (1914) (decided under former Civil Code 1910, § 4041); Bates v. Burden, 148 Ga. 157, 96 S.E. 178 (1918) (decided under former Civil Code 1910, § 4041).

Because the husband's petition for divorce was filed hours before his death, the paragraph of the parties' post-nuptial agreement that went into effect if one spouse filed for a divorce controlled and provided that the wife was entitled to one-half of the items listed on an exhibit and not a year of support as sought by the wife. In re Estate of Boyd, 340 Ga. App. 744, 798 S.E.2d 330 (2017).

Award of year's support may operate to defeat intentions of testator. — Whenever a year's support is carved out of property disposed of by will, the intention of the testator is defeated pro tanto, and there seems to be no greater antagonism in setting aside as a year's support a part of property which the executors have been directed to keep together than there is in taking property away from a person to whom it has been devised or bequeathed and devoting it to a year's support. In either case, the right to a year's support overrides the testator's instructions. Burch v. Harrell, 57 Ga. App. 514, 196 S.E. 205 (1938) (decided under former Code 1933, § 113-1002).

Year's support may not operate to divest minor heir of interest in property. — Considering both the benevolent purposes of the year's support law as well as the clear intent of other laws to protect the rights and claims of minors, the award of a year's support cannot operate to divest a minor heir of the minor's interest in property unless it appears that appropriate steps were taken to protect the minor's interest. Outlaw v. Outlaw, 121 Ga. App. 284, 173 S.E.2d 459 (1970) (decided under former Code 1933, § 113-1002).

Year's support may be set aside for fraud. Dunaway v. Clark, 536 F. Supp. 664 (S.D. Ga. 1982) (decided under former O.C.G.A. § 53-5-2).

Cited in Cleghorn v. Johnson, 69 Ga. 369 (1882); Farris v. Battle, 80 Ga. 187, 7 S.E. 262 (1887); Maddox v. Patterson, 80 Ga. 719, 6 S.E. 581 (1888); McDowell v. McMurria, 107 Ga. 812, 33 S.E. 709, 73 Am. St. R. 155 (1899); Hill v. Van Duzer, 111 Ga. 867, 36 S.E. 966 (1900); Wright v. Roberts, 116 Ga. 194, 42 S.E. 369 (1902); Sexton v. Burruss, 144 Ga. 192, 86 S.E. 537 (1915); Jones v. Wilkes, 146 Ga. 803, 92 S.E. 517 (1917); Ellis v. Hogan, 147 Ga. 609, 95 S.E. 4 (1918); Phillips v. Cook, 158 Ga. 151, 123 S.E. 108 (1924); Federal Land Bank v. Henson, 166 Ga. 857, 144 S.E. 728 (1928); Grant v. Sosebee, 173 Ga. 98, 159 S.E. 672 (1931); Rooke v. Day, 46 Ga. App. 379, 167 S.E. 762 (1932); State Banking Co. v. Hinton, 178 Ga. 68, 172 S.E. 42 (1933); National City Bank v. Welch, 53 Ga. App. 528, 186 S.E. 596 (1936); Hill v. Hill, 55 Ga. App. 500, 190 S.E. 411 (1937); Redwine v. Frizzell, 184 Ga. 230, 190 S.E. 789 (1937); Parks v. Gresham, 185 Ga. 470, 195 S.E. 728 (1938); Sweat v. Arline, 186 Ga. 460, 197 S.E. 893 (1938); Minchew v. Juniata College, 188 Ga. 517, 4 S.E.2d 212 (1939); Harrell v. Burch, 195 Ga. 96, 23 S.E.2d 434 (1942); Jones v. Federal Land Bank, 196 Ga. 419, 26 S.E.2d 731 (1943); Fulcher v. Fulcher, 75 Ga. App. 480, 43 S.E.2d 588 (1947); Bush v. Reconstruction Fin. Corp., 79 Ga. App. 25, 52 S.E.2d 515 (1949); McDaniel v. Selman, 79 Ga. App. 259, 53 S.E.2d 391 (1949); Carroll v. Hill, 80 Ga. App. 576, 56 S.E.2d 821 (1949); Dorsey v. Georgia R.R. Bank & Trust Co., 82 Ga. App. 237, 60 S.E.2d 828 (1950); Smith v. Brogan, 207 Ga. 642, 63 S.E.2d 647 (1951); Harnesberger v. Davis, 86 Ga. App. 41, 70 S.E.2d 615 (1952); Holland v. Froklis, 89 Ga. App. 768, 81 S.E.2d 317 (1954); In re Engram, 156 F. Supp. 342 (M.D. Ga. 1957); United States v. First Nat'l Bank & Trust Co., 297 F.2d 312 (5th Cir. 1961); Samples v. Samples, 107 Ga. App. 788, 131 S.E.2d 584 (1963); Williams v. Ross, 228 F. Supp. 751 (N.D. Ga. 1963); Park v. Minton, 229 Ga. 765, 194 S.E.2d 465 (1972); Gibson v. McWhirter, 230 Ga. 545, 198 S.E.2d 205 (1973); Strickland v. Trust Co., 230 Ga. 714, 198 S.E.2d 668 (1973); Payne v. Bradford, 231 Ga. 487,

202 S.E.2d 422 (1973); Walker v. Smith, 130 Ga. App. 16, 202 S.E.2d 469 (1973); Barone v. Adcox, 235 Ga. 588, 221 S.E.2d 6 (1975); Clavin v. Clavin, 238 Ga. 421, 233 S.E.2d 151 (1977); Davenport v. Davenport, 243 Ga. 613, 255 S.E.2d 695 (1979); Dolvin v. Dolvin, 248 Ga. 439, 284 S.E.2d 254 (1981); Nationwide Mut. Ins. Co. v. Walls, 546 F. Supp. 30 (S.D. Ga. 1982); Nationwide Mut. Ins. Co. v. Gay, 165 Ga. App. 293, 299 S.E.2d 611 (1983); Young v. Ellis, 250 Ga. 838, 301 S.E.2d 271 (1983); Hughes v. Hughes, 169 Ga. App. 850, 314 S.E.2d 920 (1984); Powell v. Thorsen, 253 Ga. 572, 322 S.E.2d 261 (1984); Gentry v. Black, 178 Ga. App. 284, 342 S.E.2d 729 (1986); Byrd v. McKinnon, 189 Ga. App. 768, 377 S.E.2d 686 (1989); State Farm Mut. Auto. Ins. Co. v. Day, 195 Ga. App. 823, 394 S.E.2d 913 (1990); Wynn v. Wynn, 202 Ga. App. 679, 415 S.E.2d 287 (1992); Baulding v. Turner, 208 Ga. App. 548, 430 S.E.2d 836 (1993); Cabrel v. Lum, 289 Ga. 233, 710 S.E.2d 810 (2011).

Application Generally

1. In General

When obligation is continuously recognized for two years preceding death without challenge by deceased, the deceased's estate is subject to debt of year's support. Woodes v. Morris, 247 Ga. 771, 279 S.E.2d 704 (1981) (decided under former Code 1933, § 113-1002).

Award of year's support to spouse upheld. — When co-executors failed to include in the record on appeal the transcript of the hearing on the decedent's spouse's petition for a year's support and the order showed that the probate court properly considered a lump sum death benefit payment to the spouse from the decedent's employer, there was no basis in the record for the court to reverse an award to the spouse under O.C.G.A. § 53-3-1(c). In re Estate of Battle, 263 Ga. App. 73, 587 S.E.2d 140 (2003).

Denial of application of year's support upheld. — Summary judgment in favor of a caveator, and against a wife, on the wife's application for year's support from the estate of the wife's decedent husband was properly denied as the wife opted instead to accept a $5,000 bequest from the husband's will in lieu of a year's support under a prenuptial agreement which was found to be valid, binding, and enforceable, and the wife failed to show any evidence of duress, coercion, fraud, misrepresentation, unconscionability, or changed circumstances which would have voided the agreement. Hiers v. Estate of Hiers, 278 Ga. App. 242, 628 S.E.2d 653 (2006).

Superior court's order reversing a year's support award in the amount of $30,000, along with title to a vehicle and antique furniture, and instead enforcing an oral agreement for an equal division of the assets of the estate after payment of all expenses was proper as: (1) the surviving wife failed to testify as to the amount of money needed to maintain the standard of living for a period of 12 months after the decedent husband died; (2) the wife presented no evidence of any income earned during the marriage; (3) no evidence documenting the wife's medical expenses incurred during the marriage was presented; and (4) the wife's testimony about the decline in the standard of living was relevant under O.C.G.A. § 53-3-7(c)(3), but provided little guidance to the court. Taylor v. Taylor, 288 Ga. App. 334, 654 S.E.2d 146 (2007), cert. denied, No. S08C0571, 2008 Ga. LEXIS 322 (Ga. 2008).

Denial of spouse's petition for year's support improper. — Probate court erred by allowing the objections of a bank and a decedent's parents solely on the basis of adverse title and by denying a year's support to the widow when the widow failed to meet the resulting burden of proof because the probate court lacked the jurisdiction under Ga. Const. 1983, Art. VI, Sec. III, Para. I and O.C.G.A. § 15-9-30 to determine that the relevant money-market account and real property were not part of the estate; despite the jurisdictional limitation and the lack of an appropriate objection, the probate court proceeded to conduct a hearing as to the amount necessary for the widow's support, thereby inappropriately placing upon the widow a burden of proof that was contrary to O.C.G.A. § 53-3-7(a) and otherwise lacking in the absence of the jurisdictionally defective objections to the

Application Generally (Cont'd)
1. In General (Cont'd)

petition. In re Mahmoodzadeh, 314 Ga. App. 383, 724 S.E.2d 797 (2012).

2. Arbitrary Exclusion of Minor Children

Arbitrary exclusion of minor children from application prohibited. — To arbitrarily discriminate against the minor child under the application for 12 months' support, and so set apart to the widow the entire assets of an insolvent estate, is such as to render such action nugatory and void; and a judgment based on such action is void as a matter of law. De Jarnette v. De Jarnette, 176 Ga. 204, 167 S.E. 526 (1933) (decided under former Civil Code 1910, § 4041).

When the appraisers assumed that it was not compulsory on them to set aside any portion of the estate for the benefit of the minor, who was, so far as the record shows, more dependent upon his father's estate for support and maintenance than the widow who received the entire net amount of the insolvent estate, the appraisers acted under a mistake of law causing the judgment thereby obtained to be set aside. De Jarnette v. De Jarnette, 176 Ga. 204, 167 S.E. 526 (1933) (decided under former Civil Code 1910, § 4041).

When the entire estate is set aside to the widow alone, arbitrarily excluding any minor children by depleting the assets of the estate, the award of the appraisers to the widow must be disallowed. Collins v. Collins, 110 Ga. App. 569, 139 S.E.2d 459 (1964) (decided under former Code 1933, § 113-1002).

Vesting

1. In General

Applicability and purpose. — Right to year's support by a widower is a vested right, superior to any encumbrances or debts or other legal entitlement of or to the estate, including bequests to legatees under a testate deceased; it is intended to protect the widow or widower and minor child and children even if the award overrides a testamentary bequest to another. Goodman v. Independent Life & Accident Ins. Co., 196 Ga. App. 783, 397 S.E.2d 56 (1990) (decided under former O.C.G.A. § 53-5-2).

Widow is entitled to a year's support to be set apart to the widow out of the estate of the widow's deceased husband, whether he died testate or intestate, and this right is absolute and is superior to all other claims against the estate, except as provided by law. Rogers v. Woods, 63 Ga. App. 195, 10 S.E.2d 404 (1940) (decided under former Code 1933, § 113-1002).

2. Vesting of Right to Year's Support

Right of widow of decedent to a year's support is a "vested" right, and the courts are jealous of any attempt to encroach upon it. Seiden v. Southland Chenilles, Inc., 195 F.2d 899 (5th Cir. 1952) (decided under former Code 1933, § 113-1002).

Statute permits separate portions of a decedent's estate to be set aside as year's support to the widow and to children of the deceased. Collins v. Collins, 110 Ga. App. 569, 139 S.E.2d 459 (1964) (decided under former Code 1933, § 113-1002).

Right to year's support vests upon death of deceased. — Right to a year's support out of the estate of a deceased, which is given to the widow and minor children by statute, vests upon the death of the deceased. Philpot v. Ramsey & Hogan, 47 Ga. App. 635, 171 S.E. 204 (1933) (decided under former Code 1933, § 113-1002).

Right to a 12 months' support vests immediately on death of decedent. Dougherty-Little-Redwine Co. v. Hatcher, 169 Ga. 858, 151 S.E. 796 (1930) (decided under former Civil Code 1910, § 4041).

Right to a year's support vests in a widow and minor children at the time of the death of the husband and father. Farmers Bank v. Williams, 188 Ga. 789, 5 S.E.2d 195 (1939) (decided under former Code 1933, § 113-1002); Seiden v. Southland Chenilles, Inc., 195 F.2d 899 (5th Cir. 1952) (decided under former Code 1933, § 113-1002).

Right to a year's support vests in the widow and minor children, if any, imme-

diately upon the death of the husband. McDaniel v. Kelley, 61 Ga. App. 105, 5 S.E.2d 672 (1939) (decided under former Code 1933, § 113-1002).

3. Vesting of Title

Title to property set aside as a year's support vests in the widow and minor children; the interest of a minor in the title is not divested upon the minor's reaching majority, and upon the death of the widow, if she survives the minor's majority, and the majority of any remaining children, the minor is entitled to the minor's proportionate interest in such of the property as then remains unconsumed. Walden v. Walden, 191 Ga. 182, 12 S.E.2d 345 (1940) (decided under former Code 1933, § 113-1002).

Year's support for a widow can be set apart to her only from the estate of her deceased husband; and if property included therein does not as a matter of fact constitute a part of his estate, the judgment of the court of ordinary (now probate court) simply will not attach to such property, but will be void as applied thereto. Johnson v. City of Blackshear, 196 Ga. 652, 27 S.E.2d 316 (1943) (decided under former Code 1933, § 113-1002).

Year's support can only be set aside from property interests which were a part of the decedent's estate at the time of her death. A judgment of the probate court is void as to any property set aside which was not a part of the decedent's estate at her death. Johnson v. Johnson, 199 Ga. App. 549, 405 S.E.2d 544 (1991) (decided under former O.C.G.A. § 53-5-2).

Widow receives such title as husband had. — When property is set apart to a widow as a year's support she receives just such title as her deceased husband had, and acquires no greater title by reason of the setting apart to her. Stephens v. Carter, 215 Ga. 355, 110 S.E.2d 762 (1959) (decided under former Code 1933, § 113-1002).

All that the year's support award does is vest in the widow whatever interest, legal or equitable, that husband had in the property. Stephens v. Carter, 215 Ga. 355, 110 S.E.2d 762 (1959) (decided under former Code 1933, § 113-1002).

Year's support may be set apart out of any assets to which the husband or father had legal title at the time of his death. In addition thereto, property in which the deceased had an equity at the time of his death may be set aside for a year's support. Knowles v. Knowles, 125 Ga. App. 642, 188 S.E.2d 800 (1972) (decided under former Code 1933, § 113-1002).

Provision for periodic payment from fund. — When the appraisers of estate set aside as a year's support to the widow a sum of money in the hands of the husband's administrator, with the provision that the sum be turned over to the widow in periodic payments, no objection being filed to the return of the appraisers, absolute title to the fund vests in the widow from the time the return is made to the ordinary (now probate judge). May v. Braddock, 92 Ga. App. 302, 88 S.E.2d 539 (1955) (decided under former Code 1933, § 113-1002).

Award from trust. — Even if no legal title remained in the decedent at her death, if her estate retained an equitable interest as beneficiary of the alleged trust, a year's support may include an award of such interest. Johnson v. Johnson, 199 Ga. App. 549, 405 S.E.2d 544 (1991) (decided under former O.C.G.A. § 53-5-2).

Title must be in decedent at the time of death in order for a year's support to be assignable from specified property. Scruggs v. Morel, 22 Ga. App. 93, 95 S.E. 316 (1918) (decided under former Civil Code 1910, § 4041).

Year's support may not attach to alienated property. — Widow is not entitled to have a year's support set apart in land to which the husband during his lifetime conveyed all his title, since such year's support can only be set aside from property of the estate of the husband. Plowden v. Plowden, 47 Ga. App. 751, 171 S.E. 388 (1933) (decided under former Code 1933, § 113-1002).

A judgment of the court of ordinary (now probate court) allowing a year's support for the family of deceased will not attach to property which has been conveyed away by the deceased prior to his death and is no longer a part of his estate; the rule is the same as applied to the legal title, although the property was conveyed as security only. Richey v. First Nat'l

Vesting (Cont'd)
3. Vesting of Title (Cont'd)

Bank, 180 Ga. 751, 180 S.E. 740 (1935) (decided under former Code 1933, § 113-1002).

When the father of certain minor children made a deed conveying to them a lot of land already encumbered, and actually delivered the deed to them, they were not estopped, after the death of the father, from claiming a year's support out of the proceeds of the sale of the land under an execution in favor of certain creditors of the estate, by reason of the fact that the deed had been delivered to them and they had received it, and that therefore the land was no longer a part of the estate of the deceased father. Pierce v. J.A. Alford & Sons, 180 Ga. 327, 179 S.E. 84 (1935) (decided under former Code 1933, § 113-1002).

4. Unconsumed Property

Unconsumed property generally. — General allowance from the estate of a decedent for a year's support, if not consumed during the year, will stand over for the support of the widow and minors afterwards so long as they are members of the family and fill this description. Children attaining majority or ceasing by marriage to be of the family, cannot, during that time coerce partition of land thus allowed and set apart, the whole land being charged with the support of the family. Whitt v. Ketchum, 84 Ga. 128, 10 S.E. 503 (1889) (decided under former Code 1882, § 2571).

Disposition of unconsumed property upon death of widow. — Because the statute expressly states that the year's support for the family may be set aside on the application of the widow, when it is set aside, the provision so made inures to the benefit of the class named in the statute. Accordingly, a widow and three children, who are unmarried minors and members of the family at the time of their father's death, are vested with an undivided one-fourth interest each in the lands set apart under the year's support; and the interest which minors take under a year's support is not divested upon reaching majority; and after the widow's death such children are entitled to their proportionate interest in the unconsumed property; and the proportionate interest of the widow under the year's support goes to her heirs at law upon her death intestate. Ennis v. Ennis, 207 Ga. 665, 63 S.E.2d 887 (1951) (decided under former Code 1933, § 113-1002).

5. Lack of Administration No Bar to Vesting

Year's support not dependent upon qualification of legal representative. — Right to a year's support accrues upon the death of the husband or parent, and not upon the qualification of the legal representative of the estate. Nixon v. Nixon, 196 Ga. 148, 26 S.E.2d 711 (1943) (decided under former Code 1933, § 113-1002).

Procurement of the year's support is not dependent upon an administration of the estate. Nixon v. Nixon, 196 Ga. 148, 26 S.E.2d 711 (1943) (decided under former Code 1933, § 113-1002).

Appraisers

1. Duties

Language of statute was mandatory, for the statute declares that it shall be the duty of the appraisers to set apart and assign "to such widow and children." De Jarnette v. De Jarnette, 176 Ga. 204, 167 S.E. 526 (1933) (decided under former Code 1933, § 113-1002).

Duties of appraisers generally. — When a widow makes application, for a year's support for herself and the minor child of the deceased husband by a former marriage, and the order of the ordinary (now probate judge) appointing appraisers directs them to set apart a year's support for the widow and minor child, it is the duty of the appraisers to set apart and assign to such widow and child a sufficiency for their maintenance and support for the space of 12 months from the date of administration, if there be such. De Jarnette v. De Jarnette, 176 Ga. 204, 167 S.E. 526 (1933) (decided under former Code 1933, § 113-1002).

On an application by a widow for a year's support the duties of the ap-

praisers are purely ministerial. Shingler v. Furst, 52 Ga. App. 39, 182 S.E. 72 (1935) (decided under former Code 1933, § 113-1002).

2. Return

Award of the appraisers is prima facie correct, and the burden is on objectors to disapprove the award's correctness. Smith v. Smith, 115 Ga. 692, 42 S.E. 72 (1902) (decided under former Civil Code 1895, § 3465); Touchton v. Mock, 91 Ga. App. 689, 86 S.E.2d 699 (1955) (decided under former Code 1933, § 113-1002).

When appraisers have set aside a year's support to a widow, and a caveat thereto has been filed by the administrator of the estate, irrespective of whether the burden of proof rests on the widow or on the administrator, the return of the appraisers makes a prima facie case for the widow, and, in the absence of any evidence tending to show the circumstances and standing of the family before the death of the husband, or as to the solvency of the estate, a verdict in favor of the claimant sustaining the return of the appraisers is demanded as a matter of law. Wilson v. Wilson, 54 Ga. App. 770, 189 S.E. 71 (1936) (decided under former Code 1933, § 113-1002).

When the appraisers set aside, as a year's support to the widow, property valued at $300.00, and the only evidence in rebuttal of the presumption of the correctness of the year's support was that various sums of money from the sale of property of the estate had been paid to the widow by the administrator, and there was still unpaid an indebtedness against the estate of $150.00, and there was no evidence tending to show that the value of the property set aside as a year's support was in excess of the amount necessary for the support of the widow, estimated according to the circumstances and standing of the family previous to the death of the husband, although the property set aside may have consisted of all of the estate and no assets were left with which to pay the indebtedness, the evidence was insufficient to rebut the presumption of the correctness of the return of the appraisers. Wilson v. Wilson, 54 Ga. App. 770, 189 S.E. 71 (1936) (decided under former Code 1933, § 113-1002).

When excessiveness of the award of a year's support is the sole issue involved, the return of the appraisers is prima facie correct, the burden is upon the party disputing the return to show otherwise, and in the absence of evidence tending to show the circumstances and standing of the family before the testator's death or as to the solvency of the estate, a verdict sustaining the return is demanded as a matter of law. Bright v. Knecht, 182 Ga. App. 820, 357 S.E.2d 159 (1987) (decided prior to 1986 amendment of former O.C.G.A. § 53-5-2).

Caveat as remedy for incorrect or improper return. — When objections to the return of the appraisers to set apart and assign a 12 months' support to the widow and children of a decedent have been filed and sustained, so as to have the effect of amending the return, the return of the appraisers and the judgment may be recorded, and will be effective to set apart as a 12 months' support the property or money included in the report as corrected and amended by the judgment. Davis v. City of Atlanta, 182 Ga. 242, 185 S.E. 279 (1936) (decided under former Code 1933, § 113-1002).

If, in making their return, the appraisers have acted upon insufficient or misleading information as to the property owned by the decedent at the time of decedent's death, or as to any other relevant fact upon which their return may in part be predicated, the law provides a remedy for any person whose legal rights may be injuriously affected thereby, by giving to such person the right to caveat the return; and, upon a trial of the issue thus raised before the ordinary (now probate judge), all the relevant facts may be developed by competent and legal evidence introduced for this purpose, and the return, if incorrect and improper, under the facts disclosed, may be corrected. Knowles v. Knowles, 125 Ga. App. 642, 188 S.E.2d 800 (1972) (decided under former Code 1933, § 113-1002).

Return of appraisers not vitiated by mere irregularities. — Mere irregularities, such as the number of minors being mistakenly stated in other portions

Appraisers (Cont'd)
2. Return (Cont'd)

of the proceedings, do not have the effect of vitiating the return of the appraisers in the year's support proceedings. Ennis v. Ennis, 207 Ga. 665, 63 S.E.2d 887 (1951) (decided under former Code 1933, § 113-1002).

Failure of the appraisers in year's support proceeding to take the prescribed oath is an irregularity which alone will not vitiate their return. Smith v. Smith, 187 Ga. 743, 2 S.E.2d 417 (1939) (decided under former Code 1933, § 113-1002).

Appraisers not required to place value upon property. — It is not required by law, nor is it essential to the return, that the appraisers specifically find the value of the property, or in the return place a value upon the property. Daniel v. First Nat'l Bank, 50 Ga. App. 632, 179 S.E. 152 (1935) (decided under former Code 1933, § 113-1002).

Widow's right to a year's support is not affected by the appraisers' dereliction of duty for which the widow is not responsible. Knowles v. Knowles, 125 Ga. App. 642, 188 S.E.2d 800 (1972) (decided under former Code 1933, § 113-1002).

Ordinary's (now probate judge) duty is ministerial, unless objections are filed to the return of the appraisers; but, when objections are filed, the ordinary discharges a judicial function in determining their validity. Shingler v. Furst, 52 Ga. App. 39, 182 S.E. 72 (1935) (decided under former Code 1933, § 113-1002).

Character of Award

Appraisers or jury to determine character of year's support. — It is for the appraisers or the jury, as the case might be, to determine whether the year's support allowance should be in money to be charged to the property of the estate, or should be in property of the estate measured by money. Calhoun Nat'l Bank v. Slagle, 53 Ga. App. 553, 186 S.E. 445 (1936) (decided under former Code 1933, § 113-1002).

Widow is entitled to have a year's support allowance in property, instead of cash, unless the appraisers or the jury should determine to the contrary, and a year's support to a widow and children may be set apart from property of which their husband and father died possessed, to be estimated according to the circumstances and standing of the family previous to the death of their husband and father. Calhoun Nat'l Bank v. Slagle, 53 Ga. App. 553, 186 S.E. 445 (1936) (decided under former Code 1933, § 113-1002).

There is no provision of law by which the widow is bound to accept cash offered by the judgment creditors of her husband, in lieu of a year's support allowance, even though the amount offered is the amount at which the appraisers had valued the year's support allowance set apart by them. Calhoun Nat'l Bank v. Slagle, 53 Ga. App. 553, 186 S.E. 445 (1936) (decided under former Code 1933, § 113-1002).

The award of a year's support to a widow holding the security deed should be made of the equity of redemption as to the remainder interest, or of the remainder interest subjected to the outstanding security deed, rather than in the value of the remainder interest before deducting the debts against the estate. Strickland v. Miles, 131 Ga. App. 300, 205 S.E.2d 880 (1974) (decided under former Code 1933, § 113-1002).

Widow entitled to interest following delayed payment. — When a cash award of a year's support to a widow could not be paid until four years after the judgment, the widow was entitled to interest from the date of the judgment. Clark v. Georgia R.R. Bank & Trust Co., 182 Ga. 472, 185 S.E. 716 (1936) (decided under former Code 1933, § 113-1002).

Inclusion of medical services in year's support authorized. — If the circumstances of the decedent, and the standing of decedent's family during decedent's lifetime, were such as to warrant reasonable medical attention to the wife, in the event such were necessary, if such medical services are required by the widow during the year following the death of the husband, the medical services should be considered in fixing the amount to be allowed her as a year's support. Walraven v. Walraven, 76 Ga. App. 713, 47 S.E.2d 148 (1948) (decided under former

Code 1933, § 113-1002).

Amount

Setting aside of whole estate valued in excess of $1,600.00. — Statute, which requires that the whole estate, when the estate's value is $1,600.00 or less, be set aside for a year's support, does not inhibit the setting aside of the whole estate when the estate's value exceeds $1,600.00, and the question of whether or not the amount set aside by the appraisers is excessive is one of fact solely for the determination of the jury. Edwards v. Addison, 187 Ga. 756, 2 S.E.2d 77 (1939) (decided under former Code 1933, § 113-1002).

Theory of this statute is that the amount set aside be "a sufficiency from the estate for support and maintenance for the space of 12 months from the date of administration." Davis v. Birdsong, 275 F.2d 113 (5th Cir. 1960) (decided under former Code 1933, § 113-1002).

Dependency. — Amount to be set apart for a year's support is governed in part by dependency. Driskell v. Crisler, 237 Ga. App. 408, 515 S.E.2d 416 (1999) (decided under former O.C.G.A. § 53-5-2).

Sufficiency estimated according to circumstances of family. — Year's support to a widow and children may be set apart from property of which their husband and father died possessed, the same to be either in property or money, and to be "a sufficiency from the estate for their support and maintenance for the space of 12 months … estimated according to the circumstances and standing of the family previous to the death" of their husband and father. Lang v. Hopkins, 10 Ga. 37 (1851) (decided under former Laws 1850, Cobb's 1851 Digest, p. 297); Cheney v. Cheney, 73 Ga. 66 (1884) (decided under former Code 1882, § 2571).

Other support available. — When the surviving wife had no other support available except welfare, which she had not sought, and her daughter's voluntary contributions from her own personal assets, such resources did not need to be weighed in the mix of the statute's contemplated "support available." Driskell v. Crisler, 237 Ga. App. 408, 515 S.E.2d 416 (1999) (decided under former O.C.G.A. § 53-5-2).

Whole amount allowed the widow should be sufficient to support and maintain the widow, including necessary medical service, in keeping with the circumstances and standing of the family previous to the death of the husband; due regard being had to the solvency of the estate. Walraven v. Walraven, 76 Ga. App. 713, 47 S.E.2d 148 (1948) (decided under former Code 1933, § 113-1002).

Consideration of lifestyle prior to death. — Upon the trial of an issue formed by a caveat to the return of the appraisers setting aside a year's support, evidence of the size of the estate and amount of property owned by the wife individually during the lifetime of the husband is immaterial and irrelevant. Daniel v. First Nat'l Bank, 50 Ga. App. 632, 179 S.E. 152 (1935) (decided under former Code 1933, § 113-1002).

An inquiry into the circumstances and standing of the family for the purpose of setting aside a year's support to the widow must be limited to the circumstances and standing of the family as affected by the estate of the deceased husband. Daniel v. First Nat'l Bank, 50 Ga. App. 632, 179 S.E. 152 (1935) (decided under former Code 1933, § 113-1002).

Evidence was insufficient to establish the fact that a passenger automobile sold to a widow (a sharecropper) was a necessity of life, so as to make funds set aside to her and her minor children as a year's support subject to an execution for the balance due on the purchase price of the automobile. Rimes v. Graham, 199 Ga. 406, 34 S.E.2d 443 (1945) (decided under former Code 1933, § 113-1002).

In determining the year's support to be set apart for a beneficiary entitled to it, consideration should not be given to provision otherwise made for such beneficiary. Byrd v. Byrd, 223 Ga. 24, 153 S.E.2d 422 (1967) (decided under former Code 1933, § 113-1002).

One-time purchases, repairs, and expenses. — Probate court was not forbidden by law to accommodate the need, in the year following testator's death, for one-time purchases, repairs, and expenses which would restore the testator's spouse's standard of living during marriage. Driskell v. Crisler, 237 Ga. App. 408,

Amount (Cont'd)

515 S.E.2d 416 (1999) (decided under former O.C.G.A. § 53-5-2).

Evidence of "cruel treatment" of decedent by widow. — Probate court did not abuse the court's discretion in setting aside decedent's house and furnishings, where evidence of the widow's "cruel treatment" toward decedent was conflicting, and the mere fact that the court may have slightly miscalculated the widow's gross income or living expenses was of no consequence in light of the entire record. Bell v. Bell, 201 Ga. App. 218, 411 S.E.2d 47 (1991) (decided under former O.C.G.A. § 53-5-2).

Medical expenses. — Provision for reasonable medical attention to the surviving spouse during the year following testator's death, when it is necessary and the circumstances and standing of the family before the death would warrant it, may be considered in fixing the amount of year's support. Driskell v. Crisler, 237 Ga. App. 408, 515 S.E.2d 416 (1999) (decided under former O.C.G.A. § 53-5-2).

A $10,000.00 award for a year's support was not contrary to law and evidence, nor arbitrary and grossly insufficient, since the trial court did not abuse the court's discretion in the manner in which the court applied the statutory year's support determination methods of subsections (b) and (c) of former O.C.G.A. § 53-5-2. Baker v. Baker, 194 Ga. App. 477, 390 S.E.2d 892 (1990) (decided under former O.C.G.A. § 53-5-2).

Time period considered in determining standard of living. — Court did not err in weighing into the balance the standard of living which the surviving wife was able to maintain during her marriage to the testator before the life-altering, terminal disability which deprived them both of their accustomed lifestyle since: (1) the statute does not limit consideration to the year before the death or any particular time other than "prior to the death of the testator or intestate"; (2) the right to year's support is founded on status, and the surviving wife enjoyed the status of spouse from 1972 to 1996; and (3) the court was not required to blind itself to the fact that the greatly reduced standard of living was occasioned by the very circumstance which rendered the surviving wife urgently needy in the 12 months subsequent to her husband's death. Driskell v. Crisler, 237 Ga. App. 408, 515 S.E.2d 416 (1999) (decided under former O.C.G.A. § 53-5-2).

Since there was conflicting evidence as to the value of the widow's separate estate, the value of the property she was awarded as year's support, her needs, and her standard of living prior to her husband's death, the court did not abuse the court's discretion in making the award. McClure v. Mason, 228 Ga. App. 797, 493 S.E.2d 16 (1997) (decided under former O.C.G.A. § 53-5-2).

Jury authorized to increase or decrease appraiser designated year's support. — When authorized by the pleadings and evidence in a trial de novo, the court should charge that the jury may find that the applicant is entitled to more or less than the appraisers designated as a reasonable year's support for the applicant. Hayes v. Hay, 92 Ga. App. 88, 88 S.E.2d 306 (1955) (decided under former Code 1933, § 113-1002).

On the retrial of a case in the superior court, the return of the appraisers may be changed or modified as to the amount of property set apart. Knowles v. Knowles, 125 Ga. App. 642, 188 S.E.2d 800 (1972) (decided under former Code 1933, § 113-1002).

Jury's duty is to determine from the evidence how much would be a sufficiency from the estate for the widow's support and maintenance for the space of 12 months to be estimated according to the circumstances and standing of the family previous to the death and keeping in view also the solvency of the estate. Carter v. Carter, 139 Ga. App. 548, 228 S.E.2d 708 (1976) (decided under former Code 1933, § 113-1002).

Jury authorized to make general estimate as to value of property. — Since it is not required that the specific property set aside as a year's support should be of any specific value, but only that it be a sufficiency, either in itself or when taken in connection with money, for the support of the applicants for one year, the jury, in setting aside specific property

for a year's support, may, from the general nature and description of the property as it appears from the evidence, without any evidence otherwise as to its value, make a general estimate of the value of the property and determine its sufficiency as respects its value for a year's support. Daniel v. First Nat'l Bank, 50 Ga. App. 632, 179 S.E. 152 (1935) (decided under former Code 1933, § 113-1002).

Valuation of property. — Verdict which sets aside as a year's support specifically designated property, each item of which is in the verdict specifically valued by the jury, together with a designated sum of money, is not, insofar as it estimates the value of the property set aside in a sum in excess of the estimated value of the same property contained in the return of the appraisers, invalid or without evidence to support it, in the absence of any evidence as to the value of the property. Daniel v. First Nat'l Bank, 50 Ga. App. 632, 179 S.E. 152 (1935) (decided under former Code 1933, § 113-1002).

Court is not required in the court's written order to assign a monetary value to any property awarded. McClure v. Mason, 228 Ga. App. 797, 493 S.E.2d 16 (1997) (decided under former O.C.G.A. § 53-5-2).

Support of the family of a deceased person should be paid out of the general funds of the estate, without regard or reference to the solvency or insolvency of the estate. Matthews v. Manhattan Life Ins. Co., 55 Ga. App. 204, 189 S.E. 858 (1937) (decided under former Code 1933, § 113-1002).

Priority

Year's support is the highest claim against an estate, whether testate or intestate. Smith v. Sanders, 208 Ga. 405, 67 S.E.2d 229 (1951) (decided under former Code 1933, § 113-1002).

Among the necessary expenses of administration is the provision for the support of the family of the deceased, which can be accomplished only by an application for a year's support and for each year thereafter that the estate is kept together. White v. Wright, 211 Ga. 556, 87 S.E.2d 394 (1955) (decided under former Code 1933, § 113-1002).

Year's support is on the same footing as expenses of administration, and is not subject to the law of distribution of estates or to debts against an estate, or liens against the property, except where it is made so by law. Robson v. Harris, 82 Ga. 153, 7 S.E. 926 (1888) (decided under former Code 1882, § 2571); Tomlinson v. City of Adel, 169 Ga. 758, 151 S.E. 482 (1930) (decided under former Civil Code 1910, § 4041).

Year's allowance is upon the footing of expenses of administration; indeed, a part of them. Smith v. Sanders, 208 Ga. 405, 67 S.E.2d 229 (1951) (decided under former Code 1933, § 113-1002).

A 12 months' support is not a debt, but is an encumbrance higher than a debt. Barron v. Burney, 38 Ga. 264 (1868) (decided under former Code 1863, § 2531); Dougherty-Little-Redwine Co. v. Hatcher, 169 Ga. 858, 151 S.E. 796 (1930) (decided under former Civil Code 1910, § 4041).

Year's support is one of the necessary expenses of administration and is an encumbrance higher than any debt. Montgomery v. McCants, 49 Ga. App. 324, 175 S.E. 397 (1934) (decided under former Code 1933, § 113-1002).

Vesting of year's support to exclusion of other debts. — Title to property set apart to a widow and child or children, in pursuance of the law, as a year's support for the family of the decedent, vests in the family to the exclusion of all debts, "except as otherwise specially provided" by law. Bank of Hampton v. Smith, 177 Ga. 532, 170 S.E. 508 (1933) (decided under former Code 1933, § 113-1002).

Allowance of a year's support from property belonging to the husband's estate is to be taken as higher than any debt and is to be regarded as a part of expenses of administration. Tilley v. King, 193 Ga. 602, 19 S.E.2d 281 (1942) (decided under former Code 1933, § 113-1002).

Although the law provides that the year's support is to be preferred above "all other debts," the provision for a year's support is not a debt at all, but is an encumbrance higher than any debt. Smith v. Sanders, 208 Ga. 405, 67 S.E.2d 229 (1951) (decided under former Code 1933, § 113-1002).

Priority (Cont'd)

Provision for the support of the family of the decedent is classed as one of the necessary expenses of administration, and is made for a class as a whole, and not for the benefit of one or some of that class. Ennis v. Ennis, 207 Ga. 665, 63 S.E.2d 887 (1951) (decided under former Code 1933, § 113-1002).

The year's support takes precedence even of taxes due the state. Tomlinson v. City of Adel, 169 Ga. 758, 151 S.E. 482 (1930) (decided under former Civil Code 1910, § 4041).

Claim of a widow for a year's support is superior to legacies given by her husband in his will. Knowles v. Knowles, 125 Ga. App. 642, 188 S.E.2d 800 (1972) (decided under former Code 1933, § 113-1002).

Money set aside as a year's support cannot be subjected to the claim of creditors of the wife, other than those creditors who have provided or furnished the family with support or the necessities of life. Rimes v. Graham, 199 Ga. 406, 34 S.E.2d 443 (1945) (decided under former Code 1933, § 113-1002).

Property received by the widow as a year's support is exempt from levy for any but debts created for her actual maintenance and support. Davis v. Birdsong, 275 F.2d 113 (5th Cir. 1960) (decided under former Code 1933, § 113-1002).

Property of a decedent may be sold free from a year's support only under the provisions of Ga. L. 1955, p. 731, § 1 by a sale or conveyance made under court order or under power contained in a will by the representative prior to the setting apart of such year's support. Knowles v. Knowles, 125 Ga. App. 642, 188 S.E.2d 800 (1972) (decided under former Code 1933, § 113-1002).

Year's support superior to judgment for alimony. — While a judgment for alimony, payable in monthly installments of money, creating a special lien on land may not be classed as an ordinary debt, being more than such a debt, it is a debt within the meaning of the law, providing that a year's support to the family of the deceased shall be "preferred over all other debts." Wainwright v. Morrow, 180 Ga. 120, 178 S.E. 155 (1935) (decided under former Code 1933, § 113-1002).

Priority status of year's support predicated on public policy. — Year's support set apart to a widow and minor children takes precedence, not only over debts due by the decedent, but even of taxes which are due the state; and this is based upon a sound public policy looking to the protection of widows and children out of the estate of a decedent for the space of 12 months, and until such time as they may provide support for the future. Tomlinson v. City of Adel, 169 Ga. 758, 151 S.E. 482 (1930) (decided under former Civil Code 1910, § 4041).

Title of widow subordinate to prior lien. — When the decedent husband, under a foreclosure of his security deed, acquired title to the property subsequently set apart to his widow as a year's support, after the lien of a paving assessment had attached thereto, her title was subordinate to such lien of the city, and the court did not err in so holding. Paulk v. City of Ocilla, 188 Ga. 69, 2 S.E.2d 642 (1939) (decided under former Code 1933, § 113-1002).

Year's support is superior to liens created by the decedent, or liens arising by operation of law during the decedent's ownership, except for purchase money. Tomlinson v. City of Adel, 169 Ga. 758, 151 S.E. 482 (1930) (decided under former Civil Code 1910, § 4041).

While it is true that, except as to conveyances of title to secure debt, a year's support is superior to liens created by a decedent, or liens arising by operation of law during decedent's ownership, and the widow thus takes the interest of the decedent stripped of all such inferior claims, the title of the widow to the property set apart as a year's support is not superior to liens which had already adhered against the property before the decedent husband acquired the property. Paulk v. City of Ocilla, 188 Ga. 69, 2 S.E.2d 642 (1939) (decided under former Code 1933, § 113-1002).

While a lien arising by operation of law after one's death could hardly be a "debt" within the purview of former Code 1933, § 113-1002, it may be a "claim against the estate" within the meaning of former Code

1933, § 113-1508. Johnson v. City of Blackshear, 196 Ga. 652, 27 S.E.2d 316 (1943) (decided under former Code 1933, § 113-1002).

Management and Control

Widow, as the head of the family, is vested with the exclusive right to manage and control the property for the joint benefit of herself and minor children, and, after the marriage or majority of the children, for the benefit of herself alone for life, including the power to sell the entire interest in the property for such purpose. King v. King, 203 Ga. 811, 48 S.E.2d 465 (1948) (decided under former Code 1933, § 113-1002); Tribble v. Knight, 238 Ga. 84, 231 S.E.2d 68 (1976) (decided under former Code 1933, § 113-1002).

If necessary, the property awarded to a widow and minor child may be consumed or exhausted, and so long as it lasts it will be subject to exclusive use by the widow during her life, after the child marries or reaches majority. McCommons v. Reid, 201 Ga. 500, 40 S.E.2d 73 (1946) (decided under former Code 1933, § 113-1002).

When realty is set aside as a year's support to a widow and three minor children, and all the minors have since attained their majority, the title is vested in them jointly, subject to the right of the widow to sell the entire interest for her maintenance and support. King v. King, 203 Ga. 811, 48 S.E.2d 465 (1948) (decided under former Code 1933, § 113-1002).

When a year's support was set aside to the widow and three minor children jointly, the title thereto vested in them for their joint support and maintenance, and the other children had no interest therein. When the minor children married or attained their majority, the right of support and maintenance from the property set aside as a year's support belonged to the widow alone as long as she lives or the property lasted, and she was entitled to the property's use and control. She could sell the property for her maintenance and support. The children who have attained their majority have no right to participate in the property's consumption or its control. King v. King, 203 Ga. 811, 48 S.E.2d 465 (1948) (decided under former Code 1933, § 113-1002).

Once the children attain their majority, title remains vested in them jointly, subject to the right of the widow to sell all or part of the property for her maintenance and support. Tribble v. Knight, 238 Ga. 84, 231 S.E.2d 68 (1976) (decided under former Code 1933, § 113-1002).

Widow may maintain suit to control property. — Although property set aside as a year's support may have been set aside to the widow and minor children, the widow nevertheless has the right to control the property, and can, in her own name, maintain a suit in trover for the property's conversion. Philpot v. Ramsey & Hogan, 47 Ga. App. 635, 171 S.E. 204 (1933) (decided under former Code 1933, § 113-1002).

Power of widow to encumber property restricted. — Although the Georgia cases have held that when there is a widow and no minor children, complete title vests in the widow, the cases nevertheless restrict her power to encumber her year's support unless for actual need for her maintenance. Davis v. Birdsong, 275 F.2d 113 (5th Cir. 1960) (decided under former Code 1933, § 113-1002).

Widow as quasi-trustee of minor children. — Under the right of the widow to dispose of property set apart for the support of herself and her minor children under her care, even without an order of court, she acts as the quasi-trustee of the minor children, who with herself are entitled to all of the support. She may thus not only lawfully sell, but lawfully execute a mortgage or security deed conveying the property to obtain funds for such support, or for the purpose of building or repairing a dwelling for herself and such children. Jones v. Federal Land Bank, 189 Ga. 419, 6 S.E.2d 52 (1939) (decided under former Code 1933, § 113-1002).

Award to widow and minor children made in gross. — When an application for a year's support is made by a widow for herself and her minor child, the law contemplates that an award shall be made to such widow and minor child in gross, and not that awards shall be made to them separately; so that, although the legal title will vest in them share and share alike, the use of the entire property shall be a joint one for the support of both

Management and Control (Cont'd)

the mother and the child, and of neither to the exclusion of the other, so long as the widow lives and until the child marries or reaches majority. McCommons v. Reid, 201 Ga. 500, 40 S.E.2d 73 (1946) (decided under former Code 1933, § 113-1002).

When property is set aside in gross, the widow and minor children become owners in common, and share equally in the title. Walden v. Walden, 191 Ga. 182, 12 S.E.2d 345 (1940) (decided under former Code 1933, § 113-1002).

Georgia law without doubt permits, and in some cases requires, separate portions of the estate to be set aside as a year's support to the widow and children of the deceased. Gale v. Stewart, 105 Ga. App. 767, 125 S.E.2d 694 (1962) (decided under former Code 1933, § 113-1002).

Child is not divested of the child's interest upon reaching majority while the widow is alive or while any of the child's siblings are still minors, even though the child is not entitled to the control or possession of the property or to any support therefrom. Tribble v. Knight, 238 Ga. 84, 231 S.E.2d 68 (1976) (decided under former Code 1933, § 113-1002).

Use and possession of a sui juris child's undivided interest is merely postponed to the child until the death of the widow and the reaching of age of majority of all the children. Tribble v. Knight, 238 Ga. 84, 231 S.E.2d 68 (1976) (decided under former Code 1933, § 113-1002).

When all of the beneficiaries of a year's support cease to exist as such, — any of the property set aside which may be unconsumed belongs to them or their heirs in common. Walden v. Walden, 191 Ga. 182, 12 S.E.2d 345 (1940) (decided under former Code 1933, § 113-1002).

Testamentary disposition by widow of children's share prohibited. — While the widow is entitled, after the child or children reach majority, to the possession of the entire property for her support and maintenance, and has the right to sell the property for such purpose, this does not include the power to give the children's share of the property to another by will. Walden v. Walden, 191 Ga. 182, 12 S.E.2d 345 (1940) (decided under former Code 1933, § 113-1002).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former O.C.G.A. § 53-5-2 are included in the annotations for this Code section.

Payment of tax liability prior to award of year's support. — Award of year's support cannot divest a tax lien which has already been paid in full and satisfied prior to the award. 1985 Op. Att'y Gen. No. U85-45 (decided under former O.C.G.A. § 53-5-2).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 662, 677 et seq.

C.J.S. — 34 C.J.S., Executors and Administrators, § 430 et seq.

ALR. — Right of nonresident to widow's or child's allowance out of estate of one who was domiciled in state, 26 A.L.R. 132.

Bank deposit to credit of decedent or other indebtedness to him as subject to widow's or family allowance or other estate exemption, as affected by right of bank to apply deposit, or of other debtor to assert counterclaim or setoff, 108 A.L.R. 773.

Family allowance granted widow as payable from community interests of decedent and widow, 9 A.L.R.2d 529.

Effect of extrajudicial separation on surviving spouse's right to widow's allowance, 34 A.L.R.2d 1056.

Conclusiveness of statement or decision of accountant or similar third person under contract between others requiring property to be valued by him, 50 A.L.R.2d 1268.

Right of nonresident surviving spouse or minor children to allowance of property exempt from administration or to family allowance from local estate of nonresident decedent, 51 A.L.R.2d 1026.

Who is included in term "family" or "household" in statutes relating to family allowance or exemption out of decedent's estate, 88 A.L.R.2d 890.

Effect of testamentary gift on widow's right to fixed statutory allowance or allowance for support, 97 A.L.R.2d 1319.

Statutory family allowance to minor children as affected by previous agreement or judgment for their support, 6 A.L.R.3d 1387.

Waiver of right to widow's allowance by postnuptial agreement, 9 A.L.R.3d 955.

Eligibility of illegitimate child to receive family allowance out of estate of his deceased father, 12 A.L.R.3d 1140.

Right to partial distribution of estate or distribution of particular assets, prior to final closing, 18 A.L.R.3d 1173.

Family allowance from decedent's estate as exempt from attachment, garnishment, execution, and foreclosure, 27 A.L.R.3d 863.

Waiver of right to widow's allowance by antenuptial agreement, 30 A.L.R.3d 858.

Validity of inter vivos trust established by one spouse which impairs the other spouse's distributive share or other statutory rights in property, 39 A.L.R.3d 14.

Extension of time within which spouse may elect to accept or renounce will, 59 A.L.R.3d 767.

53-3-2. Events barring right to support.

(a) A surviving spouse's right to year's support shall be barred by the marriage or death of the spouse prior to the filing of the petition for year's support.

(b) A minor child's right to year's support shall be barred by the marriage or death of the minor or by the minor's attaining the age of 18 years prior to the filing of the petition for year's support.

History. — Code 1981, § 53-3-2, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

Subsection (a) carries forward the rule that appeared in former OCGA Sec. 53-5-2(d). Subsection (b) carries forward former OCGA Sec. 53-5-3.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-1002, Ga. L. 1958, p. 378, § 1, and former O.C.G.A. § 53-5-2 are included in the annotations for this Code section.

Annulment of subsequent remarriage. — When wife died in 1982, husband remarried in 1984, husband petitioned for a year's support from estate of deceased former wife's estate, and then husband obtained decree of annulment of second marriage, the trial court erred in excluding from evidence the marriage certificate and the proffered testimony concerning the nature of the actual relationship between petitioner for a year's support and the second woman, since given the financial benefits which petitioner and the woman stood to achieve after the caveat was filed by having their marriage annulled, a manifest injustice could result if caveators were not permitted to go behind the annulment decree in an attempt to prove that the couple had in fact cohabitated as man and wife both before and after the entry of the annulment decree. Hamrick v. Bonner, 182 Ga.

App. 76, 354 S.E.2d 687 (1987) (decided under former O.C.G.A. § 53-5-2).

Married daughter not entitled to year's support. — Minor daughter, married at the time of her father's death, and not a member of his household, but living with and supported by her husband, is not entitled to a year's support out of her deceased parent's estate. Having no right to any benefit obtained by the mother, plaintiff was not represented by her or bound by her acts. Therefore, while the other children of the decedent father were so bound, she was not estopped or precluded from attacking the validity of the proceedings. Jones v. Federal Land Bank, 189 Ga. 419, 6 S.E.2d 52 (1939) (decided under former Code 1933, § 113-1002).

Repudiating judgments. — When a widow applied for and was awarded a year's support for herself and her son from the probate court, she could not afterwards repudiate judgments which she secured for their own benefit. Sheffield v. Estate of Sheffield, 172 Ga. App. 469, 323 S.E.2d 679 (1984) (decided under former O.C.G.A. § 53-5-2).

Cited in Collins v. Collins, 224 Ga. 671, 164 S.E.2d 139 (1968).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under Ga. L. 1958, p. 378, § 1 are included in the annotations for this Code section.

Minor's right to year's support barred. — A "year's support" is barred by a minor's attaining the age of 18 years prior to the filing of the application for a "year's support." 1975 Op. Att'y Gen. No. U75-95 (decided under Ga. L. 1958, p. 378, § 1).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, § 686 et seq.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 452, 465.

ALR. — Widow's or family allowance out of decedent's estate as surviving death or marriage of widow or minor children, or attainment of majority by children, 144 A.L.R. 270.

Who is included in term "family" or "household" in statutes relating to family allowance or exemption out of decedent's estate, 88 A.L.R.2d 890.

53-3-3. Provision in will in lieu of support; election.

A testator by will may make provision for the spouse in lieu of year's support, in which case the surviving spouse must make an election.

History. — Code 1981, § 53-3-3, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-5-5.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 4045, former Code 1933, §§ 113-1002 and 113-1007, and former O.C.G.A. §§ 53-5-2 and 53-5-5 are included in the annotations for this Code section.

Testamentary provision in lieu of year's support must be clearly expressed. — In case of testacy, in order to

put the widow to an election between the provisions made in her favor in the will and her right to a year's support, such testamentary provision in her favor must be either expressly made in lieu of a year's support, or the intention of the testator to that effect must be deduced by clear and manifest implication from the will, founded on the fact that the claim of year's support would be inconsistent with the will or so repugnant to its provisions as necessarily to defeat them. Chambliss v. Bolton, 146 Ga. 734, 92 S.E. 204 (1917) (decided under former Civil Code 1910, § 4045); Clark v. Clark, 62 Ga. App. 738, 9 S.E.2d 710 (1940) (decided under former Code 1933, § 113-1007); Bowen v. Bowen, 200 Ga. 572, 37 S.E.2d 797 (1946) (decided under former Code 1933, § 113-1007); Samples v. Samples, 107 Ga. App. 788, 131 S.E.2d 584 (1963) (decided under former Code 1933, § 113-1007); Studstill v. Studstill, 130 Ga. App. 803, 204 S.E.2d 496 (1974) (decided under former Code 1933, § 113-1007); Young v. Ellis, 250 Ga. 838, 301 S.E.2d 271 (1983) (decided under former O.C.G.A. § 53-5-5).

Widow's claim for a year's support is not barred by accepting provisions made for her in her husband's will when the will does not show a plain and manifest intention on the part of the testator that the provisions made for the wife should be in lieu of a year's support, although the will provides that the executors conduct certain farming operations and pay the profits thereof to the wife, and that his property be kept "intact" and none of the lands be sold unless absolutely necessary. Burch v. Harrell, 57 Ga. App. 514, 196 S.E. 205 (1938) (decided under former Code 1933, § 113-1007).

When husband's will provides that all of the property of the testator is devised to the widow and the daughter for life, with remainder over to other children of the testator, and that the property of the testator be kept intact as long as either the widow or daughter should live, the wife's claim for a year's support is inconsistent with and repugnant to the will and necessarily defeats the provisions of the will, in that the allowance of a year's support to the widow will defeat the testamentary scheme of the testator, which was to provide for his wife and daughter and to keep his estate intact so long as either of them should live. Therefore the widow may elect whether she will take a life estate under the will or a year's support. Rogers v. Woods, 63 Ga. App. 195, 10 S.E.2d 404 (1940) (decided under former Code 1933, § 113-1007).

When by the will the widow is devised a life estate in all of the testator's property, in order to put her to an election between the provisions of the will in her favor and her right to a year's support, such provisions in the will must be either expressly made in lieu of a year's support, or the intention of the testator to that effect must be deduced by clear and manifest implication from the will, founded on the fact that the claim of year's support would be inconsistent with the will or so repugnant to the will's provisions as necessarily to defeat the provisions. Rogers v. Woods, 63 Ga. App. 195, 10 S.E.2d 404 (1940) (decided under former Code 1933, § 113-1007).

When the will does not expressly require an election by the widow and there is no conflict of facts requiring submission to a jury, the trial court has the duty as a matter of law to determine if the will can be read to give the "clear and manifest implication" necessary to require an election of the widow. Studstill v. Studstill, 130 Ga. App. 803, 204 S.E.2d 496 (1974) (decided under former Code 1933, § 113-1007).

Will which did not provide that the devise of income from real property to the widow was in lieu of a year's support, as might have been done under the statute, does not preclude the widow's right to claim a year's support. Strickland v. Miles, 131 Ga. App. 300, 205 S.E.2d 880 (1974) (decided under former Code 1933, § 113-1007).

When the will devised to the widow a life estate in the marital home, and directed payment by the estate of taxes, insurance, and certain maintenance expenses on the family home, and it contained a further provision relative to income to the widow during her lifetime, inasmuch as the unquestioned desire of the testator was to provide certain basic needs to the wife during her lifetime,

there was no manifest implication of the will that would require the widow to elect between a year's support and the benefits of the will. Young v. Ellis, 250 Ga. 838, 301 S.E.2d 271 (1983) (decided under former O.C.G.A. § 53-5-5).

Acceptance of testamentary provision as renunciation of right to year's support. — Even though the will of a decedent provides that his widow shall take under the will only if she renounces her right to a year's support, she must do some act which shows her acceptance of that provision in lieu of a year's support. Walraven v. Walraven, 76 Ga. App. 713, 47 S.E.2d 148 (1948) (decided under former Code 1933, § 113-1007).

When after will was probated, widow was entitled, under the will's terms, to receive, use and consume as her own what she testified she had received, this would not bar her right to a year's support or require her to account therefor in having year's support set apart. Clark v. Clark, 62 Ga. App. 738, 9 S.E.2d 710 (1940) (decided under former Code 1933, § 113-1007).

Withdrawal of funds by a widow from a joint checking account with her deceased husband, after his death, is not tantamount to an election to take under the will of her deceased husband, particularly when there was evidence of excessive medical expenses of the widow following her husband's death. Howard v. Howard, 150 Ga. App. 213, 257 S.E.2d 336 (1979) (decided under former Code 1933, § 113-1007).

Estoppel. — When a widow claims the legacy in lieu of a year's support made under the will and at the same time makes application to the ordinary (now probate judge) for a year's support, any interested person may file a caveat to the return of the appraisers, and may set up as a bar to the allowance of year's support an inconsistent election on the part of the widow, whereby under the provisions of the will she has estopped herself from such an allowance. Bowen v. Bowen, 200 Ga. 572, 37 S.E.2d 797 (1946) (decided under former Code 1933, § 113-1007).

Question of fact. — Summary judgment was not proper when a question of fact remained as to whether the funds received by the surviving spouse passed to her outside the estate and did not constitute an election to take under the will and if she was therefore entitled to the statutory year's support. Wynn v. Wynn, 202 Ga. App. 679, 415 S.E.2d 287 (1992) (decided under former O.C.G.A. § 53-5-5).

Trial court erred in granting summary judgment against a widow where she testified that she was unaware of her year's support rights at the time of her election to take two real-property bequests under the will and the executor presented no evidence that she knew the condition of the estate at that time. Brown v. Estate of Brown, 246 Ga. App. 332, 539 S.E.2d 824 (2000) (decided under former O.C.G.A. § 53-5-5).

Grant of life estate to widow under will does not preclude award of year's support. Adams v. Adams, 249 Ga. 477, 291 S.E.2d 518 (1982) (decided under former O.C.G.A. § 53-5-2).

Testamentary gift in addition to a year's support. — Widow's claim for a year's support is not barred by accepting provisions made for her in her husband's will when the will does not show a plain and manifest intention on the part of the testator that the provisions made for the wife should be in lieu of a year's support, although the will provides that the executors conduct certain farming operations and pay the profits thereof to the wife, and that his property be kept "intact" and none of the lands be sold unless absolutely necessary. Burch v. Harrell, 57 Ga. App. 514, 196 S.E. 205 (1938) (decided under former Code 1933, § 113-1002).

Life estate in widow. — When under a will the widow is given a life estate in all of the property, it is correct and proper for the appraisers to carve her year's support allowance out of the remainder interest, when that is the only interest, other than the life estate, created by the will. Saxon v. Aycock, 72 Ga. App. 728, 34 S.E.2d 914 (1945) (decided under former Code 1933, § 113-1002).

Widow is entitled to a 12 months' support out of the estate of her deceased husband, notwithstanding the fact that he left to her by will, which was probated over her caveat thereto, a life estate in all of his property real and personal. Russell v. Hall, 245 Ga. 677, 266 S.E.2d 491 (1980)

(decided under former Code 1933, § 113-1002).

Will provisions in lieu of year's support. — Testator can make provisions in the testator's will for the benefit of his widow and in lieu of a year's support, and when this is done the widow must elect as between the provisions of the will for her benefit and her right to a year's support. Saxon v. Aycock, 72 Ga. App. 728, 34 S.E.2d 914 (1945) (decided under former Code 1933, § 113-1002).

When husband's will provides that all of the property of the testator is devised to the widow and the daughter for life, with remainder over to other children of the testator, and that the property of the testator be kept intact as long as either the widow or daughter should live, the wife's claim for a year's support is inconsistent with and repugnant to the will and necessarily defeats the provisions of the will, in that the allowance of a year's support to the widow will defeat the testamentary scheme of the testator, which was to provide for his wife and daughter and to keep his estate intact so long as either of them should live. Therefore, the widow may elect whether she will take a life estate under the will or a year's support. Rogers v. Woods, 63 Ga. App. 195, 10 S.E.2d 404 (1940) (decided under former Code 1933, § 113-1002).

Waiver by electing to take inconsistent benefit. — When a husband as the head of a family has a homestead set apart for himself and wife, and the widow after his death continues upon the property constituting the homestead for a great number of years, enjoying during that period the rents, issues, and profits of the homestead, she will not be allowed, after the expiration of such a time, to take a year's support out of the homestead property, but will be conclusively presumed to have made an election in favor of the enjoyment of the homestead as such, and against the right to have a year's support set apart to her. McDaniel v. Kelley, 61 Ga. App. 105, 5 S.E.2d 672 (1939) (decided under former Code 1933, § 113-1002).

In case of testacy, in order to put the widow to an election between the provisions made in her favor in the will and her right to a year's support under the statute, such testamentary provision in her favor must be either expressly made in lieu of year's support, or the intention of the testator to that effect must be deduced by clear and manifest implication from the will, founded on the fact that the claim of year's support would be inconsistent with the will or so repugnant to its provisions as necessarily to defeat them. Clark v. Clark, 62 Ga. App. 738, 9 S.E.2d 710 (1940) (decided under former Code 1933, § 113-1002); Rogers v. Woods, 63 Ga. App. 195, 10 S.E.2d 404 (1940) (decided under former Code 1933, § 113-1002).

Widow may waive her statutory right to a year's support by her election to take an inconsistent benefit. Smith v. Sanders, 208 Ga. 405, 67 S.E.2d 229 (1951) (decided under former Code 1933, § 113-1002).

Cited in McNair v. Robun, 159 Ga. 401, 126 S.E. 9 (1924); Smalley v. Bassford, 191 Ga. 642, 13 S.E.2d 662 (1941); Johnson v. City of Blackshear, 196 Ga. 652, 27 S.E.2d 316 (1943); Smith v. Davis, 203 Ga. 175, 45 S.E.2d 609 (1947); Strother v. Kennedy, 218 Ga. 180, 127 S.E.2d 19 (1962); Russell v. Hall, 245 Ga. 677, 266 S.E.2d 491 (1980); Hiers v. Estate of Hiers, 278 Ga. App. 242, 628 S.E.2d 653 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 80 Am. Jur. 2d, Wills, § 1416.

C.J.S. — 34 C.J.S., Executors and Administrators, § 342.

ALR. — Right of one who elects against will to share in lapsed legacy, 26 A.L.R. 91.

Does surviving spouse who elects against will take by way of distributive share or by way of inheritance from deceased spouse, 160 A.L.R. 429.

Election by spouse to take under or against will as exercisable by agent or personal representative, 83 A.L.R.2d 1077.

Waiver of right to widow's allowance by postnuptial agreement, 9 A.L.R.3d 955.

Extension of time within which spouse may elect to accept or renounce will, 59 A.L.R.3d 767.

Conflict of laws regarding election for or

against will, and effect in one jurisdiction of election in another, 69 A.L.R.3d 1081.

Liability for administration expenses of spouse electing against will, 89 A.L.R.3d 315.

Construction, application, and effect of statutes which deny or qualify surviving spouse's right to elect against deceased spouse's will, 48 A.L.R.4th 972.

53-3-4. "Homestead" defined; taxes and tax liens.

(a) As used in this Code section, the term "homestead" shall have the same meaning as set forth in Code Section 48-5-40.

(b)(1) In solvent and insolvent estates, all taxes and liens for taxes accrued for years prior to the year of the decedent's death against the homestead set apart and against any equity of redemption applicable to the homestead set apart shall be divested as if the entire title were included in the year's support. Additionally, as elected in the petition, property taxes accrued in the year of the decedent's death or in the year in which the petition for year's support is filed or, if the petition is filed in the year of the decedent's death, in the year following the filing of the petition shall be divested if the homestead is set apart for year's support; provided, however, that, if the property taxes elected in the petition pursuant to this paragraph are paid after the filing of the petition but prior to the entry of the order setting apart the homestead for year's support, the property taxes accrued in the year following the year elected in the petition shall be divested instead.

(2) In solvent and insolvent estates, if the homestead is not claimed, all taxes and liens for taxes accrued for years prior to the year of the decedent's death against the real property set apart and against any equity of redemption applicable to the real property set apart shall be divested as if the entire title were included in the year's support. Additionally, as elected in the petition, property taxes accrued in the year of the decedent's death or in the year in which the petition for year's support is filed or, if the petition is filed in the year of the decedent's death, in the year following the filing of the petition shall be divested if the real property is set apart for year's support; provided, however, that, if the property taxes elected in the petition pursuant to this paragraph are paid after the filing of the petition but prior to the entry of the order setting apart the real property for year's support, the property taxes accrued in the year following the year elected in the petition shall be divested instead.

History. — Code 1981, § 53-3-4, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 12; Ga. L. 2016, p. 349, § 1/HB 547; Ga. L. 2020, p. 377, § 1-5/HB 865.

The 2020 amendment, effective January 1, 2021, added the proviso at the end of paragraph (b)(1); and added the proviso at the end of paragraph (b)(2).

Law reviews. — For annual survey of

wills, trusts, guardianships, and fiduciary administration, see 68 Mercer L. Rev. 321 (2016).

COMMENT

This section replaces the provision that appeared in former 53-5-2(b) relating to the divesting of taxes. This section provides that taxes and liens that accrued in the years before the year the decedent died shall be divested. Additionally, the petitioner may elect to have divested property taxes from either the year the decedent died or the year the petition is filed. If the petition is filed the year the decedent died, then the petitioner may elect between that year or the year following the filing of the petition.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-1002, are included in the annotations for this Code section.

Married daughter not entitled to year's support. — Minor daughter, married at the time of her father's death, and not a member of his household, but living with and supported by her husband, is not entitled to a year's support out of her deceased parent's estate. Having no right to any benefit obtained by the mother, plaintiff was not represented by her or bound by her acts. Therefore, while the other children of the decedent father were so bound, she was not estopped or precluded from attacking the validity of the proceedings. Jones v. Federal Land Bank, 189 Ga. 419, 6 S.E.2d 52 (1939) (decided under former Code 1933, § 113-1002).

Paramount right of United States to collect taxes. — Even though Georgia law exempts property set aside as year's support from levy in favor of general creditors, this exemption would not be valid as against the right of the United States to collect an assessment for income taxes. Davis v. Birdsong, 275 F.2d 113 (5th Cir. 1960) (decided under former Code 1933, § 113-1002).

53-3-5. Filing of petition.

(a) Upon the death of any individual leaving an estate solvent or insolvent, the surviving spouse or a guardian or other person acting in behalf of the surviving spouse or in behalf of a minor child may file a petition for year's support in the probate court having jurisdiction over the decedent's estate. If the petition is brought by a guardian acting on behalf of a minor child, no additional guardian ad litem shall be appointed for such minor child unless ordered by the court.

(b) The petition shall set forth, as applicable, the full name of the surviving spouse, the full name and birthdate of each surviving minor child, and a schedule of the property, including household furniture, that the petitioner proposes to have set apart as year's support. The petition shall describe fully and accurately any real property the petitioner proposes to have set apart as year's support with a legal description sufficient under the laws of this state to pass title to the real property.

(c) A petition for year's support shall be filed within 24 months of the date of death of the decedent.

History. — Code 1981, § 53-3-5, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 13; Ga. L. 2020, p. 377, § 1-6/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (b), substituted "apart as year's support" for "aside" twice; in the first sentence, inserted a comma following "child" and substituted "which" for "that"; and substituted "describe fully and accurately" for "fully and accurately describe" in the second sentence.

Law reviews. — For survey article on wills, trusts, guardianships, and fiduciary administration, see 60 Mercer L. Rev. 417 (2008). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 65 Mercer L. Rev. 295 (2013).

COMMENT

This section contains provisions from former O.C.G.A. Secs. 53-5-2 and 53-5-6. The time period for applying for year's support is shortened to the 24-month period following the decedent's death. The entitlement to year's support in subsequent years, which appeared in former O.C.G.A. Sec. 53-5-4, is repealed.

JUDICIAL DECISIONS

Analysis

General Consideration
Application Generally
1. In General
2. Qualification of Minor Children for Beneficial Interest
3. Independent Application by Excluded Persons

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 2530, former Code 1933, § 113-1002, and former O.C.G.A. § 53-5-2 are included in the annotations for this Code section.

No one can become a beneficiary merely because he or she happens to be an heir at law of the deceased. Pullen v. Johnson, 173 Ga. 581, 160 S.E. 785 (1931) (decided under former Civil Code 1910, § 4041).

Cited in Cabrel v. Lum, 289 Ga. 233, 710 S.E.2d 810 (2011).

Application Generally

1. In General

An application for a year's support is a suit in a court to recover a right. Nixon v. Nixon, 196 Ga. 148, 26 S.E.2d 711, answer conformed to, 69 Ga. App. 667, 26 S.E.2d 722 (1943) (decided under former Code 1933, § 113-1002).

It is immaterial who makes the application required by statute for the 12 months' support for the family of the deceased, so that the representative of the deceased's estate has notice; therefore, such an application by the temporary administrator and the action of the ordinary (now probate judge) thereon is not void as against creditors. Mackie, Beattie & Co. v. Glendenning, 49 Ga. 367 (1873) (decided under former Code 1868, § 2530).

Widow who acts as executor may apply for year's support. Dunaway v. Clark, 536 F. Supp. 664 (S.D. Ga. 1982) (decided under former O.C.G.A. § 53-5-2).

For whom the widow may act. — In making the application for year's support the widow may act for herself and the minor children. Farmers Bank v. Williams, 188 Ga. 789, 5 S.E.2d 195 (1939) (decided under former Code 1933, § 113-1002).

Repudiating judgments. — When widow applied for and was awarded a year's support for herself and her son from the probate court, she could not after-

wards repudiate judgments which she secured for their own benefit. Sheffield v. Estate of Sheffield, 172 Ga. App. 469, 323 S.E.2d 679 (1984) (decided under former O.C.G.A. § 53-5-2).

Denial of spouse's petition for year's support improper. — Probate court erred by allowing the objections of a bank and a decedent's parents solely on the basis of adverse title and by denying a year's support to the widow when the widow failed to meet the resulting burden of proof because the probate court lacked the jurisdiction under Ga. Const. 1983, Art. VI, Sec. III, Para. I and O.C.G.A. § 15-9-30 to determine that the relevant money-market account and real property were not part of the estate; despite the jurisdictional limitation and the lack of an appropriate objection, the probate court proceeded to conduct a hearing as to the amount necessary for the widow's support, thereby inappropriately placing upon the widow a burden of proof that was contrary to O.C.G.A. § 53-3-7(a) and otherwise lacking in the absence of the jurisdictionally defective objections to the petition. In re Mahmoodzadeh, 314 Ga. App. 383, 724 S.E.2d 797 (2012).

2. Qualification of Minor Children for Beneficial Interest

Minor children must be named or described in application. — In order for minor children to take an interest in property set apart as a year's support, it should in some manner appear in the application that it is made in their behalf; and when it affirmatively appears that the application was made by the widow, and that minor children were not referred to therein by name or otherwise, they take no interest in the property set apart. Farmers Bank v. Williams, 188 Ga. 789, 5 S.E.2d 195 (1939) (decided under former Code 1933, § 113-1002); Gale v. Stewart, 105 Ga. App. 767, 125 S.E.2d 694 (1964) (decided under former Code 1933, § 113-1002).

Names or number of children need not appear in application for year's support. — In order for minor children to take an interest in the property set apart for year's support it is not necessary that their names appear in application therefore, nor does the fact that the number of the children was not set out affect their rights. Farmers Bank v. Williams, 188 Ga. 789, 5 S.E.2d 195 (1939) (decided under former Code 1933, § 113-1002).

When one who is not mentioned in a year's support, either by name or description, that one can take no beneficial interest thereunder; however, it is not necessary that the names or number of the minor children appear in the proceeding for them to take an interest in the property set apart. Thus, the minor children take a beneficial interest in property set apart under a year's support proceeding in which a named "widow, and … minor children" are designated in various portions of the proceeding. Ennis v. Ennis, 207 Ga. 665, 63 S.E.2d 887 (1951) (decided under former Code 1933, § 113-1002).

Year's support to minor child. — When plaintiff takes no beneficial interest in the property set aside to the widow, plaintiff is not barred, on account of the allowance to the widow, from obtaining a year's support as a minor child of the deceased. Gale v. Stewart, 105 Ga. App. 767, 125 S.E.2d 694 (1962) (decided under former Code 1933, § 113-1002).

3. Independent Application by Excluded Persons

Person excluded from application for year's support may initiate independent proceeding. — When one person files an application for year's support, another person who is not mentioned in the application can take no beneficial interest in the result of the proceeding. In such a situation, an independent proceeding for year's support would be proper by the one excluded. Collins v. Collins, 110 Ga. App. 569, 139 S.E.2d 459 (1964) (decided under former Code 1933, § 113-1002).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 332, 333.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 452, 453, 471, 472, 477.

ALR. — Who is included in term "family" or "household" in statutes relating to family allowance or exemption out of decedent's estate, 88 A.L.R.2d 890.

53-3-6. Issuance of citation and publication of notice; mailing of petition to tax commissioner.

(a) As used in this Code section, the term "interested persons" means the decedent's children, spouse, other heirs, beneficiaries, and creditors and any others having a property right in or claim against the estate of the decedent that may be affected by the year's support proceedings.

(b) Upon the filing of the petition, the probate court shall issue a citation and publish a notice in the official newspaper of the county in which the petition is made once a week for four weeks, citing all interested persons to show cause by a date certain why the petition for year's support should not be granted.

(c)(1) If there is a personal representative of the decedent's estate, then, in addition to the issuance of citation and publication of notice required by subsection (b) of this Code section, the probate court shall cause a copy of the citation to be served upon the personal representative of the decedent's estate. The personal representative shall be served not fewer than 30 days prior to the date and time for objections to be filed shown in the citation.

(2) If there is no personal representative of the decedent's estate, then, in addition to the issuance of citation and publication of notice required by subsection (b) of this Code section, the petitioner or the attorney for the petitioner shall file with the probate court an affidavit, upon oath, showing the name, last known address, and age if less than age 18 of each interested person and stating that the petitioner or the attorney for the petitioner has listed all known interested persons and has made reasonable inquiry to ascertain the names, last known addresses, and ages of all interested persons. The probate court shall serve by first-class mail a copy of the citation on each interested person shown on the affidavit not fewer than 30 days prior to the date and time for objections to be filed shown in the citation.

(3) If the sole personal representative of the decedent's estate and the petitioner or the guardian of the petitioner are the same person, then paragraph (2) of this subsection shall govern as if the decedent's estate had no personal representative.

(d) The probate court shall serve by first-class or interoffice mail, as applicable, a copy of the petition within five days of its filing on the tax

commissioner or tax collector of any county in this state in which real property proposed to be set apart as year's support is located.

History. — Code 1981, § 53-3-6, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 14; Ga. L. 2020, p. 377, § 1-7/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (a), substituted "'interested persons'" for "'interested person'", "and creditors" for "creditors,", and substituted "that" for "which"; in subsection (b), inserted "in the official newspaper of the county in which the petition is made", substituted "interested persons" for "persons concerned", and substituted "date" for "day"; in paragraph (c)(1), in the first sentence, substituted "issuance of citation and publication of notice" for "citation and notice" and substituted "served upon" for "sent by mail to" and in the second sentence, substituted "personal representative shall be served not fewer than 30 days" for "copy of the citation shall be mailed not less than 21 days" and inserted "for objections to be filed"; in paragraph (c)(2), substituted "issuance of citation and publication of notice" for "citation and notice" in the first sentence, in the second sentence, inserted "serve by first-class", substituted "on" for "to", substituted "fewer" for "less", substituted "30" for "21", and inserted "for objections to be filed"; and in subsection (d), substituted "serve by first class or interoffice mail, as applicable," for "mail", substituted "on" for "to", and inserted "as year's support".

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, the second enacted version of subsection (c) was redesignated as subsection (d).

Law reviews. — For article discussing decisions involving the year's support provision of the Georgia Code, see 3 Ga. St. B.J. 427 (1967). For article surveying wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982).

COMMENT

This section carries forward the provisions of former OCGA Sec. 53-5-8 that relate to the filing of the petition, the mailing of a copy of the petition to the tax commissioner, and the notice given to the personal representative of the estate and interested persons. Provisions relating to the actual award of year's support appear in Section 53-3-7.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1882, § 2573, former Civil Code 1895, § 3467, former Civil Code 1910, § 4043, former Code 1933, §§ 113-1005, 113-1005.1, 113-1005.2, and 113-1005.3, and former O.C.G.A. § 53-5-9 are included in the annotations for this Code section.

Year's support. — In a probate matter, a trial court erred by dismissing an executor's objection to the setting aside of certain real property as a year's support in favor of an estate as the executor had filed an objection within 15 days of the default order amending the year's support order, pursuant to O.C.G.A. § 9-11-55(a), and by paying costs. The provisions of § 9-11-55(a) relating to the opening of default judgments as a matter of right within 15 days of default applied to a year's support proceedings in probate court. In re Estate of Ehlers, 289 Ga. App. 14, 656 S.E.2d 169 (2007).

Probate court erred by allowing the objections of a bank and a decedent's parents solely on the basis of adverse title and by denying a year's support to the widow when the widow failed to meet the resulting burden of proof because the probate court lacked the jurisdiction under Ga. Const. 1983, Art. VI, Sec. III, Para. I and O.C.G.A. § 15-9-30 to determine that the relevant money-market account and real property were not part of the estate; despite the jurisdictional limitation and the lack of an appropriate objection, the probate court proceeded to conduct a hearing

as to the amount necessary for the widow's support, thereby inappropriately placing upon the widow a burden of proof that was contrary to O.C.G.A. § 53-3-7(a) and otherwise lacking in the absence of the jurisdictionally defective objections to the petition. In re Mahmoodzadeh, 314 Ga. App. 383, 724 S.E.2d 797 (2012).

Due process requirements satisfied. — After the executor of a decedent's will was given notice of a widow's application for year's support, due process requirements were satisfied. Ingram v. Ruff, 236 Ga. App. 309, 511 S.E.2d 549 (1999).

Absence of signatures. — Conformed copy of a lost will was properly admitted into evidence, notwithstanding that the copy did not bear signatures of either the testator or the witnesses, especially as the attorney who prepared and witnessed the will testified that the copy was the same as the executed original. Smith v. Srinivasa, 269 Ga. 736, 506 S.E.2d 111 (1998).

Evidence held sufficient to rebut presumption of revocation. — Presumption of revocation was properly found to have been rebutted since (1) the attorney who prepared the will kept in touch with the testator until shortly before the testator's death, and the testator never mentioned changing or revoking the testator's will, and (2) just a month before the testator's death, the testator affirmed to the testator's daughter that the testator wished certain property to be disposed of as stated in the will and never indicated any desire to revoke or change the testator's will. Smith v. Srinivasa, 269 Ga. 736, 506 S.E.2d 111 (1998).

Return by appraisers required within 30 days of appointment. — Provision as to time within which appraisers may make their return is directory; and if they should fail to make their return within the statutory period, the ordinary (now probate judge) could compel them to act, or appoint new appraisers. Goss v. Greenaway, 70 Ga. 130 (1883) (decided under former Code 1882, § 2573); Whatley v. Watters, 136 Ga. 701, 71 S.E. 1103 (1911) (decided under former Civil Code 1910, § 4043).

After the ordinary (now probate judge) receives a belated return and cites interested parties, by publication as prescribed by law, to show cause why the return should not be approved and made the judgment of the court, and such return is duly approved, it is too late for a creditor to object that the return was not made within 30 days of the appointment of the appraisers. Goss v. Greenaway, 70 Ga. 130 (1883) (decided under former Code 1882, § 2573); Whatley v. Watters, 136 Ga. 701, 71 S.E. 1103 (1911) (decided under former Civil Code 1910, § 4043).

Widow's right to a year's support is not affected by the appraisers' dereliction of duty for which she is not responsible. Goss v. Greenaway, 70 Ga. 130 (1883) (decided under former Code 1882, § 2573); Whatley v. Watters, 136 Ga. 701, 71 S.E. 1103 (1911) (decided under former Civil Code 1910, § 4043).

Incomplete listing of interested persons. — Widow's application for a year's support was not void merely because the list of interested persons may have been incomplete. Scott v. Grant, 227 Ga. App. 1, 487 S.E.2d 627 (1997) (decided under former O.C.G.A. § 53-5-8).

Service of notice of action. — Filing an application for year's support without proper service does not toll the three-year limitation period of former O.C.G.A. 53-5-2(d) for year's support proceedings. In re Estate of Reece, 243 Ga. App. 173, 532 S.E.2d 726 (2000) (decided under former O.C.G.A. § 53-5-8).

Cited in Mathews v. Rountree, 123 Ga. 327, 51 S.E. 423 (1905); Foster v. Turnbull, 126 Ga. 654, 55 S.E. 925 (1906); Winn v. Lunsford, 130 Ga. 436, 61 S.E. 9 (1908); Young v. Anderson, 19 Ga. App. 551, 91 S.E. 900 (1917); Beddingfield v. Old Nat'l Bank & Trust Co., 175 Ga. 172, 165 S.E. 61 (1932); Rooke v. Day, 46 Ga. App. 379, 167 S.E. 762 (1932); Shingler v. Furst, 52 Ga. App. 39, 182 S.E. 72 (1935); Smith v. Brogan, 207 Ga. 642, 63 S.E.2d 647 (1951); Sanders v. Fulton County, 111 Ga. App. 434, 142 S.E.2d 293 (1965); Outlaw v. Outlaw, 121 Ga. App. 284, 173 S.E.2d 459 (1970); Strickland v. Trust Co., 230 Ga. 714, 198 S.E.2d 668 (1973); Allan v. Allan, 236 Ga. 199, 223 S.E.2d 445 (1976); Tribble v. Knight, 238 Ga. 84, 231 S.E.2d 68 (1976); Sudderth v. Bailey, 239 Ga. 385, 236 S.E.2d 823 (1977); Richards

v. Wadsworth, 230 Ga. App. 421, 496 S.E.2d 535 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 488 et seq., 717.

C.J.S. — 34 C.J.S., Executors and Administrators, § 472.

ALR. — Conclusiveness of statement or decision of accountant or similar third person under contract between others requiring property to be valued by him, 50 A.L.R.2d 1268.

53-3-7. Hearing and determination.

(a) If no objection is made after the publication of the notice, or, if made, is disallowed or withdrawn, the probate court shall enter an order setting apart as year's support the property applied for in the petition.

(b) If objection is made, the probate court shall hear the petition and, upon the evidence submitted, shall determine the property to be set apart as year's support according to the standards set out in subsection (c) of this Code section. If an appeal is taken, pending the appeal the petitioners shall be furnished with necessaries by the personal representative or temporary administrator of the estate, as allowed by the probate court.

(c) If objection is made to the amount or nature of the property proposed to be set apart as year's support, the court shall set apart an amount sufficient to maintain the standard of living that the surviving spouse and each minor child had prior to the death of the decedent, taking into consideration the following:

(1) The support available to the individual for whom the property is to be set apart from sources other than year's support, including but not limited to the principal of any separate estate and the income and earning capacity of that individual;

(2) The solvency of the estate; provided, however, that, if the decedent dies having a deposit in a financial institution that is applied to the payment of the funeral expenses and expenses of the last illness of the decedent under subsection (c) of Code Section 7-1-239, any effect such payment may have on the solvency of the estate shall not operate adversely to the surviving spouse or any minor child in the determination of the amount to be set apart as year's support; and

(3) Such other relevant criteria as the court deems equitable and proper.

The petitioner for year's support shall have the burden of proof in showing the amount necessary for year's support.

History. — Code 1981, § 53-3-7, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-8/HB 865.

The 2020 amendment, effective January 1, 2021, substituted "apart" for "aside" in subsection (a); in subsection (b), substituted "apart as year's support" for "aside" in the first sentence and inserted "or temporary administrator" in the last sentence; and, in subsection (c), substituted "apart" for "aside" following "to be set" in the introductory language and added the proviso at the end of paragraph (c)(2).

Law reviews. — For article discussing decisions involving the year's support provision of the Georgia Code, see 3 Ga. St. B.J. 427 (1967). For article surveying wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982). For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004). For survey article on wills, trusts, guardianships, and fiduciary administration, see 60 Mercer L. Rev. 417 (2008).

COMMENT

This section carries forward and combines provisions from former OCGA Sec. 53-5-2(c) and 53-5-8(b).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1882, § 2573, former Civil Code 1895, § 3467, former Civil Code 1910, § 4043, former Code 1933, §§ 113-1005, 113-1005.1, 113-1005.2, and 113-1005.3, and former O.C.G.A. § 53-5-9 are included in the annotations for this Code section.

Excessive award. — Award of title to the entire marital residence as year's support exceeded the amount necessary to support the surviving spouse for 12 months from the decedent's death; the surviving spouse's contributions during marriage did not entitle the surviving spouse to support based on an equitable interest in the marital residence. Hunter v. Hunter, 256 Ga. App. 898, 569 S.E.2d 919 (2002).

Award of year's support to spouse upheld. — When co-executors claimed that the probate court erred by failing to consider the value of the room and board the decedent's spouse received in lieu of wages from the spouse's own employer and that it improperly assumed that the spouse alone would need an amount of money equal to the amount the spouse and the decedent together had spent on living expenses in the last year of decedent's life but the co-executors failed to include in the record on appeal the transcript of the hearing on the decedent's spouse's petition for a year's support, there was no basis in the record for the court to reverse under O.C.G.A. § 53-3-7(c) an award to the spouse. In re Estate of Battle, 263 Ga. App. 73, 587 S.E.2d 140 (2003).

Award of year's support improper. — Undisputed evidence demanded that in light of the decedent's spouse's resources, the spouse's application for a year's support had to be denied and a directed verdict had to be granted against the spouse and in favor of the decedent's children; the evidence showed that during the 12 months following decedent's death, the spouse received $126,000 in cash from the decedent's assets outside of probate and received $22,019 in income for a total of $148,019. Allgood v. Allgood, 263 Ga. App. 177, 587 S.E.2d 377 (2003).

Superior court's order reversing a year's support award in the amount of $30,000, along with title to a vehicle and antique furniture, and instead enforcing an oral agreement for an equal division of the assets of the estate after payment of all expenses was proper as: (1) the wife failed to testify as to the amount of money needed to maintain the standard of living for a period of 12 months after the decedent husband died; (2) the wife presented no evidence of any income earned during the marriage; (3) no evidence documenting the wife's medical expenses incurred

during the marriage was presented; and (4) the wife's testimony about the decline in the standard of living was relevant under O.C.G.A. § 53-3-7(c)(3), but provided little guidance to the court. Taylor v. Taylor, 288 Ga. App. 334, 654 S.E.2d 146 (2007), cert. denied, No. S08C0571, 2008 Ga. LEXIS 322 (Ga. 2008).

Because it appeared from the testimony that a widow's standard of living was improved after receiving an award of year's support after the decedent's death, and that the widow had the resources independent of the year's support to afford those improvements, the award was erroneously entered; thus, the trial court erred in denying a motion for involuntary dismissal filed by the decedent's only child. Anderson v. Westmoreland, 286 Ga. App. 561, 649 S.E.2d 820 (2007), cert. denied, No. S07C1740, 2007 Ga. LEXIS 676 (Ga. 2007).

Denial of spouse's petition for year's support improper. — Probate court erred by allowing the objections of a bank and a decedent's parents solely on the basis of adverse title and by denying a year's support to the widow when the widow failed to meet the resulting burden of proof because the probate court lacked the jurisdiction under Ga. Const. 1983, Art. VI, Sec. III, Para. I and O.C.G.A. § 15-9-30 to determine that the relevant money-market account and real property were not part of the estate; despite the jurisdictional limitation and the lack of an appropriate objection, the probate court proceeded to conduct a hearing as to the amount necessary for the widow's support, thereby inappropriately placing upon the widow a burden of proof that was contrary to O.C.G.A. § 53-3-7(a) and otherwise lacking in the absence of the jurisdictionally defective objections to the petition. In re Mahmoodzadeh, 314 Ga. App. 383, 724 S.E.2d 797 (2012).

Superior court erred in setting aside the year's support award for failure to provide evidence of the amount sufficient to constitute a year's support because the only issue properly before the superior court on appeal from the probate court under O.C.G.A. § 5-3-29 was whether or not an objection had been made to the petitioner's petition for year's support, and because the superior court found that no objection had been made to the petition for year's support, the court erred in placing the burden of proof to show the amount sufficient for year's support upon the petitioner as the language of O.C.G.A. § 53-3-7(c) indicated that the petitioner shouldered that burden of proof only once an objection had been made. Garren v. Garren, 316 Ga. App. 646, 730 S.E.2d 123 (2012).

Cited in Mathews v. Rountree, 123 Ga. 327, 51 S.E. 423 (1905); Foster v. Turnbull, 126 Ga. 654, 55 S.E. 925 (1906); Winn v. Lunsford, 130 Ga. 436, 61 S.E. 9 (1908); Young v. Anderson, 19 Ga. App. 551, 91 S.E. 900 (1917); Beddingfield v. Old Nat'l Bank & Trust Co., 175 Ga. 172, 165 S.E. 61 (1932); Rooke v. Day, 46 Ga. App. 379, 167 S.E. 762 (1932); Shingler v. Furst, 52 Ga. App. 39, 182 S.E. 72 (1935); Smith v. Brogan, 207 Ga. 642, 63 S.E.2d 647 (1951); Sanders v. Fulton County, 111 Ga. App. 434, 142 S.E.2d 293 (1965); Outlaw v. Outlaw, 121 Ga. App. 284, 173 S.E.2d 459 (1970); Strickland v. Trust Co., 230 Ga. 714, 198 S.E.2d 668 (1973); Allan v. Allan, 236 Ga. 199, 223 S.E.2d 445 (1976); Tribble v. Knight, 238 Ga. 84, 231 S.E.2d 68 (1976); Sudderth v. Bailey, 239 Ga. 385, 236 S.E.2d 823 (1977); Richards v. Wadsworth, 230 Ga. App. 421, 496 S.E.2d 535 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 488 et seq., 717.

C.J.S. — 34 C.J.S., Executors and Administrators, § 472.

ALR. — Conclusiveness of statement or decision of accountant or similar third person under contract between others requiring property to be valued by him, 50 A.L.R.2d 1268.

53-3-8. Minor children by individuals other than surviving spouse.

(a) If the decedent leaves a minor child or minor children by an individual or individuals other than the surviving spouse, the probate court shall specify the portion going to the minor child or minor children of such individual or individuals, and the portion so specified shall vest in that child or those children.

(b) If the decedent leaves one or more minor children and the surviving spouse is the parent of all such minor children, the probate court may in its discretion specify separate portions for such minor children and the surviving spouse if the court deems the award of separate portions to be in the best interests of the parties, and the portions so specified shall vest separately in the surviving spouse and such minor children.

(c) If the decedent leaves one or more minor children for whom the probate court specifies separate portions under subsection (a) or (b) of this Code section, personal property in the portions so specified shall be delivered and received in compliance with Code Section 29-3-1.

History. — Code 1981, § 53-3-8, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 6; Ga. L. 2020, p. 377, § 1-9/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (a), inserted "a minor child or", substituted "an individual or individuals other than the surviving spouse" for "different spouses", inserted "minor child or minor", substituted "such individual or individuals, and the portion so specified" for "the former spouse or spouses, which portion", and inserted "that child or"; in subsection (b), inserted "one or more", substituted "parent of all such" for "parent of the", substituted "portions for such" for "portions for the", inserted "so specified", and substituted "spouse and such minor" for "spouse and the"; and added subsection (c).

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

COMMENT

This section carries forward former OCGA Sec. 53-5-9.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-1108, and former O.C.G.A. § 53-5-9 are included in the annotations for this Code section.

Language of this statute is mandatory when the statute declares that, when there are two sets of minor children by different wives, the appraisers shall specify the portion going to the children of the deceased wife for the support and maintenance of such minors. De Jarnette v. De Jarnette, 176 Ga. 204, 167 S.E. 526 (1933) (decided under former Code 1933, § 113-1008).

Georgia law without doubt permits, and in some cases requires, separate portions of the estate to be set aside as year's support to the widow and to children of the deceased. Gale v. Stewart, 105 Ga. App. 767, 125 S.E.2d 694 (1962)

(decided under former Code 1933, § 113-1002).

Cited in McCommons v. Reid, 201 Ga. 500, 40 S.E.2d 73 (1946); State Farm Mut. Auto. Ins. Co. v. Day, 195 Ga. App. 823, 394 S.E.2d 913 (1990).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 686 et seq., 717.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 452, 472.

53-3-9. Vesting of title to property set apart.

(a) Except as otherwise provided in Code Section 53-3-8, title to the property set apart shall vest in the surviving spouse and child or children or, if there is no surviving spouse, in the children, share and share alike; and the property shall not be administered as the estate of the deceased spouse or parent.

(b) When property is set apart as a year's support for the benefit of the surviving spouse alone, the spouse shall thereafter own the same in fee, without restriction as to use, encumbrance, or disposition.

History. — Code 1981, § 53-3-9, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article discussing title by year's support, see 2 Ga. B.J. 45 (1940).

COMMENT

This section carries forward former OCGA Sec. 53-5-10.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 4084, former Code 1933, § 113-1006, and former O.C.G.A. § 53-5-10 are included in the annotations for this Code section.

Title to property set apart as a year's support to a widow and minor children vests in them for such purpose, share and share alike. Moore v. Pittman, 185 Ga. 619, 196 S.E. 50 (1938) (decided under former Code 1933, § 113-1006).

Vesting of title. — Property duly set apart to the widow, or widow and minor child, of an intestate as a year's support vests in them, and is not subject to be administered as a part of the estate of the deceased husband or father. Holamon v. Jenkins, 50 Ga. App. 129, 177 S.E. 262 (1934) (decided under former Code 1933, § 113-1006).

When property owned by one at the time of one's death is set apart to one's minor children as a year's support, the title thereto vests in such children share and share alike, and a child's arrival at majority does not divest his or her legal interest. Pardue Medicine Co. v. Pardue, 194 Ga. 516, 22 S.E.2d 143 (1942) (decided under former Code 1933, § 113-1006).

When a year's support was set aside to the widow and three minor children jointly under former Code 1933, § 113-1002, the title thereto vested in them for their joint support and maintenance, and the other children had no interest therein. When the minor children married or attained their majority, the right of support and maintenance from the property set aside as a year's support

belonged to the widow alone as long as the property lasted or as she lived, and she was entitled to its use and control. She could sell the property for her maintenance and support. The children who have attained their majority have no right to participate in its consumption or its control. King v. King, 203 Ga. 811, 48 S.E.2d 465 (1948) (decided under former Code 1933, § 113-1006).

When uncontradicted evidence showed that the application for a year's support made by widow was not admitted to record, and there was no judgment by the ordinary (now probate judge) making the return of the appraisers the judgment of the court of ordinary (now probate court), title to the property did not vest in the widow under a valid year's support proceeding. Miles v. Blanton, 211 Ga. 754, 88 S.E.2d 273 (1955) (decided under former Code 1933, § 113-1006).

Interest of a minor child in the estate awarded is not divested upon the child reaching majority, and upon the death of the child's mother, the child is entitled to the child's proportionate interest in such of the property as remains unconsumed. Barber v. Dunn, 225 Ga. 134, 166 S.E.2d 572 (1969) (decided under former Code 1933, § 113-1006).

Title to property set apart to a widow and child or children, as a year's support vests in the family to the exclusion of all debts, "except as otherwise specially provided" by law. Bank of Hampton v. Smith, 177 Ga. 532, 170 S.E. 508 (1933) (decided under former Civil Code 1910, § 4044).

Award of year's support to widow and minor child made in gross. — When property is set aside to a widow and minor children in gross, the widow and minor children become owners of the property in common, and share equally in the title. Walden v. Walden, 191 Ga. 182, 12 S.E.2d 345 (1940) (decided under former Code 1933, § 113-1006).

When an application for a year's support is made by a widow for herself and her minor child, the law contemplates that an award shall be made to such widow and minor child in gross, and not that awards shall be made to them separately; so that, although the legal title will vest in them share and share alike, the use of the entire property shall be a joint one for the support of both the mother and the child, and of neither to the exclusion of the other, so long as the widow lives and until the child marries or reaches majority. McCommons v. Reid, 201 Ga. 500, 40 S.E.2d 73 (1946) (decided under former Code 1933, § 113-1006).

When property is set apart as a year's support for the benefit of the widow alone, she owns the property in fee, without restriction as to use, incumbrance, or disposition. Strickland v. Strickland, 99 Ga. App. 531, 109 S.E.2d 289 (1959) (decided under former Code 1933, § 113-1006).

Exclusive use. — If necessary, the property awarded to a widow and minor child may be consumed or exhausted, and so long as it lasts, it will be subject to exclusive use by the widow during her life, after the child marries or reaches majority. McCommons v. Reid, 201 Ga. 500, 40 S.E.2d 73 (1946) (decided under former Code 1933, § 113-1006).

Property awarded to the widow alone as a year's support may be freely sold or encumbered like any other property. Pierce v. Moore, 244 Ga. 739, 261 S.E.2d 647 (1979) (decided under former Code 1933, § 113-1006).

Year's support property subject to sale for personal debts. — When a widow was awarded her deceased husband's real property as a year's support, the property was subject to sheriff's sale for the widow's personal debts. Martin v. Jones, 266 Ga. 156, 465 S.E.2d 274 (1996) (decided under former O.C.G.A. § 53-5-10).

Because the law does not confer upon the appraisers the power to direct that the fund be paid to a widow over a period of time, husband's estate is not held together during the time that the fund is in the hands of husband's legal representative subject to the use of the widow; estate of the husband is divested of any interest in the money. May v. Braddock, 92 Ga. App. 302, 88 S.E.2d 539 (1955) (decided under former Code 1933, § 113-1006).

Right to testamentary disposition of property awarded as year's sup-

port. — While the widow is entitled, after the child or children reach majority, to the possession of the entire property for her support and maintenance, and has the right to sell the property for such purpose, this does not include the power to give the children's share of the property to another by will. Walden v. Walden, 191 Ga. 182, 12 S.E.2d 345 (1940) (decided under former Code 1933, § 113-1006); Barber v. Dunn, 225 Ga. 134, 166 S.E.2d 572 (1969) (decided under former Code 1933, § 113-1006).

When property is set apart as a year's support for the benefit of the widow alone, the fee vests in her, and she can make a testamentary disposition of the unconsumed portion thereof; and, accordingly, the petition of another seeking to recover an interest in the property as an heir at law failed to set forth a cause of action. Hiers v. Striplin, 210 Ga. 293, 79 S.E.2d 539 (1954) (decided under former Code 1933, § 113-1006).

Effect of judgment setting apart year's support. — Judgment setting apart a year's support is not void on the ground that the appraisers have not filed with their report a plat of the land set apart. Smith v. Smith, 187 Ga. 743, 2 S.E.2d 417 (1939) (decided under former Code 1933, § 113-1006).

When no caveat to widow's application for support was filed, and citation had issued and been published as required by law, a court of equity would not set aside the judgment of the court of ordinary (now probate court) for irregularities. Smith v. Smith, 187 Ga. 743, 2 S.E.2d 417 (1939) (decided under former Code 1933, § 113-1006).

Judgment setting apart a year's support to a widow and her minor children has the same binding force and effect as that of any other judgment rendered by a court of competent jurisdiction and cannot be collaterally attacked. Wayne County Bd. of Comm'rs of Rds. & Revenue v. Reddish, 220 Ga. 262, 138 S.E.2d 375 (1964) (decided under former Code 1933, § 113-1006).

Disposition of unconsumed property. — When all of the beneficiaries of a year's support cease to exist as such, any of the property set aside which may be unconsumed belongs to them or their heirs in common. Walden v. Walden, 191 Ga. 182, 12 S.E.2d 345 (1940) (decided under former Code 1933, § 113-1006).

Cited in Pullen v. Johnson, 173 Ga. 581, 160 S.E. 785 (1931); Davis v. City of Atlanta, 182 Ga. 242, 185 S.E. 279 (1936); Dowdy v. Dowdy, 187 Ga. 26, 199 S.E. 191 (1938); Whitfield v. Maddox, 189 Ga. 878, 8 S.E.2d 54 (1940); Gaddy v. Harmon, 191 Ga. 563, 13 S.E.2d 357 (1941); Harnesberger v. Davis, 86 Ga. App. 41, 70 S.E.2d 615 (1952); Calloway v. Dubose, 89 Ga. App. 513, 80 S.E.2d 62 (1954); Strain v. Monk, 212 Ga. 194, 91 S.E.2d 505 (1956); Davis v. Birdsong, 275 F.2d 113 (5th Cir. 1960); United States v. First Nat'l Bank & Trust Co., 297 F.2d 312 (5th Cir. 1961); Outlaw v. Outlaw, 121 Ga. App. 284, 173 S.E.2d 459 (1970); Strickland v. Trust Co., 230 Ga. 714, 198 S.E.2d 668 (1973); Barone v. Adcox, 235 Ga. 588, 221 S.E.2d 6 (1975); Adams v. Adams, 249 Ga. 477, 291 S.E.2d 518 (1982); Dunaway v. Clark, 536 F. Supp. 664 (S.D. Ga. 1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 324 et seq., 330 et seq.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 470, 482.

ALR. — Widow's or family allowance out of decedent's estate as surviving death or marriage of widow or minor children, or attainment of majority by children, 144 A.L.R. 270.

Nontrust life estate expressly given for support and maintenance, as limited thereto, 26 A.L.R.2d 1207.

Rights in survival benefits under public pension or retirement plan as between designated beneficiary and heirs, legatees, or personal representative of deceased employee, 5 A.L.R.3d 644.

53-3-10. Property inside or outside county.

The probate court may award year's support as to property located inside or outside the county where the decedent was domiciled at the time of death; and title to property both inside and outside the county where the decedent was domiciled at the time of death shall vest in the surviving spouse, spouse and children, or children only, as applicable.

History. — Code 1981, § 53-3-10, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-5-7.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1947, p. 866, § 1, are included in the annotations for this Code section.

Cited in Smith v. Brogan, 207 Ga. 642, 63 S.E.2d 647 (1951).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 324, 325, 335.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 452, 453, 471, 472, 477.

ALR. — Conclusiveness of statement or decision of accountant or similar third person under contract between others requiring property to be valued by him, 50 A.L.R.2d 1268.

53-3-11. Awarding interest in real property.

(a) When the probate court grants an order for year's support which awards an interest in real property located in this state, within 30 days after granting the order the court shall cause a certificate for the order to be filed with the clerk of the superior court in the county of this state where the real property or any part of the real property is located. The certificate shall:

(1) Identify in the manner provided in Code Section 53-3-5 those individuals receiving the interest;

(2) Identify the interest received;

(3) Contain a legal description sufficient under the laws of this state to pass title to the real property in which the interest was received, provided that the words "Also lands in _____ County(ies)," which accurately identifies other counties within which the real property is located, shall be sufficient to describe real property located outside the county to which the order or a copy of the order was sent; and

(4) Contain a certification by the probate court that the information in the certificate is correct.

(b) The certificate to be filed under subsection (a) of this Code section shall be accompanied by the same fee required for the filing of deeds with the clerk of the superior court. The filing fee and any fee for the certificate shall be taxed as costs to the estate.

(c) The clerk of any superior court receiving the certificate provided in subsection (a) of this Code section shall file and record the certificate upon the deed records of that county. The certificate shall be indexed according to the names appearing on the certificate as follows:

(1) The grantor is the name of decedent; and

(2) The grantee is the name of the individual or individuals to whom the award was made.

(d) Upon the filing and recording as provided in subsection (c) of this Code section, the certificate shall be returned to the probate court from whom it was received, for inclusion in the probate court's permanent file. The probate court shall not be required to enter a certificate on the minutes of the court after the return of a certificate recorded under subsection (c) of this Code section.

History. — Code 1981, § 53-3-11, enacted by Ga. L. 1996, p. 504, § 10.

Cross references. — Recording of deeds and other instruments generally, § 44-2-1 et seq.

COMMENT

This section carries forward former OCGA Sec. 53-5-11.

RESEARCH REFERENCES

C.J.S. — 34 C.J.S., Executors and Administrators, § 481.

ALR. — Family allowance granted widow as payable from community interests of decedent and widow, 9 A.L.R.2d 529.

53-3-12. Fees.

(a) The fees of the probate court shall be paid by the petitioner for year's support out of the fund set apart for such petitioner or for the surviving spouse or a minor child in whose behalf the petitioner acted pursuant to subsection (a) of Code Section 53-3-5.

(b) The probate court may issue a writ of fieri facias against the personal representative or temporary administrator of the estate for the amount awarded as provided in subsection (a) of this Code section.

(c) The issuance by the probate court of a writ of fieri facias against the temporary administrator of the estate as provided in subsection (b)

of this Code section shall be deemed a proper order under Code Section 53-7-4 for the payment by the temporary administrator of the amount awarded as provided in subsection (a) of this Code section.

History. — Code 1981, § 53-3-12, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-10/HB 865.

The 2020 amendment, effective January 1, 2021, added "for such petitioner or for the surviving spouse or a minor child in whose behalf the petitioner acted pursuant to subsection (a) of Code Section 53-3-5" at the end of subsection (a); inserted "or temporary administrator" in subsection (b); and added subsection (c).

COMMENT

This section carries forward former OCGA Sec. 53-5-12. Former Sec. 53-5-13, providing for probate court approval of the payment of debts by the surviving spouse, is repealed.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-1009, are included in the annotations for this Code section.

Cited in Shingler v. Furst, 52 Ga. App. 39, 182 S.E. 72 (1935).

RESEARCH REFERENCES

C.J.S. — 34 C.J.S., Executors and Administrators, § 481.

53-3-13. Sale or conveyance of property by personal representative or temporary administrator prior to award.

The right of a surviving spouse or minor child to year's support from the estate of a decedent shall be barred by a sale or conveyance made prior to the award of year's support by the personal representative or temporary administrator of the estate under authority of a court of competent jurisdiction or under power in a will; provided, however, that the sale or conveyance shall bar year's support and rights to year's support only as to the property sold or conveyed.

History. — Code 1981, § 53-3-13, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-11/HB 865.

The 2020 amendment, effective January 1, 2021, inserted "or temporary administrator" in this Code section.

COMMENT

This section carries forward former OCGA Sec. 53-5-14.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1972, p. 731, § 1, and former O.C.G.A. § 53-5-14 are included in the annotations for this Code section.

Property of a decedent may be sold free from a year's support only under the provisions of this statute by a sale or conveyance made under court order or under power contained in a will by the representative prior to the setting apart of such year's support. Knowles v. Knowles, 125 Ga. App. 642, 188 S.E.2d 800 (1972) (decided under Ga. L. 1972, p. 731, § 1).

Widow's application for year's support is not barred by executor's deed of assent as to the property conveyed therein by operation of this statute. Anderson v. Groover, 242 Ga. 50, 247 S.E.2d 851 (1978) (decided under Ga. L. 1972, p. 731, § 1).

An executor's assent to devise does not come within the meaning of this statute, which was intended to offer protection to third-party purchasers of property in an estate against claims for year's support, and was not intended to exempt devises and legacies from year's support. Anderson v. Groover, 242 Ga. 50, 247 S.E.2d 851 (1978) (decided under Ga. L. 1972, p. 731, § 1).

Widow of the decedent was entitled to a year's support since the estate still contained over $45,000.00 and no action had been taken by the executor to obtain the court's permission to distribute those funds to the minor child of the decedent; the executor's attempt to designate the funds for the minor by purchasing a cashier's check after the application was filed by the widow was of no avail. Evans v. Evans, 236 Ga. App. 896, 514 S.E.2d 74 (1999) (decided under former O.C.G.A. § 53-5-14).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 324, 326, 327.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 453, 456, 459, 465.

53-3-14. Real property subject to option to purchase or contract to sell.

If year's support is set apart for the benefit of any individual in or with respect to real property on which there is a recorded option to purchase or contract to sell outstanding at the time the same is so set apart, the individual and any purchasers or lessees of the real property, after the same has been so set apart, shall take the real property or any interest therein subject to all of the rights and privileges of the grantee of the option or contract and of any assignees of the option or contract if the assignment or assignments are also recorded.

History. — Code 1981, § 53-3-14, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For note, "Advantages and Disadvantages of Intestate Death for Married Persons With an Estate of $120,000 or Less," see 9 Ga. St. B.J. 102 (1972).

COMMENT

This section carries forward former OCGA Sec. 53-5-17.

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 690, 691.
C.J.S. — 34 C.J.S., Executors and Administrators, §§ 454, 456.
ALR. — Time in which option created by will to purchase real estate is to be exercised, 82 A.L.R.3d 790.

53-3-15. Conveyance, contract, or lien made by surviving spouse or guardian.

A conveyance, contract, or lien made or created by the surviving spouse or by the guardian of the minor child or children shall be superior to the title and interest of the surviving spouse or minor child or children under year's support subsequently applied for and set apart.

History. — Code 1981, § 53-3-15, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-5-16.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1937, p. 861, § 5, are included in the annotations for this Code section.

Cited in Whitfield v. Maddox, 189 Ga. 870, 8 S.E.2d 57 (1940); Parks v. Fort Oglethorpe State Bank, 225 Ga. 54, 166 S.E.2d 27 (1969); Pierce v. Moore, 244 Ga. 739, 261 S.E.2d 647 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 690, 691.
C.J.S. — 34 C.J.S., Executors and Administrators, §§ 454, 482, 473.
ALR. — Statutory family allowance to minor children as affected by previous agreement or judgment for their support, 6 A.L.R.3d 1387.
Family allowance from decedent's estate as exempt from attachment, garnishment, execution, and foreclosure, 27 A.L.R.3d 863.

53-3-16. Real property subject to purchase money mortgage.

Whenever the vendor of real property makes a deed to such real property and takes a mortgage to secure the purchase money for such real property, neither the surviving spouse nor the children of the vendee shall be entitled to year's support in the real property as against the vendor or the vendor's heirs or assigns until the purchase money is fully paid.

History. — Code 1981, § 53-3-16, enacted by Ga. L. 1996, p. 504, § 10.
Law reviews. — For comment on King v. Dalton, 85 Ga. App. 641, 69 S.E.2d 907 (1952), see 15 Ga. B.J. 211 (1952).

COMMENT

This section carries forward former OCGA Sec. 53-5-17.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1890-91, p. 227, § 1, former Civil Code 1895, § 3472, former Civil Code 1910, § 4048, and former Code 1933, § 113-1010, are included in the annotations for this Code section.

Statute presents an exception to the general law that a widow's right to a year's support takes precedence over all other debts. Ullman v. Brunswick Title Guarantee & Loan Co., 96 Ga. 625, 24 S.E. 409 (1895) (decided under Ga. L. 1890-91, p. 227, § 1); Luthersville Banking Co. v. Hopkins, 12 Ga. App. 488, 77 S.E. 589 (1913) (decided under former Civil Code 1910, § 4048).

General rule and not the exception applies when the consideration for a mortgage is other than the purchase money for the land. Derrick v. Sams, 114 Ga. 81, 39 S.E. 924 (1901) (decided under former Civil Code 1895, § 3472).

Statute affects property rights and must be strictly construed. King v. Dalton, 85 Ga. App. 641, 69 S.E.2d 907 (1952), for comment, see 15 Ga. B.J. 211 (1952) (decided under former Code 1933, § 113-1010).

Purchase money mortgage superior to year's support. — When the purchaser of land under a bond for title or other executory contract of sale agrees therein to pay the purchase money thereof and the taxes thereon, and the purchaser is put in possession of the land, and the equitable interest of the purchaser is set apart as a year's support to his widow and minor children, the widow would have to pay off the purchase-money debt, including the taxes which accrued on the property, before she would be entitled to enjoy such equitable interest against the claim of the state and county for taxes due on the land. Beaton v. Ware County, 171 Ga. 798, 156 S.E. 672 (1931) (decided under former Civil Code 1910, § 4048).

Year's support under former Civil Code 1910, § 4048 was not superior to the claim of a creditor of the decedent, who holds title to the land as vendor thereof under an executory contract of sale, or under a deed to secure debt. So, when the vendor conveys the property to another, and takes a mortgage to secure the purchase money, the claim of the vendor is superior to a year's support. Beaton v. Ware County, 171 Ga. 798, 156 S.E. 672 (1931) (decided under former Civil Code 1910, § 4048).

Former Code 1933, § 113-1010 did not amend former Code 1933, § 113-1508 except as to make a year's support inferior to the lien or claim of a vendor for the purchase money of land. King v. Dalton, 85 Ga. App. 641, 69 S.E.2d 907 (1952), for comment, see 15 Ga. B.J. 211 (1952) (decided under former Code 1933, § 113-1010).

Statute does not attempt or purport to regulate or change the general law as to the priority of the payment of the debts of a deceased person, as set forth in former Code 1933, § 113-1508. King v. Dalton, 85 Ga. App. 641, 69 S.E.2d 907 (1952), for comment, see 15 Ga. B.J. 211 (1952) (decided under former Code 1933, § 113-1010).

Cited in House v. Johnson, 171 Ga. 209, 154 S.E. 879 (1930); Philpot v. Ramsey & Hogan, 47 Ga. App. 635, 171 S.E. 204 (1933).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 690, 691.

C.J.S. — 34 C.J.S., Executors and Administrators, § 454.

53-3-17. Personal property subject to mortgage or other security interest.

Whenever the vendor of personal property, at the time of selling and delivering such personal property, takes a mortgage or other security interest to secure the payment of the purchase money for such personal property, neither the surviving spouse nor the minor child or children of the vendee shall be entitled to year's support in the personal property as against the vendor or the vendor's heirs, personal representatives, or assigns until the purchase money of the personal property is fully paid; provided, however, that the mortgage or other security interest shall expressly state that the same is executed and delivered for the purpose of securing the debt for the purchase.

History. — Code 1981, § 53-3-17, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-5-18.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 4049 and former Code 1933, § 113-1011, are included in the annotations for this Code section.

Superiority of purchase-money mortgage. Purchase-money mortgage on personalty is superior to a year's support in such mortgaged property, regardless of whether the bill of sale to secure a debt is recorded or is not recorded. Hammett v. Citizens & S. Nat'l Bank, 231 Ga. 400, 202 S.E.2d 66 (1973) (decided under former Code 1933, § 113-1010).

When an agreement is made for the furnishing of money to pay for personalty added or to be added to real estate as improvements thereto and it is specifically agreed that such described goods whether affixed to the premises or not, are and should remain personal property and that the lender has security title to and a security interest in those goods until the note is fully paid, the language in such agreement is sufficient to meet the requirements of this statute that it was executed and delivered for the purpose of securing the debt for such purchase money. Hammett v. Citizens & S. Nat'l Bank, 231 Ga. 400, 202 S.E.2d 66 (1973) (decided under former Code 1933, § 113-1010).

Only a mortgage expressly made for the balance of the purchase money comes within the favored position allowed by statute. Hartley v. Smith, 152 Ga. 723, 111 S.E. 41 (1922) (decided under former Civil Code 1910, § 4049).

Cited in Cobb v. Hall, 136 Ga. 254, 71 S.E. 145 (1911); Gresham v. Loganville Banking Co., 32 Ga. App. 177, 122 S.E. 806 (1924); Philpot v. Ramsey & Hogan, 47 Ga. App. 635, 171 S.E. 204 (1933); Bell v. Bell, 210 Ga. 295, 79 S.E.2d 524 (1954).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 690, 691.

C.J.S. — 34 C.J.S., Executors and Administrators, § 454.

ALR. — Bank deposit to credit of decedent or other indebtedness to him as subject to widow's or family allowance or other estate exemption, as affected by

right of bank to apply deposit, or of other debtor to assert counterclaim or setoff, 108 A.L.R. 773.

53-3-18. Landlord's lien on crops.

Whenever a tenant dies owing a landlord for rent or for supplies for which the landlord has a special lien on the crops made on the lands rented from the landlord in the year the rent accrued or supplies were furnished, neither the surviving spouse nor spouse and minor children nor minor child or children only of the tenant shall be entitled to year's support out of the crops so planted or grown in that year as against the landlord until the accounts for the rent and supplies are fully paid, provided that the surviving spouse shall be entitled to year's support in such part of the crop as may remain after the landlord's lien for rent and supplies shall have been discharged.

History. — Code 1981, § 53-3-18, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-5-19.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 4050 and former Code 1933, § 113-1012, are included in the annotations for this Code section.

Cited in Moore v. Ramsey & Legwen, 144 Ga. 118, 86 S.E. 219 (1915); Philpot v. Ramsey & Hogan, 47 Ga. App. 635, 171 S.E. 204 (1933).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 690, 691.

C.J.S. — 34 C.J.S., Executors and Administrators, § 454.

53-3-19. Conveyance or encumbrance by surviving spouse of property set aside; effect.

(a) When property is set apart as year's support for the joint benefit of the surviving spouse and the minor child or children, a conveyance or encumbrance of the same or any or all parts of such property by the surviving spouse shall convey or encumber the title and interest of the spouse and shall be binding and conclusive upon the spouse.

(b) The conveyance or encumbrance of any or all the property set apart as year's support for the joint benefit of the surviving spouse and the minor child or children shall convey or encumber and be binding and conclusive upon the child or children and person claiming through

or under them only when approved by the probate court of the county in which the year's support award was made. No such approval shall be necessary to bind a child who is sui juris and who joins with the surviving spouse in making the conveyance or encumbrance.

(c) The purchaser or lender shall not be responsible for the proper use or application of the proceeds derived from a sale or encumbrance contemplated under this Code section.

History. — Code 1981, § 53-3-19, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-5-20.

JUDICIAL DECISIONS

Interest in year's support property. — Trial court did not err in refusing to set aside as void any sale of year's support property by a mother because the question of the extent of the daughters' interests in the year's support property was resolved in a partitioning judgment, which awarded the daughters their share of the year's support property; because the partitioning judgment was not appealed, the daughters could not complain that the daughters had a greater interest in the property than that which was awarded. Cabrel v. Lum, 289 Ga. 233, 710 S.E.2d 810 (2011).

53-3-20. Conveyance or encumbrance by surviving spouse of property set aside; approval of probate court.

(a) The approval of the probate court required by subsection (b) of Code Section 53-3-19 shall be obtained in the following manner: The surviving spouse shall petition the probate court, stating the purposes of the proposed conveyance or encumbrance and describing the property the spouse desires to convey or encumber, the nature of the proposed conveyance or encumbrance, and the names, last known addresses, and ages of the children for whose benefit the year's support was set apart. If the surviving spouse has died, the petition may be made by the guardian for any one or more of the children for whose benefit the year's support was set apart. The probate court shall set a date for hearing on the petition and shall appoint a guardian ad litem who shall accept the appointment in writing to represent the minor children. Not less than ten days prior to the date set for the hearing, personal service shall be made on each child for whose benefit the year's support was set apart who has attained the age of 18 at the time the petition is filed. If the surviving spouse does not know and cannot easily ascertain the addresses of any of the children, service shall be made by publishing notice of the date and purpose of the hearing one time and by posting a copy of the notice at the courthouse not less than ten days prior to the date set for the hearing. In addition to publication, the

probate court shall mail a copy of the notice to the last known address of each child whose current address is unknown, not less than ten days prior to the date set for such hearing. Objections, if any, shall be made in writing.

(b) At the hearing, the probate court shall determine that service has been made as required by this Code section and that the purpose or purposes of the proposed conveyance or encumbrance are proper and shall pass an order reciting due compliance with this Code section and approval of the proposed conveyance or encumbrance, which order shall be final and conclusive.

(c) The proceedings shall be indexed and recorded in books to be kept for that purpose by the probate court in each county in which any of the property is located.

(d) An appeal shall lie in the manner, under the restrictions, and with the effect provided for appeals from the probate court in other cases.

History. — Code 1981, § 53-3-20, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-5-21.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-5-21 are included in the annotations for this Code section.

Interlocutory award of year's support. — Former O.C.G.A. § 53-5-21 gave a right to appeal to the superior court an award of year's support, even if the estate is not fully probated or administered. Goodman v. Independent Life & Accident Ins. Co., 196 Ga. App. 783, 397 S.E.2d 56 (1990) (decided under former O.C.G.A. § 53-5-21).

Interest in year's support property. — Trial court did not err in refusing to set aside as void any sale of year's support property by a mother because the question of the extent of daughters' interests in the year's support property was resolved in a partitioning judgment, which awarded the daughters their share of the year's support property; because the partitioning judgment was not appealed, the daughters could not complain that the daughters had a greater interest in the property than that which was awarded. Cabrel v. Lum, 289 Ga. 233, 710 S.E.2d 810 (2011).

Cited in McCoy v. Patten Ga. Corp., 260 Ga. 877, 401 S.E.2d 9 (1991).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former O.C.G.A. § 53-5-21 are included in the annotations for this Code section.

What must be kept in books established. — Clerks of probate courts must enter documents and proceedings in sets of books established by O.C.G.A. §§ 15-9-37(8) and former 53-5-21 and

must also enter them in minutes of court under § 15-9-37(7), if such matters are applications to court or orders of court, or otherwise show what was done in probate court. 1981 Op. Att'y Gen. No. U81-41 (decided under former O.C.G.A. § 53-5-21).

53-3-21. Appointment of temporary administrator.

If there is no personal representative of the decedent's estate, the probate court may appoint a temporary administrator as provided in Code Section 53-6-30 to perform the duties of a personal representative under subsection (b) of Code Section 53-3-7 or under subsection (b) of Code Section 53-3-12; provided, however, that the appointment of such temporary administrator shall not alter or affect the citation, notice, and mailing requirements of Code Section 53-3-6.

History. — Code 1981, § 53-3-21, enacted by Ga. L. 2020, p. 377, § 1-12/HB 865.

Effective date. — This Code section became effective January 1, 2021.

CHAPTER 4

WILLS

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Editor's notes. — This chapter was effective January 1, 1998, to the extent that no vested rights of title, year's support, succession, or inheritance are impaired, as provided by the version of Code Section 53-1-1 enacted by Ga. L. 1996, p. 504, § 10, as amended by Ga. L. 1997, p. 1352, § 1.

Ga. L. 1996, p. 504, § 10, effective January 1, 1998, repealed the Code sections formerly codified at this chapter, and enacted the current chapter. The former chapter consisted of §§ 53-4-1 through 53-4-54, and was based on Laws 1766, Cobb's 1851 Digest, p. 292; Laws 1804, Cobb's 1851 Digest, p. 291; Laws 1810, Cobb's 1851 Digest, p. 253; Laws 1812, Cobb's 1851 Digest, p. 292; Laws 1816, Cobb's 1851 Digest, p. 293; Laws 1821, Cobb's 1851 Digest, p. 293; Laws 1827, Cobb's 1851 Digest, p. 294; Laws 1829, Cobb's 1851 Digest, p. 295; Laws 1841, Cobb's 1851 Digest, p. 296; Laws 1843, Cobb's 1851 Digest, p. 296; Laws 1845, Cobb's 1851 Digest, p. 297; Laws 1850, Cobb's 1851 Digest, p. 299; Ga. L. 1853-54, p. 41, §§ 1, 2; Ga. L. 1855, p. 227, § 2; Ga. L. 1859, p. 35, § 1; Ga. L. 1859, p. 36, § 2; Orig. Code 1863, §§ 1711, 1712, 1751, 1752, 2226, 2451, 2452, 2454, 2455, 2530, 2537-2545, 2628; Ga. L. 1865-66, p. 85, § 1; Ga. L. 1865-66, p. 102, § 1; Code 1868, §§ 1751, 1752, 1791, 1792, 2220, 2447-2450, 2529, 2538-2547, 2628; Ga. L. 1871-72, p. 48, § 1; Code 1873, §§ 1761, 1762, 1800, 1801, 2246, 2483-2486, 2570, 2579-2588, 2670; Ga. L. 1882-83, p. 47, § 1; Ga. L. 1882-83, p. 66, § 1; Code 1882, §§ 1761, 1762, 1800, 1801, 2246, 2483-2486, 2570, 2579-2588, 2670; Ga. L. 1884-85, p. 135, § 1; Civil Code 1895, §§ 2510, 2511, 3081, 3353-3355, 3357, 3358, 3464, 3474-3483, 3576; Civil Code 1910, §§ 3029, 3030, 3657, 3929-3931, 3933, 3934, 4040, 4052-4061, 4156; Ga. L. 1922, p. 47, § 1; Ga. L. 1931, p. 114, § 1; Code 1933, §§ 85-1102, 113-901 through 113-905, 113-907, 113-908, 113-1001, 113-1013 through 113-1022; Ga. L. 1941, p. 331, § 1; Ga. L. 1943, p. 236, §§ 1, 2; Ga. L. 1947, p. 1141, § 1; Ga. L. 1952, p. 288, §§ 1, 3; Ga. L. 1958, p. 361, §§ 1-8; Ga. L. 1959, p. 299, § 1; Ga. L. 1964, p. 139, § 1; Ga. L. 1967, p. 746, §§ 1-4; Ga. L. 1968, p. 1093, § 1; Ga. L. 1971, p. 403, § 2; Ga. L. 1972, p. 880, § 1; Ga. L. 1980, p. 1432, § 1; Ga. L. 1982, p. 3, § 53; Ga. L. 1985, p. 1257, § 1; Ga. L. 1987, p. 632, § 1; Ga. L. 1988, p. 1720, §§ 18, 19; Ga. L. 1991, p. 660, §§ 1, 2; Ga. L. 1992, p. 6, § 53.

RESEARCH REFERENCES

Am. Jur. Trials. — Decisionmaking at the End of Life, 63 Am. Jur. Trials 1.

ARTICLE 1

GENERAL PROVISIONS

53-4-1. Power of testator.

A testator, by will, may make any disposition of property that is not inconsistent with the laws or contrary to the public policy of the state and may give all the property to strangers, to the exclusion of the testator's spouse and descendants.

History. — Code 1981, § 53-4-1, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article discussing the pretermitted heir, see 10 Ga. L. Rev. 447 (1976).

For note, "Preventing Spousal Disinheritance in Georgia," see 19 Ga. L. Rev. 427 (1984).

COMMENT

This section carries over portions of former OCGA Sec. 53-2-9. The second sentence of former OCGA Sec. 53-2-9(b), which required close scrutiny of a will that excluded the testator's spouse or children, is not carried forward because the laws relating to undue influence, fraud, and testamentary capacity cover such situations and because the Georgia courts have held that that sentence could be evaded by leaving a spouse or child some nominal sum, such as $1.00. The exclusion of the second sentence is not meant to signal a change in the law or policy of the state.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 3832, former Code 1933, § 113-106, and former O.C.G.A. § 53-2-9 are included in the annotations for this Code section.

Close scrutiny when wife or child excluded. — Under the general rules of evidence, every presumption is in favor of the probate of a will after it is shown that the testator was of sound mind and disposing memory at the time the will was executed; but under the statutory provisions, if it appears that the testator has excluded his wife, and that he has no child, there is but little, if any, presumption in favor of the propounder; for the will is to be closely scrutinized, and upon the slightest evidence of aberration of intellect, or collusion, or fraud, or any undue influence or unfair dealing, probate should be refused. Rules as to the nature of proof and the quantum of evidence necessary for a caveator to produce and present to the court and jury, in ordinary cases of probate of wills, can have no application in the face of the declaration that probate of a will of the class referred to should be refused upon the slightest evidence of any of the ingredients of operative causes set forth in law. The law does not define the term "slightest evidence," but it is the superlative degree of the adjective "slight," and therefore must mean very slight. Deans v. Deans, 171 Ga. 644, 156 S.E. 691 (1931) (decided under former Civil Code 1910, § 3832); Bowman v. Bowman, 205 Ga. 796, 55 S.E.2d 298 (1949) (decided under former Code 1933, § 113-106).

When one bequeaths one's entire estate to strangers to the exclusion of one's spouse and children, upon the slightest evidence of the aberration of intellect, or collusion or fraud, or any undue influence or unfair dealing, probate should be refused. Crawford v. Crawford, 218 Ga. 369, 128 S.E.2d 53 (1962) (decided under former Code 1933, § 113-106).

Evidence of aberration of intellect

would, when coupled with the fact that the testator bequeathed the testator's entire estate to a stranger to the exclusion of an afflicted child as well as the testator's other children, make a question for the jury to weigh the testimony and determine whether or not the testator had the mental capacity to make a will at the time of the will's execution. English v. Shivers, 220 Ga. 737, 141 S.E.2d 443 (1965) (decided under former Code 1933, § 113-106).

Application of pre-1998 probate code. — Trial court did not err when the court applied the law in place before the 1998 probate code was adopted to determine whether a husband and wife had a contract not to revoke their joint and mutual will because the issue was not the propriety of the devises in the will but whether the husband and wife had a contract not to revoke the will; the 1998 probate code only applies to contracts entered into on or after January 1, 1998, so it would not apply to any contract allegedly made in 1980. Davis v. Parris, 289 Ga. 201, 710 S.E.2d 757 (2011).

Statute expressly authorizes a testator to give one's entire estate to strangers, to the exclusion of one's spouse and children. Marshall v. Trust Co., 231 Ga. 415, 202 S.E.2d 94 (1973) (decided under former Code 1933, § 113-106).

Word "strangers" in legal contemplation has a meaning distinctly different from the meaning in common usage or parlance. For instance, one who is not a party to a contract is generally referred to as a stranger to the contract. The word is often used in a legal sense to convey the meaning converse to "privy" or "privity." Deans v. Deans, 171 Ga. 664, 156 S.E. 691 (1931) (decided under former Civil Code 1910, § 3832).

"Strangers" may include anyone other than wife or child. — When a father, who has no wife, by will leaves one's entire estate to persons other than one's child, one is leaving it to "strangers" within the meaning of the law. Deans v. Deans, 171 Ga. 664, 156 S.E. 691 (1931) (decided under former Civil Code 1910, § 3832).

Statute expressly authorizes a testator to give one's entire estate to strangers, who might be one's concubines, to the exclusion of one's spouse and children. Hood v. First Nat'l Bank, 219 Ga. 283, 133 S.E.2d 19 (1963) (decided under former Code 1933, § 113-106).

Common-law spouse of a testator is not a stranger within the meaning of the law, and the "slightest evidence of aberration of intellect" test of the law does not apply. Yuzamas v. Yuzamas, 241 Ga. 577, 247 S.E.2d 73 (1978) (decided under former Code 1933, § 113-106).

Protection for wives and children. — Statute which formed a distinct class to protect — the wife and children of a testator — there is no reference or provision for the husband, and therefore no law upon which the husband could caveat his wife's will, except those provided for any other heirs. Deans v. Deans, 171 Ga. 664, 156 S.E. 691 (1931) (decided under former Civil Code 1910, § 3832).

Provisions of statute are applicable to a wife and child or children; a child or children where there is no wife; and to a wife alone where there is neither child nor children. Smith v. Davis, 203 Ga. 175, 45 S.E.2d 609 (1947) (decided under former Code 1933, § 113-106).

Application only if party excluded in will. — Statute should be applied only if party is altogether excluded in the will. Johnson v. Sullivan, 247 Ga. 663, 278 S.E.2d 640 (1981) (decided under former Code 1933, § 113-106).

When testator's wife is altogether excluded by the terms of the will, the provisions of this statute apply. Gornto v. Gornto, 217 Ga. 136, 121 S.E.2d 139 (1961) (decided under former Code 1933, § 113-106).

Exclusion of wife prerequisite to statute's application. — Provisions of this statute are applicable only when the wife, there being no child or children, is altogether excluded in the will of her husband. Beman v. Stembridge, 211 Ga. 274, 85 S.E.2d 434 (1955) (decided under former Code 1933, § 113-106).

Small bequest to wife. — Statute is not applicable when the testator having no children and approximately two years after separating from his wife, executed a will which provided for a $1.00 bequest to

his wife. Beman v. Stembridge, 211 Ga. 274, 85 S.E.2d 434 (1955) (decided under former Code 1933, § 113-106).

Child excluded. — When one who has been altogether excluded in a will establishes the fact that one is a child of the testator, the trial judge must give in charge to the jury the rule of this statute. Deans v. Deans, 171 Ga. 664, 156 S.E. 691 (1931) (decided under former Civil Code 1910, § 3832).

Provisions of this statute have no application where testator made a nominal bequest to his daughter, since daughter was not altogether excluded in the will. Lee v. Boyer, 217 Ga. 27, 120 S.E.2d 757 (1961) (decided under former Code 1933, § 113-106).

Jury must determine whether circumstances require grant or refusal of probate. Under the provisions of this statute, it is for the jury to determine whether there are any circumstances, even very slight, which make it the duty of the jury to refuse probate of a will. Deans v. Deans, 171 Ga. 664, 156 S.E. 691 (1931) (decided under former Civil Code 1910, § 3832).

What one might think of the moral duty of a testator to provide for his wife and children cannot properly affect a construction of this statute. Hood v. First Nat'l Bank, 219 Ga. 283, 133 S.E.2d 19 (1963) (decided under former Code 1933, § 113-106).

Evidence of mental state on execution date controlling. — Evidence that testator had suffered aberration of intellect on dates other than the date of execution of the will did not bar probate when the evidence did not indicate such aberration on the date of execution and there was no evidence of a continuously disabling mental disorder. Dean v. Morsman, 254 Ga. 169, 327 S.E.2d 212 (1985) (decided under former O.C.G.A. § 53-2-9).

Evidence of undue influence on execution date controlling. — Evidence that indicated sole beneficiary's great influence over testator in different areas of the testator's life did not bar probate where, on the date of execution of the will, testator appeared to be acting on testator's own volition and not pursuant to beneficiary's undue influence. Dean v. Morsman, 254 Ga. 169, 327 S.E.2d 212 (1985) (decided under former O.C.G.A. § 53-2-9).

No evidence of undue influence. — Testator's exclusion of her children in a will leaving her property to a grandchild could not be refused probate because there was not even the slightest evidence of undue influence. Joseph v. Grisham, 267 Ga. 677, 482 S.E.2d 251 (1997) (decided under former O.C.G.A. § 53-2-9).

Invalidation of will on ground of unreasonableness. — Fact that testator made dispositions of property in the testator's will that favored the propounder and other people, and did not favor the caveator, did not show that the will could be invalidated on the ground of unreasonableness, as the testator was free under the law to bequeath the majority of the testator's estate to other relatives rather than the caveator, who was the testator's estranged wife. Ashford v. Van Horne, 276 Ga. 636, 580 S.E.2d 201 (2003).

Intent to exclude will contestant. — Probate court erred in finding a genuine issue of material fact regarding a will contestant's beneficiary status because although there could be a genuine issue of fact as to the contestant's status as the testator's daughter, resolution of that issue was unnecessary in determining the daughter's status under the will, which clearly and unambiguously expressed the testator's intent that only the daughters born of the testator's marriage would share as children thereunder; the plain terms of the will clearly reflected the testator's intent to exclude the contestant because the contestant was not mentioned in any portion of the will, as contrasted with the daughters, who were specifically designated as the testator's "two living children," were named co-executors, and were named as trustees of respective trusts created for each of them from the family trust, and by defining the term "children" as "lawful blood descendants," the testator demonstrated the testator's intent that the testator's child born out of wedlock not be included as a beneficiary under the will. Hood v. Todd, 287 Ga. 164, 695 S.E.2d 31 (2010).

Cited in Scott v. Wimberly, 188 Ga. 148, 3 S.E.2d 71 (1939); First Nat'l Bank v.

Robinson, 209 Ga. 582, 74 S.E.2d 875 (1953); Williams v. Jones, 219 Ga. 45, 131 S.E.2d 553 (1963); Morgan v. Ivey, 222 Ga. 850, 152 S.E.2d 833 (1967); Clavin v. Clavin, 238 Ga. 421, 233 S.E.2d 151 (1977); Sauls v. Estate of Avant, 143 Ga. App. 469, 238 S.E.2d 564 (1977); Bloodworth v. Bloodworth, 240 Ga. 614, 241 S.E.2d 827 (1978); Russell v. Fulton Nat'l Bank, 248 Ga. 421, 283 S.E.2d 879 (1981); Coggin v. Fitts, 268 Ga. 112, 485 S.E.2d 495 (1997).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 58 et seq., 68, 70, 90, 93, 371, 394 et seq.

C.J.S. — 95 C.J.S., Wills, §§ 30, 42, 172, 173, 357 et seq., 379, 380, 382.

ALR. — Validity of provision in will vesting discretion in executor or third person as to objects of testator's bounty, 3 A.L.R. 297; 45 A.L.R. 1440.

Will as exclusive means of exercising power conferred by will to dispose of property, 20 A.L.R. 388.

Release to ancestor by heir expectant, 28 A.L.R. 427.

Applicability of doctrine of advancements to testate succession, 32 A.L.R. 730.

Intention of testator as regards child not provided for by will as affecting applicability of statutes to prevent disinheritance of children, 65 A.L.R. 472.

Right of heirs or next of kin to attack devise to corporation on ground of its incapacity to take, 69 A.L.R. 1359.

Constitutionality and construction of statute which in effect varies the quantum of evidence necessary to establish lack of testamentary capacity or undue influence according to the relationship to deceased of the persons affected, 74 A.L.R. 236.

Language of will excluding or restricting one as beneficiary, as excluding him from class to whom gift is made in another part of will, 80 A.L.R. 140.

Admissibility and weight on issue of mental capacity or undue influence in respect of will or conveyance, of instruments previously executed by the person in question, 82 A.L.R. 963.

What institutions or gifts are within statutes declaring invalid bequests for charitable, benevolent, religious, or similar purposes, if made within a specified period before testator's death, or prohibiting, or limiting the amount of, such bequests, 111 A.L.R. 525.

Standing of heir or next of kin to attack gift or conveyance made by ancestor in his lifetime as affected by will by which he is disinherited in whole or part; or to contest will as affected by the gift or conveyance or prior will by which he is similarly disinherited, 112 A.L.R. 1405.

Legal capacity of one whom testator had agreed to adopt, but whose adoption had not been effected, to contest will, 112 A.L.R. 1422.

Power and duty of probate court to set aside decree admitting forged instrument to probate as a will, 115 A.L.R. 473.

Nature of, and remedies for enforcement of, the interest which a pretermitted child takes by virtue of statute where parent leaves will, 123 A.L.R. 1073.

Validity of provision in deed or other instrument creating a cotenancy that neither tenant shall encumber or dispose of his interest without consent of the other, 124 A.L.R. 222.

Statute regarding right of surviving spouse in estate of deceased spouse as affecting contract or waiver in that regard executed before passage of the statute, 137 A.L.R. 1099.

Refund under annuity contract upon death of annuitant as part of his estate for purposes of forced heirship or statute limiting amount of disposable estate of decedent survived by spouse or child, 142 A.L.R. 609.

Illegitimate child as within contemplation of statute regarding rights of child pretermitted by will, or statute preventing disinheritance of child, 142 A.L.R. 1447.

Disinheritance provision or mere nominal bequest as affecting application of statute for benefit of pretermitted children, 152 A.L.R. 723.

Waiver, or failure to invoke protection, of statute regarding amount, or time of making, of bequest to religious, charitable, or other specified classes of institutions, 154 A.L.R. 682.

Instructions, in will contest, defining natural objects of testator's bounty, 11 A.L.R.2d 731.

Admissibility in will contest of financial condition or needs of those constituting natural objects of testator's bounty, 26 A.L.R.2d 374.

Validity, construction, and effect of provisions in life or accident policy in relation to military service, 36 A.L.R.2d 1018.

Wills: validity of condition of gift depending on divorce or separation, 14 A.L.R.3d 1219.

Wills: bequest or devise referring to services to be rendered by donee to testator during latter's lifetime as absolute or conditional gift, 22 A.L.R.3d 771.

Validity and construction of testamentary gift to political party, 41 A.L.R.3d 833.

Validity of testamentary provision making gift to person or persons meeting specified qualification and authorizing another to determine who qualifies, 74 A.L.R.3d 1073.

Effect of invalidity of provision conditioning testamentary gift upon divorce of beneficiary, on alternative provision conditioning gift upon spouse's death, 74 A.L.R.3d 1095.

Exercise by will of trustor's reserved power to revoke or modify inter vivos trust, 81 A.L.R.3d 959.

Wills: condition that devisee or legatee shall renounce, embrace, or adhere to specified religious faith, 89 A.L.R.3d 984.

Conflict of laws as to pretermission of heirs, 99 A.L.R.3d 724.

Modern status: validity and effect of mortmain statutes, 6 A.L.R.4th 603.

Validity and enforceability of provision of will or trust instrument for forfeiture or reduction of share of contesting beneficiary, 23 A.L.R.4th 369.

Adopted child as subject to protection of statute regarding rights of children pretermitted by will, or statute preventing disinheritance of child, 43 A.L.R.4th 947.

What passes under term "personal property" in will, 31 A.L.R.5th 499.

Adopted child as within class named in testamentary gift, 36 A.L.R.5th 395.

53-4-2. When will takes effect.

A will shall take effect instantly upon the death of the testator however long probate may be postponed.

History. — Code 1981, § 53-4-2, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004).

For comment on Jenkins v. United States, 296 F. Supp. 203 (M.D. Ga. 1968), see 3 Ga. L. Rev. 766 (1969).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-105, are included in the annotations for this Code section.

Application of pre-1998 probate code. — Trial court did not err when the court applied the law in place before the 1998 probate code was adopted to determine whether a husband and wife had a contract not to revoke their joint and mutual will because the issue was not the propriety of the devises in the will but whether the husband and wife had a contract not to revoke the will; the 1998 probate code only applies to contracts entered into on or after January 1, 1998, so it would not apply to any contract allegedly made in 1980. Davis v. Parris, 289 Ga. 201, 710 S.E.2d 757 (2011).

Statute did not mean that an unprobated will is operative. — Only after a will is probated will rights in property be fixed retrospectively with ref-

erence to the law and factual circumstances existing at the time of the testator's death. Woodall v. Pharr, 119 Ga. App. 692, 168 S.E.2d 645 (1969), aff'd, 226 Ga. 1, 172 S.E.2d 404 (1970) (decided under former Code 1933, § 113-105).

It is necessary to probate a will before the will can be recognized as an instrument affecting rights in property. Woodall v. Pharr, 119 Ga. App. 692, 168 S.E.2d 645 (1969), aff'd, 226 Ga. 1, 172 S.E.2d 404 (1970) (decided under former Code 1933, § 113-105).

Will is to be taken as speaking from the time of the death of the testator. Moore v. Segars, 192 Ga. 190, 14 S.E.2d 752 (1941) (decided under former Code 1933, § 113-105).

To take effect a will not only must be a validly executed instrument disposing of the testator's property at the testator's death, but it must remain so right up to its effective date, the testator's death. Lawson v. Hurt, 217 Ga. 827, 125 S.E.2d 480 (1962) (decided under former Code 1933, § 113-105).

If futurity is annexed to the substance of the gift, the vesting is suspended; but if it relates to the time of payment only, the title vests instantly upon the death of the testator. Lassiter v. Bank of Dawson, 191 Ga. 208, 11 S.E.2d 910 (1940) (decided under former Code 1933, § 113-105).

Cited in Parks v. Gresham, 185 Ga. 470, 195 S.E. 728 (1938); Fitzgerald v. Morgan, 193 Ga. 802, 20 S.E.2d 73 (1942); Nixon v. Nixon, 194 Ga. 301, 21 S.E.2d 702 (1942); Heath v. Jones, 168 F.2d 460 (5th Cir. 1948); Cummings v. Cummings, 89 Ga. App. 529, 80 S.E.2d 204 (1954); Jenkins v. United States, 428 F.2d 538 (5th Cir. 1970); Mitchell v. Mitchell, 279 Ga. 282, 612 S.E.2d 274 (2005).

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ALR. — Governing law of will as affected by change of domicil after its execution, 57 A.L.R. 229.

Time as of which members of class described as testator's "heirs," "next of kin," "relations," etc., to whom a future gift is made, are to be ascertained, 169 A.L.R. 207.

Legal status of posthumously conceived child of decedent, 17 A.L.R.6th 593.

53-4-3. Determination whether instrument is will.

No particular form is necessary to constitute a will. To determine whether an instrument is a will, the test is the intention of the maker to be gathered from the whole instrument, read in light of the surrounding circumstances. If the intention is to convey a present interest, though the possession is postponed until after death, the instrument is not a will. If the intention is to convey an interest accruing and having effect only at death, the instrument is a will.

History. — Code 1981, § 53-4-3, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-2-41.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-102, and former O.C.G.A. § 53-2-41 are included in the annotations for this Code section.

Distinction between deed and will. — A paper reciting: "I [the maker], being in good health and of sound and disposing mind and memory, do make and publish this my last will and testament, hereby revoking all former wills by me at any time heretofore made," and containing an attestation clause reciting that the paper is "signed, sealed, published, and delivered by the" maker "as and for her last will and testament," and that the witnesses, four in number, have subscribed their names in the maker's presence and in the presence of each other, and which at the time of the paper's execution is delivered to the party for whose benefit the paper is made as the will of the maker, though the devising or granting clause may contain language appropriate to a deed in some respects, is not a deed, but is an instrument testamentary in character. Page v. Jones, 186 Ga. 485, 198 S.E. 63 (1938) (decided under former Code 1933, § 113-102).

When the owner of property transfers the property inter vivos to another person in trust, the disposition is not testamentary merely because the interest of the beneficiary does not take effect in enjoyment or possession before the death of the settler, or because in addition the settler reserves power to revoke or modify the trust; in such a case the trust is created in the lifetime of the settler and the mere fact that the settler can destroy the trust or alter the trust does not make the disposition testamentary, although if the trust were not to arise until the settler's death the intended trust would be testamentary. Wilder v. Howard, 188 Ga. 426, 4 S.E.2d 199 (1939) (decided under former Code 1933, § 113-102).

If an instrument in the form of a deed conveys an estate in praesenti, although the right of possession be postponed, the instrument is a deed; but, if the instrument conveys no present estate or right, but is an attempt to convey an estate or right in the property upon the death of the grantor, the instrument is testamentary in character and will not be upheld as a deed. Smith v. Thomas, 199 Ga. 396, 34 S.E.2d 278 (1945) (decided under former Code 1933, § 113-102).

If deed were testamentary in character, it would be of no effect, since it was not executed in the manner which would entitle it to probate as a will. Childs v. Mitchell, 204 Ga. 542, 50 S.E.2d 216 (1948) (decided under former Code 1933, § 113-102).

If the intention by the grantor is to convey a present estate, although possession be postponed until the death of the grantor, the instrument is a deed. Martin v. Smith, 211 Ga. 600, 87 S.E.2d 406 (1955) (decided under former Code 1933, § 113-102).

Deed containing this reservation: "This conveyance is made with the distinct reservation by the grantor that she retains for herself an exclusive control of all of said lands as long as she may live, and to have the right to use them as her own and as she sees fit, including the working and selling of timber during the remainder of her natural life," is a warranty deed, and not a will. Martin v. Smith, 211 Ga. 600, 87 S.E.2d 406 (1955) (decided under former Code 1933, § 113-102).

An instrument containing a reservation by a grantor, who reserved a life estate, of the right to dispose of the land that the grantor owned during the grantor's lifetime is a deed rather than an attempted will. The grantee received a vested remainder subject to divestment should the grantor dispose of the property. Harris v. Neely, 257 Ga. 361, 359 S.E.2d 885 (1987) (decided under former O.C.G.A. § 53-2-41).

Directed verdict denial proper. — In a will contest action between a goddaughter and a first cousin, the trial court properly denied the challenging first cousin's motion for a directed verdict because the testimony of the goddaughter, viewed in her favor, supported the finding both that the testatrix intended the two documents at issue together to express her desired dispository scheme and that the two documents were presented together for attestation; thus, the evidence supported the jury's finding that the two documents together did in fact create a valid will. Lee v. Swain, 291 Ga. 799, 733 S.E.2d 726 (2012).

Cited in Dameron v. Southern Ry., 44 Ga. App. 444, 161 S.E. 641 (1931); Caswell v. Caswell, 177 Ga. 153, 169 S.E. 748

(1933); Chance v. Buxton, 177 F.2d 297 (5th Cir. 1949); Cummings v. Cummings, 89 Ga. App. 529, 80 S.E.2d 204 (1954); Black v. Poole, 230 Ga. 129, 196 S.E.2d 20 (1973); Akin v. Patton, 235 Ga. 51, 218 S.E.2d 802 (1975); Thomas v. Jackson, 238 Ga. 90, 231 S.E.2d 50 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 4, 5, 9 et seq., 19. 80 Am. Jur. 2d, Wills, §§ 849, 850.

C.J.S. — 95 C.J.S., Wills, §§ 167 et seq., 176, 177, 831.

ALR. — May instrument inter vivos operate also as a will, or part of will, 45 A.L.R. 843.

Delivery of deed to third person to be delivered to grantee after grantor's death, 52 A.L.R. 1222.

Letter as a will or codicil, 54 A.L.R. 917; 40 A.L.R.2d 698.

Notation on note or securities as a will or codicil, 62 A.L.R. 292.

Language of will excluding or restricting one as beneficiary, as excluding him from class to whom gift is made in another part of will, 80 A.L.R. 140.

Construction and application of provision of will expressly giving executor or trustee power to mortgage realty, 115 A.L.R. 1417.

Testamentary character of memorandum or other informal writing not testamentary on its face regarding ownership or disposition of specific personal property, 117 A.L.R. 1327.

Judgment based on construction of instrument as res judicata of its validity, 164 A.L.R. 873.

Term "proceeds" in will or other trust instrument as indicating intention as to whether assets are to constitute principal or income, 1 A.L.R.2d 194.

Admissibility of extrinsic evidence upon issue of testamentary intent, 21 A.L.R.2d 319.

Effect on validity and character of instrument in form of deed of provisions therein indicating an intention to postpone or limit the rights of grantee until after the death of grantor, 31 A.L.R.2d 532.

Validity of will written on disconnected sheets, 38 A.L.R.2d 477.

Admissibility of testator's declarations upon issue of genuineness or due execution of purported will, 62 A.L.R.2d 855.

Authorization by trust instrument of investment of trust funds in nonlegal investments, 78 A.L.R.2d 7.

Effect of mistake of draftsman (other than testator) in drawing will, 90 A.L.R.2d 924.

Wills: bequest or devise referring to services to be rendered by donee to testator during latter's lifetime as absolute or conditional gift, 22 A.L.R.3d 771.

Wills: effect of gift to be disposed of "as already agreed" upon or the like, 85 A.L.R.3d 1181.

Payable-on-death savings account or certificate of deposit as will, 50 A.L.R.4th 272.

Adoption as precluding testamentary gift under natural relative's will, 71 A.L.R.4th 374.

Adopted child as within class named in testamentary gift, 36 A.L.R.5th 395.

53-4-4. Incorporation of extrinsic documents into will.

(a) Any writing in existence when a will is executed may be incorporated into the will by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

(b) This Code section shall not be construed to imply that the common law does not permit the incorporation of an extrinsic document into a will by reference in the manner authorized under subsection (a) of this Code section.

History. — Code 1981, § 53-4-4, enacted by Ga. L. 2020, p. 377, § 1-13/HB 865.

Effective date. — This Code section became effective January 1, 2021.

53-4-5. Written statement or list disposing of items of tangible personal property.

(a) A written statement or list meeting the requirements of subsection (b) of this Code section shall dispose of items of tangible personal property, other than money, not otherwise specifically disposed of by the testator's will. If more than one otherwise effective writing exists, then, to the extent of any conflict among the writings, the provisions of a more recent writing revoke the inconsistent provisions of each prior writing.

(b) A written statement or list meets the requirements of this subsection if such writing:

(1) Is signed and dated by the testator;

(2) Describes the items and the beneficiaries with reasonable certainty; and

(3) Is referred to in the testator's will.

The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation, provided that it is signed and dated on the date of such alteration; and it may be a writing that has no significance apart from its effect on the dispositions made by the will.

History. — Code 1981, § 53-4-5, enacted by Ga. L. 2020, p. 377, § 1-13/HB 865.

Effective date. — This Code section became effective January 1, 2021.

ARTICLE 2

TESTAMENTARY CAPACITY

53-4-10. Minimum age; conviction of crime.

(a) Every individual 14 years of age or older may make a will, unless laboring under some legal disability arising either from a want of capacity or a want of perfect liberty of action.

(b) An individual who has been convicted of a crime shall not be deprived of the power to make a will.

History. — Code 1981, § 53-4-10, enacted by Ga. L. 1996, p. 504, § 10.

Cross references. — Age of majority, § 39-1-1.

Law reviews. — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969).

COMMENT

This section combines the provisions of former OCGA Sec. 53-2-20, 53-2-22, and 53-2-26.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 113-201 and 113-206, and former O.C.G.A. §§ 53-2-20 and 53-2-22 are included in the annotations for this Code section.

When testamentary capacity is the issue, capacity must be determined by the condition of the mind at the time of the execution of the will. Hill v. Deal, 185 Ga. 42, 193 S.E. 858 (1937) (decided under former Code 1933, § 113-201).

Though, as tending to illustrate the condition of the mind, evidence may be received as to what was the mental capacity at a prior or a subsequent time, yet if it be certain from all the testimony that at the time of the execution of the instrument there was no want of testamentary capacity, the instrument offered will not be refused probate on the ground of lack of sound and disposing mind and memory. Hill v. Deal, 185 Ga. 42, 193 S.E. 858 (1937) (decided under former Code 1933, § 113-201).

Although evidence as to the mental capacity at a time prior or subsequent to the execution of the will may be shown to illustrate the condition of the testator's mind, still the controlling question to be determined, when testamentary capacity is the issue, is whether the testator had sufficient testamentary capacity at the time of executing the will. Spivey v. Spivey, 202 Ga. 644, 44 S.E.2d 224 (1947) (decided under former Code 1933, § 113-201).

Neither age and physical impairments, nor declarations made subsequent to the execution of the will and contrary to the will's terms are sufficient alone to raise issues of mental incapacity. Irvin v. Askew, 241 Ga. 565, 246 S.E.2d 682 (1978) (decided under former Code 1933, § 113-201).

What is mental capacity to make a will is a question of fact. — On the trial of an issue of devisavit vel non, whether the alleged testator had mental capacity to make a will at the time of signing the paper is a question for decision by the jury, and a witness cannot testify as to such legal conclusion. Morgan v. Bell, 189 Ga. 432, 5 S.E.2d 897 (1939) (decided under former Code 1933, § 113-201).

Capacity to make a contract is not identical with the mental capacity necessary to make a valid will; a person with mental capacity less than that required to make a contract may have that degree of mental capacity necessary to make a valid will. Smith v. Davis, 203 Ga. 175, 45 S.E.2d 609 (1947) (decided under former Code 1933, § 113-201).

Understanding nature of testament. — Person has testamentary capacity who understands the nature of a testament or will, viz., that it is a disposition of property to take effect after death, and by one who is capable of remembering generally the property subject to disposition and the persons related to that person by the ties of blood and of affection, and also of conceiving and expressing by words, written or spoken, or by signs, or by both, any intelligible scheme of disposition. If the testator has sufficient intellect to enable the testator to have a decided and rational desire as to the disposition of the testator's property, this will suffice. Morgan v. Bell, 189 Ga. 432, 5 S.E.2d 897 (1939) (decided under former Code 1933, § 113-201); Spivey v. Spivey, 202 Ga. 644, 44 S.E.2d 224 (1947) (decided under former Code 1933, § 113-201).

Testimony as to mental status is necessarily opinionative, and the law requires that before a will can be probated, and subscribing witnesses shall be inquired of as to apparent capacity or

noncapacity; the fact that a witness witnesses a will qualifies the witness to give an opinion on that subject. Franklin v. First Nat'l Bank, 187 Ga. 268, 200 S.E. 679 (1938) (decided under former Code 1933, § 113-201).

When the testimony of both expert and nonexpert witnesses was insufficient to overcome the positive testimony of two of the subscribing witnesses, the testimony of the other subscribing witness being inconclusive, that at the time the will was executed the testator apparently had testamentary capacity, the evidence demanded a verdict in favor of the propounder. Spivey v. Spivey, 202 Ga. 644, 44 S.E.2d 224 (1947) (decided under former Code 1933, § 113-201).

When there is an issue as to the testamentary capacity of the testator, the opinion as to the sanity of the testator may be given in evidence by a witness who attested the will without first stating the facts upon which one bases such opinion. Brooker v. Brooker, 208 Ga. 387, 67 S.E.2d 117 (1951) (decided under former Code 1933, § 113-201).

When although the pleadings raised an issue as to testamentary capacity of the testator, not a single witness testified that the testator was not of sound and disposing memory at the time of executing or acknowledging the will, there was no evidence to carry this issue to the jury. Brooker v. Brooker, 208 Ga. 387, 67 S.E.2d 117 (1951) (decided under former Code 1933, § 113-201).

Presumption favoring testamentary capacity is necessarily a rebuttable presumption, and the capacity of the testator is always a proper subject of inquiry. Franklin v. First Nat'l Bank, 187 Ga. 268, 200 S.E. 679 (1938) (decided under former Code 1933, § 113-201).

Burden is on the propounder to show the factum of the will, free and voluntary action, and apparent testamentary capacity, and when this is shown, together with the presumption of testamentary capacity which exists in the absence of proof, a prima facie case for the propounder is made out. Franklin v. First Nat'l Bank, 187 Ga. 268, 200 S.E. 679 (1938) (decided under former Code 1933, § 113-201); Johnson v. Sullivan, 247 Ga. 663, 278 S.E.2d 640 (1981) (decided under former Code 1933, § 113-201).

While the presumption in favor of testamentary capacity exists, the presumption alone is not sufficient to make out for the propounder a prima facie case. Franklin v. First Nat'l Bank, 187 Ga. 268, 200 S.E. 679 (1938) (decided under former Code 1933, § 113-201); Johnson v. Sullivan, 247 Ga. 663, 278 S.E.2d 640 (1981) (decided under former Code 1933, § 113-201).

Law, in its zealousness always to safeguard the rights of a deceased testator, although presuming testamentary capacity, deems it wise not to rely solely upon that presumption, but to make inquiry into the immediate circumstances of the execution of the will from those who were present at the time. Franklin v. First Nat'l Bank, 187 Ga. 268, 200 S.E. 679 (1938) (decided under former Code 1933, § 113-201).

Charge that the presumption is always in favor of a mental capacity to make a will, where elsewhere in the charge the jury was instructed that the burden was on the propounder to establish the factum of the will, that it was freely and voluntarily made, and that the testator apparently had sufficient mental capacity to make a will, as a prerequisite to the making out by the propounder of a prima facie case was not error. Franklin v. First Nat'l Bank, 187 Ga. 268, 200 S.E. 679 (1938) (decided under former Code 1933, § 113-201).

Affidavit of neurologist found sufficient to create issue of fact as to testamentary capacity. See Baldwin v. First Tenn. Bank, 251 Ga. 561, 307 S.E.2d 919 (1983) (decided under former O.C.G.A. § 53-2-20).

Designation of beneficiaries to annuities. — A 15-year old ward had the authority to designate beneficiaries to the ward's annuities. Bacon v. Smith, 222 Ga. App. 542, 474 S.E.2d 728 (1996) (decided under former O.C.G.A. § 53-2-22).

Cited in Brumbelow v. Hopkins, 197 Ga. 247, 29 S.E.2d 42 (1944); Lee v. Boyer, 217 Ga. 27, 120 S.E.2d 757 (1961); Sweat v. Hughes, 219 Ga. 703, 135 S.E.2d 409 (1964).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 113-206, are included in the annotations for this Code section.

When an inmate donates the inmate's body by will, and the body is not claimed, notice should be posted on the courthouse door for 24 hours and the board should be notified of the name of the school or college specified by the inmate in the inmate's will. 1965-66 Op. Att'y Gen. No. 66-84 (decided under former Code 1933, § 113-206).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 2, 47 et seq., 53, 54, 62 et seq.

Am. Jur. Proof of Facts. — Intentional Omission of Child from Will, 6 POF2d 95.

Determination of Heirship, 12 POF2d 459.

Mentally Disordered Testator's Execution of Will During Lucide Interval, 18 POF2d 1.

Decedent's Gift to Heir as Advancement, 35 POF2d 357.

Lack of Testamentary Capacity by Reason of Insane Delusion, 40 POF2d 339.

Alzheimer's and Multi-Infarct Dementia — Incapacity to Execute Will, 17 POF3d 219.

AIDS Dementia — Incapacity to Execute Will, 19 POF3d 335.

Proof of Incompetency, 62 POF3d 197.

Determination of Heirship, 68 POF3d 93.

Proof of Decedent's Intent That Inter Vivos Gift to Heir Constitutes Advancement, 83 POF3d 295.

C.J.S. — 95 C.J.S., Wills, §§ 3, 4 et seq.

ALR. — Will of blind person, 9 A.L.R. 1416; 37 A.L.R. 603.

Epilepsy as affecting testamentary capacity, 16 A.L.R. 1418.

Admissibility of evidence other than testimony of subscribing witnesses to prove due execution of will, or testamentary capacity, 63 A.L.R. 1195.

Construction and application of statutes authorizing the appointment of trust company as guardian, trustee, or administrator upon application or consent of one acting as such (or as executor), or one entitled to appointment as such, 105 A.L.R. 1199.

Necessity of affirmative evidence of testamentary capacity to make prima facie case in will contest, 110 A.L.R. 675.

Admissibility of evidence on question of testamentary capacity or undue influence in a will contest as affected by remoteness, relative to the time when the will was executed, of the facts or events to which the evidence relates, 124 A.L.R. 433.

Illustrations of instructions or requested instructions as to effect of unnaturalness or unreasonableness of provisions of will on question of testamentary capacity or undue influence, 137 A.L.R. 989.

Soldiers' and seamen's wills, 152 A.L.R. 1450.

Proper form of question to witness or of testimony of witness, as regards mental condition of person whose capacity to execute a will is in issue, 155 A.L.R. 281.

Admissibility of declaration by beneficiary named in will in support of claim of undue influence or lack of testamentary capacity, 167 A.L.R. 13.

Admissibility and probative force, on issue of competency to execute an instrument, of evidence of incompetency at other times, 168 A.L.R. 969.

Insane delusion as invalidating a will, 175 A.L.R. 882.

Admissibility of testator's declarations upon issue of genuineness or due execution of purported will, 62 A.L.R.2d 855.

Admissibility, on issue of testamentary capacity, of previously executed wills, 89 A.L.R.2d 177.

Effect of guardianship of adult on testamentary capacity, 89 A.L.R.2d 1120.

Testamentary capacity as affected by use of intoxicating liquor or drugs, 9 A.L.R.3d 15.

Wills: testator's illiteracy or lack of knowledge of language in which will is written as affecting its validity, 37 A.L.R.3d 889.

Partial invalidity of will: may parts of will be upheld notwithstanding failure of other parts for lack of testamentary mental capacity or undue influence, 64 A.L.R.3d 261.

Convict's capacity to make will, 84 A.L.R.3d 479.

53-4-11. Decided and rational desire; incapacity to contract; insanity; advanced age or eccentricity.

(a) Testamentary capacity exists when the testator has a decided and rational desire as to the disposition of property.

(b) An incapacity to contract may coexist with the capacity to make a will.

(c) An insane individual generally may not make a will except during a lucid interval. A monomaniac may make a will if the will is in no way connected with the monomania. In all such cases, it must appear that the will expresses the wishes of the testator unbiased by the insanity or monomania with which the testator is affected.

(d) Neither advancing age nor weakness of intellect nor eccentricity of habit or thought is inconsistent with the capacity to make a will.

History. — Code 1981, § 53-4-11, enacted by Ga. L. 1996, p. 504, § 10.

Cross references. — Capacity of parties to enter into contracts, § 13-3-20 et seq.

Law reviews. — For article, "The Georgia Law of Insanity," see 3 Ga. B.J. 28 (1941). For survey article on wills, trusts, guardianships, and fiduciary administration, see 59 Mercer L. Rev. 447 (2007).

For note discussing early development of rules governing capacity to make will in Georgia, see 24 Ga. B.J. 257 (1961).

COMMENT

This section carries over the concepts of former OCGA Secs. 53-2-21, 53-2-23, and 53-2-25. Former Code Sec. 53-2-21 described the capacity necessary to make a will as including a "decided and rational desire" on the part of the testator: "decided, as distinguished from the wavering, vacillating fancies of a distempered intellect, and rational, as distinguished from the ravings of a madman, the silly pratings of an idiot, the childish whims of imbecility, or the excited vagaries of a drunkard." The changes from the former Code section are not intended to change the standard for determining testamentary capacity, but rather to eliminate from the Code language that was merely illustrative and, in some cases, outdated. The terms "insane" and "monomania," while of uncertain medical meaning, are retained because they have been defined or referred to often in Georgia case law.

Former OCGA Sec. 53-2-24 is not carried forward so that individuals who are suffering from disabilities such as hearing or speech impairments or visual impairments may make wills in the same way as individuals who do not suffer from such impairments.

JUDICIAL DECISIONS

Analysis

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Capacity to Contract versus Testamentary Capacity
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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 113-202, 113-204, and 113-205, and former O.C.G.A. §§ 53-2-21 and 53-2-23 are included in the annotations for this Code section.

Capacity to make a contract is not identical with the mental capacity necessary to make a valid will; a person with mental capacity less than that required to make a contract may have that degree of mental capacity necessary to make a valid will. Smith v. Davis, 203 Ga. 175, 45 S.E.2d 609 (1947) (decided under former Code 1933, § 113-204).

Person has testamentary capacity who understands the nature of a testament or will, viz., that it is a disposition of property to take effect after death, and by one who is capable of remembering generally the property subject to disposition and the persons related to that person by the ties of blood and of affection, and also of conceiving and expressing by words, written or spoken, or by signs, or by both, any intelligible scheme of disposition. If the testator has sufficient intellect to enable the testator to have a decided and rational desire as to the disposition of the testator's property, this will suffice. Griffin v. Barrett, 183 Ga. 152, 187 S.E. 828 (1936) (decided under former Code 1933, § 113-205); Morgan v. Bell, 189 Ga. 432, 5 S.E.2d 897 (1939) (decided under former Code 1933, § 113-204); Fowler v. Fowler, 197 Ga. 53, 28 S.E.2d 458 (1943) (decided under former Code 1933, § 113-205); Spivey v. Spivey, 202 Ga. 644, 44 S.E.2d 224 (1947) (decided under former Code 1933, § 113-205).

As tending to illustrate the mental condition at that time, evidence of such condition at other times may be received; but when it is sought to establish testamentary incapacity by such evidence, it does not controvert the positive testimony of the subscribing witnesses unless it would be proof of testamentary incapacity at the time the will was signed. Anderson v. Anderson, 210 Ga. 464, 80 S.E.2d 807 (1954) (decided under former Code 1933, § 113-204).

In order to execute a will it is necessary, as a minimum, that the testator have a rational desire as to the disposition of the testator's property. It takes a greater intellect to execute a deed. Joiner v. Joiner, 225 Ga. 699, 171 S.E.2d 297 (1969) (decided under former Code 1933, § 113-204).

While the fact that a person did or did not become insolvent, displease one's family, or become dependent as the result of signing a deed is not evidence of mental capacity, yet if his or her mental capacity was so impaired that he or she did not know at the time whether such would or could be the case, then such person would not have the capacity to make a will much less the capacity to execute a deed. Joiner v. Joiner, 225 Ga. 699, 171 S.E.2d 297 (1969) (decided under former Code 1933, § 113-204).

Testamentary capacity to change will. — Despite the fact that the testator was old and frail, the testator did not lack testamentary capacity to change the will, disinheriting the testator's son. Harper v. Harper, 274 Ga. 542, 554 S.E.2d 454 (2001).

To establish incapacity in a grantor, one must be shown to have been, at the time, non compos mentis, in the legal acceptation of that term; which means not a partial but an entire loss of understanding. Joiner v. Joiner, 225 Ga. 699, 171 S.E.2d 297 (1969) (decided under former Code 1933, § 113-204).

Weak have the same rights as the prudent and strong-minded to dispose of their property by will, and anything less than a total absence of mind does not destroy that capacity. Griffin v. Barrett, 183 Ga. 152, 187 S.E. 828 (1936) (decided under former Code 1933, § 113-205).

Weak have the same rights as the strong-minded to dispose of their property by will, and anything less than a total absence of mind does not destroy that capacity. If the testator has sufficient intellect to enable the testator to have a rational desire as to the disposition of one's property, this is sufficient. The condition of the testator's mind at the time of the execution of the will determines whether the testator can make a valid will. Anderson v. Anderson, 210 Ga. 464, 80 S.E.2d 807 (1954) (decided under former Code 1933, § 113-204); Joiner v. Joiner, 225 Ga. 699, 171 S.E.2d 297 (1969) (decided under former Code 1933, § 113-204).

Terminal cancer patient capacity to execute wills while taking prescription medications. — When a testator, who had been diagnosed with terminal cancer, executed one will in February 2004 and another shortly before the testator's death in October 2004, there was sufficient evidence to support a jury's finding that the testator lacked testamentary capacity at the time the testator executed the October will; there was evidence that the testator was taking medication that had as possible side effects hallucination, disorientation, impaired mental performance, and confusion; that two days before the will was executed, the testator had difficulty completing sentences, was somewhat forgetful, and denied having siblings; and that on the day the will was executed, a witness, who described the testator as "morphined up," saw a beneficiary of the will repeatedly administer medicine to the testator via an eyedropper used to administer narcotics. Lillard v. Owens, 281 Ga. 619, 641 S.E.2d 511 (2007).

Trial court was authorized to conclude that a decedent's will was invalid based on the decedent's lack of testamentary capacity under O.C.G.A. § 53-4-11 based on evidence that the decedent was confused and disoriented, did not recognize family members, and had a car accident after which doctors found the decedent was unable to make decisions personally. Burchard v. Corrington, 287 Ga. 786, 700 S.E.2d 365 (2010).

Physical infirmities and weakness of intellect resulting from old age do not constitute mental incapacity to make a will, unless such weakness actually amounts to imbecility. Bailey v. Bailey, 204 Ga. 556, 50 S.E.2d 617 (1948) (decided under former Code 1933, § 113-205).

Condition of the testator's mind at the time of the execution of the will determines whether or not the testator can make a valid will. Griffin v. Barrett, 183 Ga. 152, 187 S.E. 828 (1936) (decided under former Code 1933, § 113-205).

Impact of dementia. — In a will contest, it was error to grant propounders' motion for judgment notwithstanding the verdict as there was some evidence that the 95-year-old decedent lacked testamentary capacity, including expert testimony that the decedent suffered from some degree of dementia and testimony that the decedent appeared confused and spoke of deceased relations as if the relatives were alive. Mosley v. Warnock, 282 Ga. 488, 651 S.E.2d 696 (2007).

Unreasonable disposition of property alone insufficient to prove testamentary incapacity. — An unnatural or unreasonable disposition of one's property is not of itself sufficient to justify a finding that a testator was lacking in testamentary capacity. Watkins v. Jones, 184 Ga. 831, 193 S.E. 889 (1937) (decided under former Code 1933, § 113-205).

Reasonableness or unreasonableness of the disposition of a testator's estate has strong evidential value on the issue as to the testator's testamentary capacity and when the extent of the mental weakness is in doubt. Ellis v. Britt, 181 Ga. 442, 182 S.E. 596 (1935) (decided under former Code 1933, § 113-205).

When to the probate of a will a caveat has been filed on the grounds of testamentary incapacity or undue influence, and there is doubt as to the extent of weakness of intellect, the reasonableness or unreasonableness of the disposition of the estate may be considered by the jury. In the trial

General Consideration (Cont'd)

of such issue the source from which the property disposed of by the will came into the decedent's possession may be shown. Shaw v. Fehn, 196 Ga. 661, 27 S.E.2d 406 (1943) (decided under former Code 1933, § 113-205).

When, in probate proceeding, there is nothing in the testimony taken as a whole to support a finding that when the will was executed testator did not possess testamentary capacity, it was therefore erroneous to submit that issue to the jury. Brumbelow v. Hopkins, 197 Ga. 247, 29 S.E.2d 42 (1944) (decided under former Code 1933, § 113-205).

On the propounding of a will, where the question is insanity, monomania, or undue influence, the unreasonableness of the disposition of the will is always a question to be considered by the jury. A reasonable disposition of property, without more, strongly indicates mental capacity to make a will. An unreasonable disposition of property may indicate a lack of mental capacity to make a will. It follows that a reasonable or unreasonable disposition of property, regardless of the nature of the insanity or inability alleged, should be given much consideration by the jury, if any doubt exists from the evidence as to the testator's ability to make the alleged will. Yarbrough v. Yarbrough, 202 Ga. 391, 43 S.E.2d 329 (1947) (decided under former Code 1933, § 113-205).

The reasonableness, or unreasonableness of a will, while a legitimate subject of investigation by a jury in case of doubt as to the testator's capacity to make a will, is not to be considered until such a doubt has been first created by other evidence. Yarbrough v. Yarbrough, 202 Ga. 391, 43 S.E.2d 329 (1947) (decided under former Code 1933, § 113-205).

Sufficient evidence of revocation of will. — Evidence presented at trial was sufficient for the trial court to find, as a matter of fact, that the decedent had the necessary mental capacity to revoke a 1988 will because the record showed that the relevant circumstances had changed significantly in the 16 years since the execution of the 1988 will, giving the decedent good reasons to want to revoke the old will such as several people listed in the 1988 will having died, including both of the co-executors named. Mosley v. Lancaster, 296 Ga. 862, 770 S.E.2d 873 (2015).

Cited in Crow v. Whitworth, 170 Ga. 242, 152 S.E. 445 (1930); Shankle v. Crowder, 174 Ga. 399, 163 S.E. 180 (1932); Baucum v. Harper, 176 Ga. 296, 168 S.E. 27 (1933); Martin v. Martin, 185 Ga. 349, 195 S.E. 159 (1938); Peretzman v. Simon, 185 Ga. 681, 196 S.E. 471 (1938); Orr v. Blalock, 195 Ga. 863, 25 S.E.2d 668 (1943); Brazil v. Roberts, 198 Ga. 477, 32 S.E.2d 171 (1944); Yarbrough v. Yarbrough, 202 Ga. 391, 43 S.E.2d 329 (1947); Norman v. Hubbard, 203 Ga. 530, 47 S.E.2d 574 (1948); Ehlers v. Rheinberger, 204 Ga. 226, 49 S.E.2d 535 (1948); Lee v. Boyer, 217 Ga. 27, 120 S.E.2d 757 (1961); English v. Shivers, 220 Ga. 737, 141 S.E.2d 443 (1965); Powell v. Thigpen, 230 Ga. 760, 199 S.E.2d 251 (1973); Bishop v. Kenny, 266 Ga. 231, 466 S.E.2d 581 (1996).

Capacity to Contract versus Testamentary Capacity

Different capacities involved. — An incapacity to contract is not inconsistent with the capacity to make a will. Griffin v. Barrett, 183 Ga. 152, 187 S.E. 828 (1936), later appeal, 185 Ga. 443, 195 S.E. 746 (1938) (decided under former Code 1933, § 113-202).

Capacity to make a contract is not identical with the mental capacity necessary to make a valid will; a person with mental capacity less than that required to make a contract may have that degree of mental capacity necessary to make a valid will. Smith v. Davis, 203 Ga. 175, 45 S.E.2d 609 (1947) (decided under former Code 1933, § 113-202).

It takes a greater quantum or higher degree of mentality to make a contract than it does to make a will. Anderson v. Anderson, 210 Ga. 464, 80 S.E.2d 807 (1954) (decided under former Code 1933, § 113-202).

While the fact that a person did or did not become insolvent, displease one's family, or become dependent as the result of signing a deed is not evidence of mental capacity, yet if his or her mental capacity

was so impaired that he or she did not know at the time whether such would or could be the case, then such person would not have the capacity to make a will, much less the capacity to execute a deed. Joiner v. Joiner, 225 Ga. 699, 171 S.E.2d 297 (1969) (decided under former Code 1933, § 113-202).

Person is insane when he or she is not possessed of mind and reason equal to a full and clear understanding of the nature and consequence of his or her act in making the contract. Joiner v. Joiner, 225 Ga. 699, 171 S.E.2d 297 (1969) (decided under former Code 1933, § 113-202).

In order to execute a will it is necessary, as a minimum, that the testator have a rational desire as to the disposition of one's property. It takes a greater intellect to execute a deed. Joiner v. Joiner, 225 Ga. 699, 171 S.E.2d 297 (1969) (decided under former Code 1933, § 113-202).

An incapacity to contract is not inconsistent with the capacity to make a will. Griffin v. Barrett, 183 Ga. 152, 187 S.E. 828 (1936) (decided under former Code 1933, § 113-205).

Insane Persons

Insanity defined. — Person is insane when he or she is not possessed of mind and reason equal to a full and clear understanding of the nature and consequence of his or her act in making the contract. Joiner v. Joiner, 225 Ga. 699, 171 S.E.2d 297 (1969) (decided under former Code 1933, § 113-204).

Issue of mental capacity to make a will is confined to the mental condition of the testator at the time the will was executed. Scott v. Gibson, 194 Ga. 503, 22 S.E.2d 51 (1942) (decided under former Code 1933, § 113-204).

Not only may an insane person make a will during a lucid interval, but a person may be feeble and suffering from an illness that today might cause sufficient reason to be wanting, and yet tomorrow or at another time even in the same day sufficient reason (mental capacity) would be present. Scott v. Gibson, 194 Ga. 503, 22 S.E.2d 51 (1942) (decided under former Code 1933, § 113-204).

Although evidence as to the mental capacity at a time prior or subsequent to the execution of the will may be shown to illustrate the condition of the testator's mind, still the controlling question to be determined, when testamentary capacity is the issue, is whether the testator had sufficient testamentary capacity at the time of executing the will. Spivey v. Spivey, 202 Ga. 644, 44 S.E.2d 224 (1947) (decided under former Code 1933, § 113-204).

To make one incapable of making a will from insanity there must be a "total deprivation of reason." However old, feeble, weak-minded, capricious, or notionate one may be, if one "be able to have a decided and rational desire as to the disposition of his property," one is not wanting in testamentary capacity. Spivey v. Spivey, 202 Ga. 644, 44 S.E.2d 224 (1947) (decided under former Code 1933, § 113-205).

Delusions have to be insane to deprive one of testamentary capacity. — In a dispute concerning the distribution of the decedent's estate, the evidence was legally insufficient to sustain the verdict finding that the decedent lacked testamentary capacity because there was no evidence that the decedent lacked the ability to form a decided and rational desire as to the disposition of the decedent's property; and the caveators expressly disclaimed that the decedent was insane or suffered from monomania, and, instead, they merely argued that the decedent suffered from delusions; however, the caveators' claim nevertheless failed as the case law was clear that not every delusion deprived one of testamentary capacity, rather, it had to be an insane delusion, but none of the decedent's delusions were insane ones. Meadows v. Beam, 302 Ga. 494, 807 S.E.2d 339 (2017).

Testamentary capacity of epileptic. — An epileptic, when not in the throes of an attack of epilepsy, is not less capacitated than a lunatic in a lucid interval, and it is well settled law that a lunatic during a lucid interval may make a will. Anderson v. Anderson, 210 Ga. 464, 80 S.E.2d 807 (1954) (decided under former

Insane Persons (Cont'd)

Code 1933, § 113-204).

Intellect Necessary for Testamentary Capacity

When testamentary capacity is the issue, it must be determined by the condition of the mind at the time of the execution of the will. Hill v. Deal, 185 Ga. 42, 193 S.E. 858 (1937) (decided under former Code 1933, § 113-202).

To establish incapacity in a grantor, the grantor must be shown to have been, at the time, non compos mentis, in the legal acceptation of that term; which means not a partial but an entire loss of understanding. Joiner v. Joiner, 225 Ga. 699, 171 S.E.2d 297 (1969) (decided under former Code 1933, § 113-202).

Error to submit testamentary capacity to jury. — When, in a probate proceeding, there is nothing in the testimony taken as a whole to support a finding that when the will was executed testator did not possess testamentary capacity, it was erroneous to submit that issue to the jury. Brumbelow v. Hopkins, 197 Ga. 247, 29 S.E.2d 42 (1944) (decided under former Code 1933, § 113-202).

Law does not withhold from the aged, the feeble, the weak-minded, the capricious, or the notionate, the right to make a will, provided such person has a decided and rational desire as to the disposition of one's property. Hill v. Deal, 185 Ga. 42, 193 S.E. 858 (1937) (decided under former Code 1933, § 113-202).

Weak have the same rights as the strong-minded to dispose of their property by will, and anything less than a total absence of mind does not destroy that capacity. If the testator has sufficient intellect to enable the testator to have a rational desire as to the disposition of the testator's property, this is sufficient. The condition of the testator's mind at the time of the execution of the will determines whether the testator can make a valid will. Anderson v. Anderson, 210 Ga. 464, 80 S.E.2d 807 (1954) (decided under former Code 1933, § 113-202); Joiner v. Joiner, 225 Ga. 699, 171 S.E.2d 297 (1969) (decided under former Code 1933, § 113-202).

"Decided" means a mental capacity to frame a desire that is certain, or with distinct limits, and "rational" means that the desire must be consistent with reason. Spivey v. Spivey, 202 Ga. 644, 44 S.E.2d 224 (1947) (decided under former Code 1933, § 113-202).

"Decided" does not connote stubbornness, or even mental strength; it simply means that the mind must have capacity enough to frame a desire that is certain, or one that has distinct limits. Hill v. Deal, 185 Ga. 42, 193 S.E. 858 (1937) (decided under former Code 1933, § 113-202).

To be rational does not mean that the desire must spring from a strong intellect, but that it is consistent with reason. Hill v. Deal, 185 Ga. 42, 193 S.E. 858 (1937) (decided under former Code 1933, § 113-202).

Attention is to be given, not so much to the abstract state of the mind, as to the mind's capacity for the precise thing in hand. For a man may say and do things which a medical man would take as evidence of insanity, and yet it may be that one is nevertheless able to have a decided rational desire as to the disposition of one's property. Hill v. Deal, 185 Ga. 42, 193 S.E. 858 (1937) (decided under former Code 1933, § 113-202); Spivey v. Spivey, 202 Ga. 644, 44 S.E.2d 224 (1947) (decided under former Code 1933, § 113-202).

Understanding nature of testament. — Person has testamentary capacity who understands the nature of a testament or will, viz., that is a disposition of property subject to disposition and the persons related to the person by the ties of blood and of affection, and also of conceiving and expressing by words, written or spoken, or by signs, or by both, any intelligible scheme of disposition. Griffin v. Barrett, 183 Ga. 152, 187 S.E. 828 (1936) (decided under former Code 1933, § 113-202); Morgan v. Bell, 189 Ga. 432, 5 S.E.2d 897 (1939) (decided under former Code 1933, § 113-202); Spivey v. Spivey, 202 Ga. 644, 44 S.E.2d 224 (1947) (decided under former Code 1933, § 113-202).

Petition to probate the will was properly granted as the decedent had testamentary capacity because the evidence did not

show a total absence of mind and the attorneys who took part in the preparation and/or execution of the will testified that the decedent appeared to understand what the decedent was doing and to be of sound mind when the decedent signed the document. O'Callaghan v. Samples, 354 Ga. App. 42, 840 S.E.2d 139 (2020).

Condition of the testator's mind at the time of the execution of the will determines whether or not the testator can make a valid will. Griffin v. Barrett, 183 Ga. 152, 187 S.E. 828 (1936) (decided under former Code 1933, § 113-202).

Though, as tending to illustrate the condition of the mind, evidence may be received as to what was the mental capacity at a prior or a subsequent time, yet if it be certain from all the testimony that at the time of the execution of the instrument there was no want of testamentary capacity, the instrument offered will not be refused probate on the ground of lack of sound and disposing mind and memory. Hill v. Deal, 185 Ga. 42, 193 S.E. 858 (1937) (decided under former Code 1933, § 113-202).

Schizophrenia patient had knowledge about nature and extent of estate. — In a probate case, when the decedent was diagnosed with schizophrenia in 1973, the probate court did not err in denying the sister's caveat and in admitting the will to probate as the decedent did not lack testamentary capacity because the decedent had enough knowledge about the nature and extent of the decedent's estate to sustain a finding that the decedent had a decided and rational desire as to the disposition of the decedent's property; the medical records reflected that the decedent's state of mind improved close in time to the execution of the will; and, even if there was some evidence that the decedent was not lucid at times, the record did not demand a finding that the decedent was not lucid when the decedent executed the will. Webb v. Reeves, 299 Ga. 760, 791 S.E.2d 35 (2016).

Monomaniacs

Monomania defined. — Monomania exists when one, because of partial insanity, becomes imbued with an hallucination or delusion that something extravagant exists which has no existence whatever, and is incapable of being permanently reasoned out of that conception. Moreland v. Word, 209 Ga. 463, 74 S.E.2d 82 (1953) (decided under former Code 1933, § 113-204).

Monomania distinguished from sane desires. — Monomania is a mental disease; an insane delusion such as will deprive one of testamentary capacity. Monomania must be distinguished from an expressed desire to exclude a person from a will because of ill will, bad judgment, animosity, prejudice, or other conditions of mind which can be coexistent with sanity. Russell v. Fulton Nat'l Bank, 248 Ga. 421, 283 S.E.2d 879 (1981) (decided under former Code 1933, § 113-204).

Showing of hallucinations or insane delusions is essential to proving monomania. Hammett v. Reynolds, 243 Ga. 669, 256 S.E.2d 354 (1979) (decided under former Code 1933, § 113-204).

Testator's belief that a spouse had been intimate with another does not amount to an insane delusion so as to constitute monomania. Hammett v. Reynolds, 243 Ga. 669, 256 S.E.2d 354 (1979) (decided under former Code 1933, § 113-204).

Mental incapacity due to monomania directed toward parent. — When caveat to application to probate a will brought by child of testator alleged mental incapacity due to monomania, the evidence showing that the testator had without cause maintained an antagonistic attitude toward caveator even before she was born, by physical attacks upon her mother, and continued numerous acts of cruelty toward the caveator for about 30 years, and the substance of this voluminous evidence was stated as a basis for a hypothetical question which was propounded to a psychiatrist, and upon which the psychiatrist gave the opinion answer that the testator suffered monomania as to the caveator, there was a conflict in the evidence rendering it reversible error to direct a verdict in favor of the propounder of the will. Duncan v. Mayfield, 209 Ga. 882, 76 S.E.2d 805 (1953) (decided under former Code 1933, § 113-204).

Monomania not shown. — Evidence of the testator's lack of trust of her daugh-

Monomaniacs (Cont'd)

ter and her daughter's companion, and concern that the companion was taking advantage of her daughter, was not sufficient to establish monomania. Joseph v. Grisham, 267 Ga. 677, 482 S.E.2d 251 (1997) (decided under former O.C.G.A. § 53-2-23).

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Burden is on the propounder to show the factum of the will, free and voluntary action, and apparent testamentary capacity, and when this is shown, together with the presumption of testamentary capacity which exists in the absence of proof, a prima facie case for the propounder is made out. Franklin v. First Nat'l Bank, 187 Ga. 268, 200 S.E. 679 (1938) (decided under former Code 1933, § 113-202).

When the witnesses, both for the propounder and the caveator, testified to the effect that the deceased had perfectly normal periods up until a very short time before death, almost all the facts relied upon to establish the mental incapacity of the deceased occurred after the will was executed, most of them very shortly before death, the only doctor who testified said that the next year after the will was executed the deceased was perfectly normal, and on the date the will was executed, the deceased went to the office of the deceased's attorney and in a perfectly intelligent manner furnished the information for the preparation of the will, all of the subscribing witnesses testifying that the deceased was perfectly normal the day the will was executed, the evidence was not sufficient to carry the burden placed by law upon the caveator. Orr v. Orr, 208 Ga. 431, 67 S.E.2d 209 (1951) (decided under former Code 1933, § 113-202).

Upon the trial of an issue arising upon the propounding of a will and a caveat thereto, the burden, in the first instance, is upon the propounder of the alleged will to make out a prima facie case, by showing the factum of the will and that at the time of the will's execution the testator apparently had sufficient mental capacity to make the will, and, in making the will, acted freely and voluntarily. When this is done, the burden of proof shifts to the caveator. Cornelius v. Crosby, 243 Ga. 26, 252 S.E.2d 455 (1979) (decided under former Code 1933, § 113-202).

While the presumption in favor of testamentary capacity exists, the presumption alone is not sufficient to make out for the propounder a prima facie case. Franklin v. First Nat'l Bank, 187 Ga. 268, 200 S.E. 679 (1938) (decided under former Code 1933, § 113-202).

There is no less reason to presume sane action in the execution of a will than in other instances of human relations and conduct. Franklin v. First Nat'l Bank, 187 Ga. 268, 200 S.E. 679 (1938) (decided under former Code 1933, § 113-202).

Presumption favoring testamentary capacity is necessarily a rebuttable presumption, and the capacity of the testator is always a proper subject of inquiry. Franklin v. First Nat'l Bank, 187 Ga. 268, 200 S.E. 679 (1938) (decided under former Code 1933, § 113-202).

Cross examination on effect of wills in terrorem clause. — In a will contest, the caveator was properly prevented from cross-examining the executor as to the effect of the will's in terrorem clause as the uncontroverted testimony showed that the testator was of sound mind and was not influenced by the desires of others, and evidence as to the effect of the forfeiture provision would not have been probative of either undue influence or the lack of testamentary capacity. Caswell v. Caswell, 285 Ga. 277, 675 S.E.2d 19 (2009).

Inquiry into peculiar circumstances required. — Law, in its zealousness always to safeguard the rights of a deceased testator, although presuming testamentary capacity, deems it wise not to rely solely upon that presumption, but to make inquiry into the immediate circumstances of the execution of the will from those who were present at the time. Franklin v. First Nat'l Bank, 187 Ga. 268, 200 S.E. 679 (1938) (decided under former Code 1933, § 113-202).

Charge that the presumption is always in favor of a mental capacity to make a will, where elsewhere in the charge the jury was instructed that the burden was on the propounder to establish the factum

of the will, that it was freely and voluntarily made, and that the testator apparently had sufficient mental capacity to make a will, as a prerequisite to the making out by the propounder of a prima facie case was not error. Franklin v. First Nat'l Bank, 187 Ga. 268, 200 S.E. 679 (1938) (decided under former Code 1933, § 113-202).

Evidence of testator's mental condition at times other than the signing of the will does not controvert positive testimony of subscribing witnesses unless it would be proof of testamentary incapacity at the time the will was signed. Russell v. Fulton Nat'l Bank, 248 Ga. 421, 283 S.E.2d 879 (1981) (decided under former Code 1933, § 113-202).

Trial court properly denied a granddaughter's motion for judgment notwithstanding the verdict following a jury verdict upholding the last will and testament of her grandmother giving the bulk of her estate to her grandson because a videotape of the execution of the will, the will's witnesses, and other evidence established the grandmother's testamentary capacity. Patterson-Fowlkes v. Chancey, 291 Ga. 601, 732 S.E.2d 252 (2012).

Ruling upholding the 2010 will was affirmed because subscribing witnesses stated in an affidavit that the testatrix was mentally competent when the will was executed, it was self-proved, and contained an affidavit complying with O.C.G.A. § 53-4-24, which created a presumption that the will was executed with the requisite testamentary formalities, including that the testatrix had sufficient mental capacity to do so, and the challenger failed to rebut that presumption. Woods v. Stonecipher, 349 Ga. App. 698, 824 S.E.2d 633 (2019).

Affidavit of neurologist found sufficient to create issue of fact as to testamentary capacity. Baldwin v. First Tenn. Bank, 251 Ga. 561, 307 S.E.2d 919 (1983) (decided under former O.C.G.A. § 53-2-21).

Relevancy of prior wills. — In a will contest action, the trial court did not abuse the court's discretion in admitting the three wills executed by the decedent as the wills were relevant to the issue of whether the trust agreement that was executed was a result of undue influence and the objector expressly conceded at the end of trial that the decedent's capacity to execute the trust agreement and related deeds was no longer an issue before the jury. Horton v. Hendrix, 291 Ga. App. 416, 662 S.E.2d 227 (2008), cert. denied, No. S08C1574, 2008 Ga. LEXIS 780 (Ga. 2008).

For charge defining testamentary capacity, see Manley v. Combs, 197 Ga. 768, 30 S.E.2d 485 (1944) (decided under former Code 1933, §§ 113-202, 113-205).

Sanity or insanity is a proper subject for opinion evidence. Espy v. Preston, 199 Ga. 608, 34 S.E.2d 705 (1945) (decided under former Code 1933, § 113-202).

Testimony as to mental status is necessarily opinionative, and the law requires that before a will can be probated, the subscribing witnesses shall be inquired of as to apparent capacity or noncapacity; the fact that a witness witnesses a will qualifies the witness to give an opinion on that subject. Franklin v. First Nat'l Bank, 187 Ga. 268, 200 S.E. 679 (1938) (decided under former Code 1933, § 113-202).

When there is conflicting evidence as to testamentary capacity to make a will, and sufficient evidence to establish the absence of testamentary capacity, the verdict of the jury finding in favor of the caveat will not be set aside on the ground that there is lack of evidence to support the verdict. Manley v. Combs, 197 Ga. 768, 30 S.E.2d 485 (1944) (decided under former Code 1933, § 113-202).

While ordinarily the sufficiency of the reasons given by witnesses for their opinions as to a person's sanity or insanity cannot be determined as a matter of law by the court, but is a question for the jury, yet, where it plainly and indisputably appears that the reasons are insufficient, the court may on review so hold as a matter of law. Espy v. Preston, 199 Ga. 608, 34 S.E.2d 705 (1945) (decided under former Code 1933, § 113-202).

When there was no testimony of any expert witnesses showing or tending to show mental incapacity of the testator, and the testimony of every nonexpert witness to that effect was based on acts,

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conduct, and sayings of the testator which did not within themselves show mental incapacity to make a will, such testimony was therefore insufficient to support a verdict finding for the caveators. Espy v. Preston, 199 Ga. 608, 34 S.E.2d 705 (1945) (decided under former Code 1933, § 113-202).

When the testimony of both expert and nonexpert witnesses was insufficient to overcome the positive testimony of two of the subscribing witnesses, the testimony of the other subscribing witness being inconclusive, that at the time the will was executed the testator apparently had testamentary capacity, the evidence demanded a verdict in favor of the propounder. Spivey v. Spivey, 202 Ga. 644, 44 S.E.2d 224 (1947) (decided under former Code 1933, § 113-202).

As tending to illustrate the mental condition at that time, evidence of such condition at other times may be received; but when it is sought to establish testamentary incapacity by such evidence, it does not controvert the positive testimony of the subscribing witnesses unless it would be proof of testamentary incapacity at the time the will was signed. Anderson v. Anderson, 210 Ga. 464, 80 S.E.2d 807 (1954) (decided under former Code 1933, § 113-202).

When two subscribing witnesses give positive testimony that testator had testamentary capacity at the time the will was executed, evidence of testator's mental condition at times other than the signing of the will will not controvert the positive testimony of the subscribing witnesses unless it is proof of testamentary incapacity at the time the will was signed. Yuzamas v. Yuzamas, 241 Ga. 577, 247 S.E.2d 73 (1978) (decided under former Code 1933, § 113-202).

Charge that "an insane person generally may make a will" is clearly an erroneous statement of the law. Milam v. Terrell, 214 Ga. 199, 104 S.E.2d 219 (1958) (decided under former Code 1933, § 113-204).

General rule is that a charge on legal principles must be adjusted to the pleadings and the evidence; hence when there was no evidence which would have authorized a verdict on the issue of monomania (because of testator's belief that beneficiary was the testator's illegitimate son) the failure to charge on that subject was not error. Smith v. Davis, 203 Ga. 175, 45 S.E.2d 609 (1947) (decided under former Code 1933, § 113-204).

Existence of monomania is question for jury. — When all that the testimony of the witnesses for the caveator amounted to was that the testator was highly eccentric and that the testator had delusional ideas that people were trying to harm the testator, and the uncontroverted evidence showed that the testator not only conducted the testator's brokerage business while a patient in a mental institution, but that the testator continued to conduct the business until the testator's death approximately two years after execution of the will, and that the testator was not suffering from monomania about the testator's money, the caveator did not carry the burden of proving lack of testamentary capacity. Beman v. Stembridge, 211 Ga. 274, 85 S.E.2d 434 (1955) (decided under former Code 1933, § 113-204).

Question of whether the beliefs harbored by the testator were insane delusions springing from a disordered intellect, or merely illogical deductions from actual facts, was a question for the jury. Johnson v. Dodgen, 244 Ga. 422, 260 S.E.2d 332 (1979) (decided under former Code 1933, § 113-204).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 47 et seq., 62 et seq., 70 et seq., 74 et seq., 105.

C.J.S. — 95 C.J.S., Wills, §§ 4 et seq., 9, 10.

ALR. — Epilepsy as affecting testamentary capacity, 16 A.L.R. 1418.

Admissibility and weight on issue of mental capacity or undue influence in respect of will or conveyance, of instru-

ments previously executed by the person in question, 82 A.L.R. 963.

Construction and application of statutes authorizing the appointment of trust company as guardian, trustee, or administrator upon application or consent of one acting as such (or as executor), or one entitled to appointment as such, 105 A.L.R. 1199.

Admissibility of evidence of reputation on issue of mental condition, or testamentary or contractual incapacity or capacity, 105 A.L.R. 1443.

Relative weight of testimony of attesting witnesses in support of mental competency of testator, 123 A.L.R. 88.

Proper form of question to witness or of testimony of witness, as regards mental condition of person whose capacity to execute a will is in issue, 155 A.L.R. 281.

Admissibility of declaration by beneficiary named in will in support of claim of undue influence or lack of testamentary capacity, 167 A.L.R. 13.

Insane delusion as invalidating a will, 175 A.L.R. 882.

Admissibility in will contest of financial condition or needs of those constituting natural objects of testator's bounty, 26 A.L.R.2d 374.

Effect of guardianship of adult on testamentary capacity, 89 A.L.R.2d 1120.

Testamentary capacity as affected by use of intoxicating liquor or drugs, 9 A.L.R.3d 15.

Wills: testator's illiteracy or lack of knowledge of language in which will is written as affecting its validity, 37 A.L.R.3d 889.

Validity of testamentary exercise of power of appointment by donee sane when will was executed but insane thereafter, 19 A.L.R.4th 1002.

Alzheimer's disease as affecting testamentary capacity, 47 A.L.R.5th 523.

53-4-12. Freedom of volition.

A will must be freely and voluntarily executed. A will is not valid if anything destroys the testator's freedom of volition, such as fraudulent practices upon the testator's fears, affections, or sympathies; misrepresentation; duress; or undue influence whereby the will of another is substituted for the wishes of the testator.

History. — Code 1981, § 53-4-12, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For survey article on wills, trusts, guardianships, and fiduciary administration for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003). For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004). For survey article on wills, trusts, guardianships, and fiduciary administration, see 59 Mercer L. Rev. 447 (2007).

For comment on Ehlers v. Rheinberger, 204 Ga. 226, 49 S.E.2d 535 (1948), see 11 Ga. B.J. 348 (1949).

COMMENT

This section carries over and combines former OCGA Secs. 53-2-6 and 53-2-7.

JUDICIAL DECISIONS

Analysis

General Consideration
Essential Elements of Undue Influence
Fraud
Pleading and Practice
1. In General
2. Proof

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 3834, former Code 1933, §§ 113-208 and 113-209, and former O.C.G.A. 53-2-6 are included in the annotations for this Code section.

Purpose of undue influence rule. — The undue influence rule not only does not challenge the right of the citizen to make a will, but contemplates added protection of that right, and works destruction to any disposition by will and testament of property by any person other than the person entitled to make disposition thereof. Franklin v. First Nat'l Bank, 187 Ga. 268, 200 S.E. 679 (1938) (decided under former Code 1933, § 113-208).

Freedom of volition essential for valid will. — Anything which destroys freedom of volition invalidates a will, such as fraudulent practices or any undue influence whereby the will of another is substituted for the wishes of the testator. Crow v. Whitworth, 170 Ga. 242, 152 S.E. 445 (1930) (decided under former Civil Code 1910, § 3834).

Cited in Boyles v. Morgan, 168 Ga. 804, 149 S.E. 149 (1929); Scott v. Wimberly, 188 Ga. 148, 3 S.E.2d 71 (1939); Moreland v. Word, 209 Ga. 463, 74 S.E.2d 82 (1953); Northwestern Univ. v. Crisp, 211 Ga. 636, 88 S.E.2d 26 (1955); Kellar v. Edwards, 214 Ga. 633, 106 S.E.2d 787 (1959); Lee v. Boyer, 217 Ga. 27, 120 S.E.2d 757 (1961); Sweat v. Hughes, 219 Ga. 703, 135 S.E.2d 409 (1964); Akin v. Patton, 235 Ga. 51, 218 S.E.2d 802 (1975); Cames v. Joiner (In re Joiner), 319 B.R. 903 (Bankr. M.D. Ga. 2004); Mosley v. Lancaster, 296 Ga. 862, 770 S.E.2d 873 (2015).

Essential Elements of Undue Influence

Time of submission of will for probate cannot be basis for undue influence. — Fact that the propounder may have submitted will for probate sooner than might seem appropriate under the proprieties cannot be said to have any bearing upon the question as to whether or not the instrument was procured under undue influence at the time of its execution. Ehlers v. Rheinberger, 204 Ga. 226, 49 S.E.2d 535 (1948), for comment, see 11 Ga. B.J. 348 (1949) (decided under former Code 1933, § 113-208).

What constitutes undue influence. — Undue influence, to invalidate a will, must amount to force or fear and must, in effect, make the will the mental offspring of some other person, and be operative on the mind of the testator at the time the will is executed. It must destroy the free agency of the testator and constrain the testator to do what is against the testator's will, but what the testator is unable to refuse. Trust Co. v. Ivey, 178 Ga. 629, 173 S.E. 648 (1934) (decided under former Code 1933, § 113-208); Crews v. Crews, 219 Ga. 459, 134 S.E.2d 27 (1963) (decided under former Code 1933, § 113-208).

Undue influence in procuring a will to be made must amount to moral coercion; it must destroy the free agency of the testator and constrain the testator to do what is against the testator's will but which the testator is unable to refuse. Griffin v. Barrett, 183 Ga. 152, 187 S.E. 828 (1936), later appeal, 185 Ga. 443, 195 S.E. 746 (1938) (decided under former Code 1933, § 113-208).

The undue influence which the law contemplates as a ground to invalidate a properly executed will must be such as amounts to fraud, deceit, force, or coercion, destroying the testator's free agency. It must also be operative at the time the will is executed, and not merely at some other time. Boland v. Aycock, 191 Ga. 327, 12 S.E.2d 319 (1940) (decided under former Code 1933, § 113-208).

Undue influence or fraud, to invalidate the will, must amount to force or fear and must, in effect, make the will the mental offspring of some other person, and must be operative on the mind of the testator at the time the will is executed. Butler v. Lashley, 197 Ga. 461, 29 S.E.2d 508 (1944) (decided under former Code 1933, § 113-208).

Undue influence which operates to invalidate a will is such influence as amounts either to deception, or to force and coercion, destroying free agency. Butler v. Lashley, 197 Ga. 461, 29 S.E.2d 508 (1944) (decided under former Code 1933, § 113-208); Ehlers v. Rheinberger, 204

Ga. 226, 49 S.E.2d 535 (1948), for comment, see 11 Ga. B.J. 348 (1949) (decided under former Code 1933, § 113-208); Morgan v. Ivey, 222 Ga. 850, 152 S.E.2d 833 (1967) (decided under former Code 1933, § 113-208); Sauls v. Estate of Avant, 143 Ga. App. 469, 238 S.E.2d 564 (1977) (decided under former Code 1933, § 113-208).

To be sufficient to invalidate a will on the ground of undue influence, the evidence must show that such influence amounted to fear, force, overpersuasion, or coercion, to the extent of destroying the free agency and will power of the testator, and in effect made the will the mental offspring of another; and it must be shown that the undue influence was operative on the mind of the testator at the time the will was actually executed and published. Bailey v. Bailey, 204 Ga. 556, 50 S.E.2d 617 (1948) (decided under former Code 1933, § 113-208); Sweat v. Hughes, 219 Ga. 703, 135 S.E.2d 409 (1964) (decided under former Code 1933, § 113-208).

Undue influence in procuring a will may exist in many forms, and it may be operated through diverse channels; the existence and effective power of undue influence is not always susceptible of direct proof, but may be proved by circumstantial evidence. Stephens v. Brady, 209 Ga. 428, 73 S.E.2d 182 (1952) (decided under former Code 1933, § 113-208).

Such influence that is obtained by flattery, importunity, superiority of will, mind, or character, which would give dominion over the will to such an extent as to destroy free agency, or constrain one to do against one's will what one is unable to refuse, such is the kind of influence which the law condemns as undue. Sauls v. Estate of Avant, 143 Ga. App. 469, 238 S.E.2d 564 (1977) (decided under former Code 1933, § 113-208).

There can be no fatally undue influence without a person incapable of protecting oneself as well as a wrongdoer to be resisted. Morgan v. Ivey, 222 Ga. 850, 152 S.E.2d 833 (1967) (decided under former Code 1933, § 113-208); Sauls v. Estate of Avant, 143 Ga. App. 469, 238 S.E.2d 564 (1977) (decided under former Code 1933, § 113-208).

Undue influence must exist at time of execution of will. — Evidence of undue influence over the mind and will of the testator at another time will not invalidate a will. Only such influence which exists at the time of the purported will's execution destroys the testator's freedom of volition so as to invalidate a will. Crews v. Crews, 219 Ga. 459, 134 S.E.2d 27 (1963) (decided under former Code 1933, § 113-208).

It must be shown that the undue influence was operative on the mind of the testator at the time the will was actually executed and published. Morgan v. Ivey, 222 Ga. 850, 152 S.E.2d 833 (1967) (decided under former Code 1933, § 113-208); Sauls v. Avant, 143 Ga. App. 469, 238 S.E.2d 564 (1977) (decided under former Code 1933, § 113-208).

For undue influence to be a proper ground of caveat, it must exist at the time of the will's execution. Pendley v. Pendley, 251 Ga. 30, 302 S.E.2d 554 (1983) (decided under former O.C.G.A. § 53-2-6).

Undue influence exercised prior to execution of the paper may continue to operate on the mind of the testator until the paper is actually executed; and if upon account thereof the testator executes a paper in which the will of the person exercising the influence is substituted for that of the testator, the paper will be void, though the influence commenced at an antecedent date. Trust Co. v. Ivey, 178 Ga. 629, 173 S.E. 648 (1934) (decided under former Code 1933, § 113-208).

Undue influence of wife may continue subsequent to death of wife. — If the undue influence was exercised by a wife, the effect thereof may have continued after her death and may have been operative upon her husband at the time he executed the paper shortly after her death. Trust Co. v. Ivey, 178 Ga. 629, 173 S.E. 648 (1934) (decided under former Code 1933, § 113-208).

Undue influence is a question of fact requiring jury consideration. — It cannot be said as a matter of law that undue influence shown to have been exerted by the wife was not operative upon the husband at the time he executed his will, where the wife died only a short time before the paper was executed. Trust Co. v. Ivey, 178 Ga. 629, 173 S.E. 648 (1934) (decided under former Code 1933, § 113-208).

Essential Elements of Undue Influence (Cont'd)

Mere absence of direct evidence and circumstances showing that the propounder practiced fraud or undue influence at or about the time the last will was executed did not demand a finding in favor of the propounder since there was evidence, direct and circumstantial, from which the jury could have drawn the conclusion that the last will as executed by the testator resulted from prior fraud and undue influence practiced by the propounder upon the testator, and that these prior actions of the propounder controlled the mind of the testator at the time the testator executed the last will. Stephens v. Brady, 209 Ga. 428, 73 S.E.2d 182 (1952) (decided under former Code 1933, § 113-208).

Trial court properly denied the motions for a directed verdict and for a judgment notwithstanding the verdict filed by the executors of a will and trust because there was sufficient evidence to support the jury's finding that the documents were invalid as a product of undue influence based on the executors taking complete control of the elderly testator and isolating the testator from the testator's sons, as well as substituting desires and having the testator sign a new will and trust, which benefitted the executors and excluded the testator's wife and sons. Davison v. Hines, 291 Ga. 434, 729 S.E.2d 330 (2012).

Will propounder was not entitled to a directed verdict in a will caveat as the evidence established a question for the jury on the issue of undue influence because there was more than merely an opportunity for the propounder to influence the testator; there was also evidence of the testator's diminished mental faculties and an established confidential relationship between the propounder and the testator. Odom v. Hughes, 293 Ga. 447, 748 S.E.2d 839 (2013).

No undue influence when attorney not agent of propounder. — When attorney who drafted the will was not an agent of the propounder, and since no agent of the propounder was present when the will was executed, an inference is assumed that there was no undue influence at the crucial time of execution. Norton v. Georgia R.R. Bank & Trust, 248 Ga. 847, 285 S.E.2d 910 (1982), aff'd, 253 Ga. 596, 322 S.E.2d 870 (1984) (decided under former O.C.G.A. § 53-2-6).

Fraud

Fraud is a distinct head of objection to the validity of a will, from importunity and undue influence; usually they are the very opposites of each other. Both are equally destructive of the validity of a will. Stephens v. Brady, 209 Ga. 428, 73 S.E.2d 182 (1952) (decided under former Code 1933, §§ 113-208, 113-209).

Fraud, to invalidate a will, must amount to force or fear and must, in effect, make the will the mental offspring of some other person, and must be operative on the mind of the testator at the time the will is executed. Butler v. Lashley, 197 Ga. 461, 29 S.E.2d 508 (1944) (decided under former Code 1933, § 113-209).

Fraud must affect testator's plan in making will. — There was no fraud when the basis for such claim was the attorney's failure to inform testator as to the powers and fees of an executor, matters which did not affect the testator's plan in making the testator's will. Yancey v. Hall, 265 Ga. 466, 458 S.E.2d 121 (1995) (decided under former Code 1933, § 113-209).

Trial court properly granted a will beneficiary summary judgment on the issue of fraud because there was no evidence in the record that would create a genuine issue of material fact as to fraud since the alleged two misrepresentations were not shown to have been relied upon by the testator when the will was created. Johnson v. Burrell, 294 Ga. 301, 751 S.E.2d 301 (2013).

Representations of infidelity sufficient to raise presumption of fraud. — For one to represent to a wife that her husband is unfaithful to his marital vows, and giving to another the love and affection due his wife, whether the representation of infidelity be true or false, is likely to strongly influence her in the disposition of the property she may leave; hence, the evidence on behalf of the caveators was sufficient on the issue of fraud to have gone to the jury. Stephens v. Brady, 209

Ga. 428, 73 S.E.2d 182 (1952) (decided under former Code 1933, § 113-209).

Effect of fraud practiced prior to execution of will. — Mere absence of direct evidence and circumstances showing that the propounder practiced fraud at or about the time the last will was executed did not demand a finding in favor of the propounder where there was evidence, direct and circumstantial, from which the jury could have drawn the conclusion that the last will as executed by the testator resulted from prior fraud practiced by the propounder upon the testator, and that these prior actions of the propounder controlled the mind of the testator at the time the testator executed the last will. Stephens v. Brady, 209 Ga. 428, 73 S.E.2d 182 (1952) (decided under former Code 1933, § 113-209).

Fraud established. — There was sufficient evidence to support the jury's finding that a testator's will was procured by fraud because the propounder and the propounder's wife encouraged the caveator and the caveator's spouse to go on vacation, and they embarked on a campaign to convince the testator that the caveator had stolen all the testator's money, left the testator broke, and abandoned the testator; those were misrepresentations, but the misrepresentations worked because the testator changed the testator's will to disinherit the caveator completely, and as a result of those misrepresentations, the testator went into the meeting with the attorney who drafted the will intending to leave the testator's entire estate to the propounder, and the testator would have done so were it not for the attorney's suggestion that the testator leave something to the caveator's children, who were the testator's grandchildren. McDaniel v. McDaniel, 288 Ga. 711, 707 S.E.2d 60 (2011).

Pleading and Practice

1. In General

Burden of proof shifts to caveator when prima facie case made by propounder of will. — Upon the trial of an issue arising upon the propounding of a will and a caveat thereto, the burden, in the first instance, is upon the propounder of the alleged will to make out a prima facie case, by showing the factum of the will and that at the time of the will's execution the testator apparently had sufficient mental capacity to make the will, and, in making the will, acted freely and voluntarily. When this is done, the burden of proof shifts to the caveator. Cornelius v. Crosby, 243 Ga. 26, 252 S.E.2d 455 (1979) (decided under former Code 1933, § 113-208).

Cross examination of executor on effect of in terrorem. — In a will contest, the caveator was properly prevented from cross-examining the executor as to the effect of the will's in terrorem clause as the uncontroverted testimony showed that the testator was of sound mind and was not influenced by the desires of others, and evidence as to the effect of the forfeiture provision would not have been probative of either undue influence or the lack of testamentary capacity. Caswell v. Caswell, 285 Ga. 277, 675 S.E.2d 19 (2009).

Jury question as to undue influence. — It is for the jury to say under the circumstances, whether undue influence has been exercised. Bryan v. Norton, 245 Ga. 347, 265 S.E.2d 282 (1980) (decided under former Code 1933, § 113-208).

It is reversible error to charge on undue influence when there is no evidence to show that undue influence was exerted upon a testator, resulting in the testator making the will. Orr v. Blalock, 195 Ga. 863, 25 S.E.2d 668 (1943) (decided under former Code 1933, § 113-208).

2. Proof

Requirements for rebuttable presumption of undue influence. — In order to give rise to the rebuttable presumption that a will is the void product of undue influence, the evidence must show a confidential relationship wherein the primary beneficiary was capable of exerting the power of leadership over the submissive testator. Crumbley v. McCart, 271 Ga. 274, 517 S.E.2d 786 (1999).

Use of circumstantial evidence permissible as proof of undue influence. — Undue influence in procuring a will may exist in many forms, and it may be operated through diverse channels; the

Pleading and Practice (Cont'd)
2. Proof (Cont'd)

existence and effective power of undue influence is not always susceptible of direct proof and undue influence may be proved by circumstantial evidence. Stephens v. Bonner, 174 Ga. 128, 162 S.E. 383 (1932) (decided under former Civil Code 1910, § 3834).

Very wide range of testimony is permissible on the issue of undue influence, due to the fact that it seldom can be shown except by circumstantial evidence. It results from the circumstances and surroundings of the testator and the testator's associations with the person or persons exercising the undue influence. Peretzman v. Simon, 185 Ga. 681, 196 S.E. 471 (1938) (decided under former Code 1933, § 113-208); Bowman v. Bowman, 205 Ga. 796, 55 S.E.2d 298 (1949) (decided under former Code 1933, § 113-208).

It is proper to consider the testator's dealings and associations with the beneficiaries, the testator's habits, motives, feelings, the testator's strength or weakness of character, the testator's confidential, family, social, and business relations, the reasonableness or unreasonableness of the will, the testator's mental and physical condition at the time the will was made; the testator's manner and conduct, and generally every fact which will throw light on the issue raised by the charge of undue influence. Stephens v. Bonner, 174 Ga. 128, 162 S.E. 383 (1932) (decided under former Civil Code 1910, § 3834); Peretzman v. Simon, 185 Ga. 681, 196 S.E. 471 (1938) (decided under former Code 1933, § 113-208); Fowler v. Fowler, 197 Ga. 53, 28 S.E.2d 458 (1943) (decided under former Code 1933, § 113-208); Stephens v. Brady, 209 Ga. 428, 73 S.E.2d 182 (1952) (decided under former Code 1933, § 113-208).

In determining whether undue influence had been exercised by the wife, so as to substitute her will for that of her husband in his last will and testament, all of the circumstances including the conduct and demeanor of the parties with respect to each other, their comparative ages and mental capacity, and especially any physical and mental infirmity due to advanced age of the husband, may be taken into consideration. Trust Co. v. Ivey, 178 Ga. 629, 173 S.E. 648 (1934) (decided under former Code 1933, § 113-208).

Allegations of undue influence must be accompanied by the particular facts. Bare conclusions such as "fraud, scheme, device, and undue influence" are insufficient allegations in a caveat to present an issue. English v. Shivers, 219 Ga. 515, 133 S.E.2d 867 (1963) (decided under former Code 1933, § 113-208).

Where the caveat is stripped of allegations as to matters which do not appear to have had any bearing or influence upon the testator in the making of the testator's will and nothing remains except bare conclusions of the pleader as to fraud, scheme, device, and undue influence, the caveat does not provide sufficient issues to challenge the validity of the will. Marlin v. Hill, 192 Ga. 434, 15 S.E.2d 473 (1941) (decided under former Code 1933, § 113-208).

Allegations of a caveat need not in each instance furnish the exact or precise words and language employed for the purpose of unduly influencing the testator or the exact dates upon which this is said to have occurred. Levens v. Levens, 203 Ga. 646, 47 S.E.2d 748 (1948) (decided under former Code 1933, § 113-208).

Insufficient allegation of fraud or undue influence. — Allegations in a caveat to the probate of a will, "that the deceased had been insane for six or seven years prior to his death, was insane at the time the alleged will was signed, if he ever signed it, and that said alleged will is only the will" of named beneficiaries and "ought not to be probated as the will" of the alleged testator, and that the caveator had paid for the funeral expenses of the decedent without any knowledge that the chief named beneficiaries "had had decedent make a will giving them everything he had, if he ever signed the will," were insufficient to present any issue as to fraud or undue influence. Hastings v. Hastings, 175 Ga. 805, 166 S.E. 192 (1932) (decided under former Civil Code 1910, § 3834).

Ruling upholding the 2010 will was af-

firmed because subscribing witnesses stated in an affidavit that the testatrix was mentally competent when the will was executed, it was self-proved, and contained an affidavit complying with O.C.G.A. § 53-4-24, which created a presumption that the will was executed with the requisite testamentary formalities, including that the testatrix had sufficient mental capacity to do so, and the challenger failed to rebut that presumption. Woods v. Stonecipher, 349 Ga. App. 698, 824 S.E.2d 633 (2019).

Allegations of mental incapacity require examination of reasonableness of will. — When a will is attacked upon the grounds of the mental incapacity of the testator, and of undue influence in the procurement of the will, it is always proper to inquire whether the provisions of the will are just and reasonable, and in accord with the state of the testator's family relations, or the contrary. Knox v. Knox, 213 Ga. 677, 101 S.E.2d 89 (1957) (decided under former Code 1933, § 113-208).

Evidence required to show undue influence varies as to peculiar circumstances. — Rules of evidence take into account the peculiar circumstances surrounding the issue of undue influence and acts, conduct, and circumstances may constitute undue influence when exercised on a person of failing mind, poor health, and other mental and bodily enfeeblements which would not be such undue influence as to void a will executed by a person of sound mind, good health, and intelligence. Bowman v. Bowman, 205 Ga. 796, 55 S.E.2d 298 (1949) (decided under former Code 1933, § 113-208).

Quantity of influence varies with the circumstances of each case, according to the relations existing between the parties and the strength or weakness of mind of the testator; thus, the amount of influence necessary to dominate a mind impaired by age or disease may be decidedly less than that required to control a strong mind. Bowman v. Bowman, 205 Ga. 796, 55 S.E.2d 298 (1949) (decided under former Code 1933, § 113-208).

Undue influence necessary to dominate a mind impaired by age, disease, or dissipation is less than that required to control a strong mind. Crews v. Crews, 219 Ga. 459, 134 S.E.2d 27 (1963) (decided under former Code 1933, § 113-208).

Mere confidential relationship insufficient as proof of undue influence. — Person standing in a confidential relation to another is not prohibited from exercising any influence whatever to obtain a benefit to oneself. The influence must be what the law regards as undue influence; such influence that is obtained by flattery, importunity, superiority of will, mind, or character, which would give dominion over the will to such an extent as to destroy free agency or to constrain one to do against one's will what one is unable to refuse. Daniel v. Etheredge, 198 Ga. 191, 31 S.E.2d 181 (1944) (decided under former Code 1933, § 113-208); Bailey v. Bailey, 204 Ga. 556, 50 S.E.2d 617 (1948) (decided under former Code 1933, § 113-208); Morgan v. Ivey, 222 Ga. 850, 152 S.E.2d 833 (1967) (decided under former Code 1933, § 113-208).

Merely showing that the persons receiving substantial benefits under the instrument sought to be propounded occupied a confidential relationship to the testator and had an opportunity to exert undue influence is insufficient to show undue influence. Crews v. Crews, 219 Ga. 459, 134 S.E.2d 27 (1963) (decided under former Code 1933, § 113-208).

Trial court properly granted a will beneficiary summary judgment on the issue of undue influence because the caveators failed to come forward with any evidence that the beneficiary attempted to influence the making or the contents of the testator's will despite the existence of a confidential relationship. Johnson v. Burrell, 294 Ga. 301, 751 S.E.2d 301 (2013).

Presumption arises when such beneficiary is not natural object of maker's bounty. — When a person obtaining a substantial benefit under a will occupies a confidential relationship toward the maker of the will and is not a natural object of the maker's bounty, a presumption of undue influence arises if it is shown that the will was made at the request of such person. Bryan v. Norton, 245 Ga. 347, 265 S.E.2d 282 (1980) (decided under former Code 1933, § 113-208).

Pleading and Practice (Cont'd)
2. Proof (Cont'd)

Representation of infidelity between spouses as undue influence. — For one to represent to a wife that her husband is unfaithful to his marital vows, and giving to another the love and affection due his wife, whether the representation of infidelity is true or false, is likely to strongly influence her in the disposition of the property she may leave; hence, the evidence on behalf of the caveators was sufficient on the issues of fraud and undue influence to have gone to the jury. Stephens v. Brady, 209 Ga. 428, 73 S.E.2d 182 (1952) (decided under former Code 1933, § 113-208).

Presumption of undue influence is rebuttable. — Presumption of undue influence based on the existence of confidential relations between the beneficiary and the testator and the active participation of the beneficiary in the execution of the will is rebuttable by any evidence showing that the testator acted freely and voluntarily in making the testator's will and not under the coercion of the person charged with undue influence. Bryan v. Norton, 245 Ga. 347, 265 S.E.2d 282 (1980) (decided under former Code 1933, § 113-208).

Requirements for rebuttable presumption. — Caveator, who was disinherited under father's will, failed to show that the caveator's brother, who inherited, or the caveator's brother's son, exerted undue influence over testator. Harper v. Harper, 274 Ga. 542, 554 S.E.2d 454 (2001).

Honest persuasion and argument, even to the extent of importunity, is not undue influence. Sweat v. Hughes, 219 Ga. 703, 135 S.E.2d 409 (1964) (decided under former Code 1933, § 113-208).

Persuasion is not undue influence. — Honest persuasion to make a will of a certain kind, though constant and importunate and though accompanied by tears and entreaties, does not constitute undue influence, in the absence of fraud or duress, even though the testator yields to the influence in order to have quiet or peace of mind, or to keep the respect or love of members of the testator's family; provided the testator is in a mental condition to make a choice between following the testator's original intention or of yielding the testator's view in favor of the wishes of the other person. Boland v. Aycock, 191 Ga. 327, 12 S.E.2d 319 (1940) (decided under former Code 1933, § 113-208).

Honest persuasion to make a will of a certain kind, though constant and importunate and though accompanied by tears and entreaties, does not constitute undue influence, in the absence of fraud or duress, provided the testator is in a mental condition to make a choice between following the testator's original intention or of yielding the testator's view in favor of the wishes of the other person. Ehlers v. Rheinberger, 204 Ga. 226, 49 S.E.2d 535 (1948) (decided under former Code 1933, § 113-208); Morgan v. Ivey, 222 Ga. 850, 152 S.E.2d 833 (1967) (decided under former Code 1933, § 113-208); Sauls v. Estate of Avant, 143 Ga. App. 469, 238 S.E.2d 564 (1977) (decided under former Code 1933, § 113-208).

Mere opportunity does not constitute undue influence. — Evidence which does no more than show opportunities for exerting influence falls short of showing the exercise of undue influence required to invalidate a will. Orr v. Blalock, 195 Ga. 863, 25 S.E.2d 668 (1943) (decided under former Code 1933, § 113-208); Bailey v. Bailey, 204 Ga. 556, 50 S.E.2d 617 (1948) (decided under former Code 1933, § 113-208); Brown v. Bryant, 220 Ga. 80, 137 S.E.2d 36 (1964) (decided under former Code 1933, § 113-208); Morgan v. Ivey, 222 Ga. 850, 152 S.E.2d 833 (1967) (decided under former Code 1933, § 113-208).

Evidence of the caveators on the question of whether the paper propounded for probate was the result of undue influence exercised over the mind of the testator failed to present an issue for the jury; it showed no more than a mere opportunity to exercise undue influence, which is not sufficient. Bailey v. Bailey, 204 Ga. 556, 50 S.E.2d 617 (1948) (decided under former Code 1933, § 113-208).

When testimony shows at most only an opportunity on the part of a brother to impose his wishes upon his sister, the testator, the opportunity alone is insuffi-

cient to establish undue influence. Whitfield v. Pitts, 205 Ga. 259, 53 S.E.2d 549 (1949) (decided under former Code 1933, § 113-208).

It is not sufficient to establish undue influence to show merely that the persons receiving substantial benefits under the instrument sought to be propounded occupied a confidential relationship to the testator and had an opportunity to exert undue influence. Bowman v. Bowman, 205 Ga. 796, 55 S.E.2d 298 (1949) (decided under former Code 1933, § 113-208); Gornto v. Gornto, 217 Ga. 136, 121 S.E.2d 139 (1961) (decided under former Code 1933, § 113-208).

Sufficient evidence to find testator unduly influenced. See Skelton v. Skelton, 251 Ga. 631, 308 S.E.2d 838 (1983) (decided under former O.C.G.A. § 53-2-6).

No lack of testamentary capacity. — Daughter failed to show lack of testamentary capacity despite the fact that the testator's medical record contained the word "dementia" without an indication as to whether it was used as a diagnosis, a report from family members, or a matter for concern at later examinations; the testator's accountant and lawyer testified that the testator was aware of the property the testator possessed and of the relatives and that the testator expressed an intelligent scheme of disposition. Curry v. Sutherland, 279 Ga. 489, 614 S.E.2d 756 (2005).

Undue influence established. — Evidence did not demand a verdict contrary to that returned by the jury, which found that in executing a new will that favored the appellants over the appellees, the testator had been subject to undue influence by the appellants; there was evidence that the testator was cared for 24 hours a day by the appellants, who administered medication to the testator; that an appellant was with the testator during visits; that the appellees felt uncomfortable when visiting; that an appellant had the testator's financial power of attorney, wrote checks on the testator's accounts, and kept the testator's books; that two of the appellants had an attorney draft the new will and provided the attorney with an estate distribution plan; that the new will was witnessed by a neighbor and two cousins of the appellants; that an appellant administered a narcotic to the testator on the day the new will was executed; that the appellants did not inform the appellees of the new will; and that the terms of the new will were inconsistent with the testator's repeated statements to others that the parties were to be treated equally. Lillard v. Owens, 281 Ga. 619, 641 S.E.2d 511 (2007).

Trial court correctly denied an executor's motion for directed verdict in an action wherein the child of the testator filed a caveat and objection to the probate of the testator's last will and testament on the grounds that the will was the product of undue influence as sufficient evidence existed to support the conclusion that undue influence was used to have the testator bequeath the only asset, namely a home, to the caregiver who was hired by the executor. The record established that the executor blocked calls from the testator's child, refused to let the child see the testator, and a confidential relationship was established between the caregiver and the testator as the caregiver took an active role in the planning, preparation, and execution of the will. Bean v. Wilson, 283 Ga. 511, 661 S.E.2d 518 (2008).

Evidence regarding the circumstances and surroundings of the testator and the testator's associations authorized the jury's finding that the testator's will was the product of undue influence because the propounder and the propounder's wife encouraged the caveator and the caveator's wife, who had moved in with the testator and the testator's wife and provided the care they needed, to leave the state for a vacation, and in their absence the propounder poisoned the testator's mind against the caveator, telling the testator falsely that the caveator had stolen all the caveator's money, that the testator was broke, and that the caveator had abandoned the testator and would not return; acting under the influence of the propounder and the propounder's wife, the testator secured a restraining order that prevented the caveator from seeing the testator for six months after the caveator returned, and the testator's will radically changed the distribution of the

Pleading and Practice (Cont'd)
2. Proof (Cont'd)

estate envisioned by the testator in a previous will by changing the will to disinherit the caveator completely. McDaniel v. McDaniel, 288 Ga. 711, 707 S.E.2d 60 (2011).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 371 et seq., 394 et seq.

Am. Jur. Proof of Facts. — Undue Influence in Execution of Will, 36 POF2d 109.

C.J.S. — 95 C.J.S., Wills, §§ 343, 345 et seq., 686 et seq.

ALR. — Fraud as distinguished from undue influence as ground for contesting will, 28 A.L.R. 787; 92 A.L.R. 790.

Presumption and burden of proof as to undue influence on testator, 66 A.L.R. 228; 154 A.L.R. 583.

Admissibility and weight on issue of mental capacity or undue influence in respect of will or conveyance, of instruments previously executed by the person in question, 82 A.L.R. 963.

Undue influence by third person in which immediate beneficiary did not participate, 96 A.L.R. 613.

Form and particularity of allegations to raise issue of undue influence, 107 A.L.R. 832.

Admissibility of evidence on question of testamentary capacity or undue influence in a will contest as affected by remoteness, relative to the time when the will was executed, of the facts or events to which the evidence relates, 124 A.L.R. 433.

Admissibility of declarations of testator on issue of undue influence, 148 A.L.R. 1225.

Admissibility of declaration by beneficiary named in will in support of claim of undue influence or lack of testamentary capacity, 167 A.L.R. 13.

Rights and remedies against one who induces, prevents, or interferes in the making, changing, or revoking of a will, or holds the fruits thereof, 11 A.L.R.2d 808.

Judgment denying validity of will because of undue influence, lack of mental capacity, or the like, as res judicata as to validity of another will, deed, or other instrument, 25 A.L.R.2d 657.

Admissibility in will contest of financial condition or needs of those constituting natural objects of testator's bounty, 26 A.L.R.2d 374.

Drawing will or deed under which he figures as grantee, legatee, or devisee as ground of disciplinary action against attorney, 98 A.L.R.2d 1234.

Presumption or inference of undue influence from testamentary gift to relative, friend, or associate of person preparing will or procuring its execution, 13 A.L.R.3d 381.

Wills: undue influence in gift to testator's attorney, 19 A.L.R.3d 575.

Solicitation of testator to make a will or specified bequest as undue influence, 48 A.L.R.3d 961.

Existence of illicit or unlawful relation between testator and beneficiary as evidence of undue influence, 76 A.L.R.3d 743.

Liability in damages for interference with expected inheritance or gift, 22 A.L.R.4th 1229.

Action for tortious interference with request as precluded by will contest remedy, 18 A.L.R.5th 211.

Attorneys at law: disciplinary proceedings for drafting instrument such as will or trust under which attorney-drafter or member of attorney's family or law firm is beneficiary, grantee, legatee, or devisee, 80 A.L.R.5th 597.

ARTICLE 3

EXECUTION AND ATTESTATION

Law reviews. — For article suggesting that nuncupative wills should no longer be recognized in Georgia, see 11 Ga. L. Rev. 297 (1977). For survey article on wills, trusts, guardianships, and fiduciary administration, see 60 Mercer L. Rev. 417

(2008). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 61 Mercer L. Rev. 385 (2009).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Decedent's Gift to Heir as Advancement, 35 POF2d 357.

Proof of Decedent's Intent That Inter Vivos Gift to Heir Constitutes Advancement, 83 POF3d 295.

ALR. — Governing law of will as affected by change of domicil after its execution, 57 A.L.R. 229.

Admissibility and credibility of testimony of subscribing witness tending to impeach execution of will or testamentary capacity of testator, 79 A.L.R. 394.

Necessity that attesting witnesses to will subscribe in presence of each other, 99 A.L.R. 554.

Law in effect at time of execution of will or at time of death of testator as controlling, 129 A.L.R. 859.

Soldiers' and seamen's wills, 147 A.L.R. 1297; 148 A.L.R. 1384; 149 A.L.R. 1451; 149 A.L.R. 1452; 150 A.L.R. 1417; 150 A.L.R. 1418; 151 A.L.R. 1453; 152 A.L.R. 1450; 154 A.L.R. 1447.

Effectiveness of nuncupative will where essential witness thereto is beneficiary, 28 A.L.R.2d 796.

Validity of will written on disconnected sheets, 38 A.L.R.2d 477.

Weight and effect of presumption or inference of due execution of will, 40 A.L.R.2d 1223.

"Attestation" or "witnessing" of will, required by statute, as including witnesses' subscription, 45 A.L.R.2d 1365.

Effect of failure of attesting witness to observe testator's capacity, 69 A.L.R.2d 662.

Validity of will as affected by fact that witnesses signed before testator, 91 A.L.R.2d 737.

What amounts to "last sickness" or the like within requirement that nuncupative will be made during last sickness, 8 A.L.R.3d 952.

Requirement that holographic will, or its material provisions, be entirely in testator's handwriting as affected by appearance of some printed or written matter not in testator's handwriting, 37 A.L.R.4th 528.

Proper execution of self-proving affidavit as validating or otherwise curing defect in execution of will itself, 1 A.L.R.5th 965.

53-4-20. (See Editor's notes.) Required writing; signing; witnesses; codicil.

(a) A will shall be in writing and shall be signed by the testator or by some other individual in the testator's presence and at the testator's express direction. A testator may sign by mark or by any name that is intended to authenticate the instrument as the testator's will.

(b) A will shall be attested and subscribed in the presence of the testator by two or more competent witnesses. A witness to a will may attest by mark. Another individual may not subscribe the name of a witness, even in that witness's presence and at that witness's direction.

(c) A codicil shall be executed by the testator and attested and subscribed by witnesses with the same formality as a will.

History. — Code 1981, § 53-4-20, enacted by Ga. L. 1996, p. 504, § 10.

Cross references. — Execution of writings and contracts, § 1-3-10.

Editor's notes. — The general provisions concerning the competency of witnesses, referred to in the Comment, are now found at O.C.G.A. § 24-6-601.

For application of this statute in 2020, see Executive Order 04.09.20.01.

Law reviews. — For article analyzing execution and attestation requirements in Georgia and advocating certain reforms, see 11 Ga. L. Rev. 297 (1977). For article advocating abolition of the prohibition against proxy signatures and repeal of this Code section as unnecessary, see 11 Ga. L. Rev. 297 (1977). For article surveying developments in Georgia wills, trusts, and administration of estates law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 307 (1981). For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004). For annual survey of wills, trusts, guardianships, and fiduciary administration, see 57 Mercer L. Rev. 403 (2005). For survey article on wills, trusts, guardianships, and fiduciary administration, see 59 Mercer L. Rev. 447 (2007).

For comment on the constitutionality of Ga. L. 1958, p. 657; as amended by Ga. L. 1964, Ex. Sess, p. 16, reducing the number of required witnesses to a will to two, in light of the constitutional provision that no law shall refer to more than one subject matter, see 1 Ga. St. B.J. 126 (1964).

COMMENT

This section carries forward former OCGA Secs. 53-2-40 and 53-2-43, adding the concept from Georgia case law that a testator may sign by mark. Former OCGA Sec. 53-2-43(b) is clarified, stating that no other individual may sign a witness's name to the will. (For general provisions as to the competency of witnesses, see OCGA Sec. 24-9-1 et seq.) This section also carries forward the concept from former OCGA Sec. 53-2-5 that a codicil must be executed with the same formality as a will.

JUDICIAL DECISIONS

Analysis

General Consideration
Writing Required
Signing and Attestation of Will
Pleading and Practice

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 113-109 and 113-301, and former O.C.G.A. § 53-2-40 are included in the annotations for this Code section.

Purpose. — Substantive origin of the statute of frauds, as well as that of the former section, was the need to establish rules for the execution of wills which precluded as well as possible the occurrence of fraud in the disposition of estates, often the result of a life's labor. Waldrep v. Goodwin, 230 Ga. 1, 195 S.E.2d 432 (1973) (decided under former Code 1933, § 113-301).

Law provides no special formalities about the witnesses to a will; it is sufficient if the witnesses attest and subscribe the will in the presence of the testator; the law implies the request in the consummation of the act, and no special request by the testator is necessary. Whitfield v. Pitts, 205 Ga. 259, 53 S.E.2d 549 (1949) (decided under former Code 1933, § 113-301).

Attestation of a will by the subscribing witnesses, signed by the witnesses in the presence of the testator and with the testator's knowledge may be treated as the equivalent of a request by the testator that these persons subscribe their names as witnesses to the paper, and especially when such testator is shown to have been seeking witnesses for the purpose of having the witnesses attest the testator's will. Glenn v. Mann, 234 Ga. 194, 214 S.E.2d 911 (1975) (decided under former Code 1933, § 113-301).

Designation-of-beneficiary docu-

ment insufficient to operate as will. — Although the designation-of-beneficiary document for purposes of decedent's teachers' retirement system benefits executed by the decedent in 1965 did contain the signature of a notary public, as well as the signature of the decedent's employer, there was no showing that these persons signed the document in the presence of the decedent as attesting witnesses and therefore the document could not operate as a will. Kirksey v. Teachers' Retirement Sys., 250 Ga. 884, 302 S.E.2d 101 (1983) (decided under former O.C.G.A. § 53-2-40).

Discussion of history of former provisions. — See Waldrep v. Goodwin, 230 Ga. 1, 195 S.E.2d 432 (1973) (decided under former Code 1933, § 113-301).

Cited in Rea v. Pursley, 170 Ga. 488, 154 S.E. 325 (1930); Moore v. Tiller, 61 F.2d 478 (5th Cir. 1932); Bloodworth v. McCook, 193 Ga. 53, 17 S.E.2d 73 (1941); Denmark v. Rushing, 208 Ga. 557, 67 S.E.2d 766 (1951); Graham v. Stansell, 218 Ga. 832, 131 S.E.2d 103 (1963); Crews v. Cook, 220 Ga. 479, 139 S.E.2d 490 (1964); Lee v. Green, 222 Ga. 141, 149 S.E.2d 86 (1966); Black v. Poole, 230 Ga. 129, 196 S.E.2d 20 (1973); Lamb v. Bryan, 236 Ga. 237, 223 S.E.2d 122 (1976); Johnson v. Shook, 156 Ga. App. 878, 275 S.E.2d 815 (1981).

Writing Required

Wills must be in writing, and executed according to prescribed formalities, and a failure to dispose of property cannot be supplied by showing sayings and statements of the testator that the testator desired or intended to dispose of the property in a certain way, or that the testator understood that the will disposed of the property in a way different from that expressed in the will. Lining v. Jackson, 203 Ga. 22, 45 S.E.2d 410 (1947) (decided under former Code 1933, § 113-301).

When the only objection which the caveator makes to the appointment of an administrator is that it was the intention of the testator that the property should go to the caveator, and there is nothing in the will to indicate that such was the testator's intent, the court properly sustained the demurrer (now motion to dismiss) to the caveat. Lining v. Jackson, 203 Ga. 22, 45 S.E.2d 410 (1947) (decided under former Code 1933, § 113-301).

Provisions of the English statute 29 Car. 2 c. 3, § 7, known as the statute of frauds, that all declarations and creations of trusts shall be manifested and proved by writing signed by the party, who was by law enabled to declare such trust, or the party's last will in writing, or else shall be void, were embodied in former Code 1933, § 20-401 (see O.C.G.A. § 13-5-30), which provided that any contract for the sale of lands, or concerning land, must be in writing; former Code 1933, § 108-105 (see O.C.G.A. § 53-12-23), which provided that all express trusts shall be created or declared in writing; and former Code 1933, § 113-301, which provided that all wills (except nuncupative wills), disposing of real or personal property, shall be in writing, signed by the party making the will or by some other person in the party's presence and by the party's express direction, and be attested and subscribed in the presence of competent witnesses. Woo v. Markwalter, 210 Ga. 156, 78 S.E.2d 473 (1953) (decided under former Code 1933, § 113-301).

Signing and Attestation of Will

Attestation clause. — Paper testamentary in its nature does not require for its due execution an attesting clause declaring it a will, and reciting its execution according to the terms of the statute, pointing out how wills shall be executed. If it be subscribed by the testator, in the presence of the witnesses, and be attested and subscribed by the witnesses in the testator's presence, it is sufficient. Whitfield v. Pitts, 205 Ga. 259, 53 S.E.2d 549 (1949) (decided under former Code 1933, § 113-301).

Acknowledgment may be inferred. — Acknowledgment by testator need not be explicit, but may be inferred from conduct. Norton v. Georgia R.R. Bank & Trust, 248 Ga. 847, 285 S.E.2d 910 (1982), aff'd, 253 Ga. 596, 322 S.E.2d 870 (1984) (decided under former O.C.G.A. § 53-2-40).

Testator may sign using any name or signature intended to authenticate

Signing and Attestation of Will (Cont'd)

an instrument as testator's will. Mitchell v. Mitchell, 245 Ga. 291, 264 S.E.2d 222 (1980) (decided under former Code 1933, § 113-301).

Testator's mark sufficient to show intent to authenticate will. — Trial court did not err in granting a propounder's motion for summary judgment on the issue of whether a testator's will was properly executed because pursuant to O.C.G.A. § 53-4-20(a), the testator's mark was sufficient to show that she intended to authenticate the instrument as her will, and her intent to authenticate the will could not be questioned simply because she needed physical assistance to mark the instrument; the testator was unable to place her signature on the will, so one of the witnesses assisted her by moving her hand to the signature line, and it was her intent that the mark would serve as her signature. Strong v. Holden, 287 Ga. 482, 697 S.E.2d 189 (2010).

"Express direction" required by statute may be by express conduct as well as by express words. Mitchell v. Mitchell, 245 Ga. 291, 264 S.E.2d 222 (1980) (decided under former Code 1933, § 113-301).

Testator's hand resting upon the pen while it was being manipulated to produce the testator's signature constitutes the testator's "express direction" within the meaning of law. Mitchell v. Mitchell, 245 Ga. 291, 264 S.E.2d 222 (1980) (decided under former Code 1933, § 113-301).

Attorney's assistance in helping testator sign will. — When there was evidence that the attorney who prepared the will enabled the testator, who because of the testator's physical condition could not write, to make the testator's mark by placing the testator's hand upon the pen as the mark was made, this was sufficient to authorize the jury to find that the testator signed the will. Crutchfield v. McCallie, 188 Ga. 833, 5 S.E.2d 33 (1939) (decided under former Code 1933, § 113-301).

Particular acts of authentication. — Statute does not of itself make that which is attested by a witness the signature of the testator. Like the statute of frauds upon which it was modeled, it does not set forth any particular acts of authentication by the testator to be attested by the witnesses. Waldrep v. Goodwin, 230 Ga. 1, 195 S.E.2d 432 (1973) (decided under former Code 1933, § 113-301).

Testator to sign in presence of witnesses. — To constitute a legal execution of an instrument purporting to be a will, it is absolutely necessary that the attesting witnesses either actually see the testator sign the instrument, or that the testator acknowledge the testator's signature thereto either expressly or impliedly. Thornton v. Hulme, 218 Ga. 480, 128 S.E.2d 744 (1962) (decided under former Code 1933, § 113-301); Glenn v. Mann, 234 Ga. 194, 214 S.E.2d 911 (1975) (decided under former Code 1933, § 113-301).

As with questions of the authenticity of the testator's signature, of the testamentary capacity of the testator, and of the undue influence upon the testator of others in making the testator's will, the signing, or acknowledgment of the testator's signature, by the testator in the presence of attesting witnesses is a matter of proof. Waldrep v. Goodwin, 230 Ga. 1, 195 S.E.2d 432 (1973) (decided under former Code 1933, § 113-301).

Attestation of a will requires that the testator must either sign in the presence of the witness or acknowledge the testator's signature to the witness. Norton v. Georgia R.R. Bank & Trust, 248 Ga. 847, 285 S.E.2d 910 (1982), aff'd, 253 Ga. 596, 322 S.E.2d 870 (1984) (decided under former O.C.G.A. § 53-2-40).

Testator must be able to see witnesses sign a will. — Line-of-vision test of former O.C.G.A. § 53-4-20, under which a testator must be able to see the witnesses sign the testator's will from the place where the testator is situated without changing the testator's place if the testator so desires is part of O.C.G.A. § 53-4-20 as revised in 1998; revised statutory language must be construed to be consistent with existing law unless a contrary intent is clear from the language of the revised statute, and because no contrary intent appears in § 53-4-20, which mirrors the language of the previous ver-

sion, the formalities of the former Georgia Probate Code for the execution of a will are maintained. McCormick v. Jeffers, 281 Ga. 264, 637 S.E.2d 666 (2006).

Will not signed in the presence of the testator. — Will of a testator was improperly admitted to probate under the line-of-vision test of O.C.G.A. § 53-4-20(b) because the witnesses signed the will at a dining room table where the testator could not see them without changing position from the bedroom chair where the testator had signed the will; because the evidence unequivocally established that the testator could not have seen the witnesses sign the will if the testator desired to do so, any presumption of proper execution arising from the will's attestation clause was rebutted by clear proof that the will was not properly executed in that the witnesses did not sign the will in the testator's presence. McCormick v. Jeffers, 281 Ga. 264, 637 S.E.2d 666 (2006).

Signature of witnesses in each others' presence. — It is not necessary that the subscribing witnesses sign in the presence of each other; it is sufficient if each signs in the presence of the testator. Whitfield v. Pitts, 205 Ga. 259, 53 S.E.2d 549 (1949) (decided under former Code 1933, § 113-301).

Testator and witnesses in adjoining rooms. — If the situation and circumstances of the testator and the attesting witnesses to a will at the time of the will's attestation are such that the testator, in the testator's actual position, might have seen the act of attestation, the requirement of the law that the witnesses shall sign in the testator's presence is sufficiently met. Glenn v. Mann, 234 Ga. 194, 214 S.E.2d 911 (1975) (decided under former Code 1933, § 113-301).

Subscribing witnesses can attest a will, even though the witnesses and the testator are in adjoining rooms in the same house, if the testator in the testator's actual location might have seen the attestation. Newton v. Palmour, 245 Ga. 603, 266 S.E.2d 208 (1980) (decided under former Code 1933, § 113-301).

Signatures not required to be on same page. — Provisions of the code regarding signing and attestation of a will do not require that the signatures of the testator and of the witnesses be on the same page and such a requirement is not imposed by case law. In re Estate of Brannon, 264 Ga. 84, 441 S.E.2d 248 (1994) (decided under former O.C.G.A. § 53-2-40).

When all of the signature pages are physically connected as part of the will, the fact that a testator's signature and the signatures of witnesses do not appear on the same page does not in itself invalidate the execution of the will. In re Estate of Brannon, 264 Ga. 84, 441 S.E.2d 248 (1994) (decided under former Code 1933, § 113-301).

Priority of signatures. — Rules of construction as laid down in Duffie v. Corridon, 40 Ga. 122 (1869), Brooks v. Woodson, 87 Ga. 379, 13 S.E. 712 (1890) and those cases following, that witnesses attest a testator's signature and that a will is rendered invalid if a witness signs before the testator no matter whether the signatures are affixed in the same continuous transaction, are rationalizations opposing the effectuation of testamentary desires while offering no preventative for fraud. They will no longer be followed because there can be no fraud when all parties sit at the same table and affix their signatures in the presence of each other regardless of who signs first. Waldrep v. Goodwin, 230 Ga. 1, 195 S.E.2d 432 (1973) (decided under former Code 1933, § 113-301).

Even though witnesses attest to the will as declared by the testator and no priority of signature of testator and witnesses should be assigned in the execution of a will, the requirement that the testator must sign or acknowledge the testator's signature in the presence of the witnesses is not eliminated. Waldrep v. Goodwin, 230 Ga. 1, 195 S.E.2d 432 (1973) (decided under former Code 1933, § 113-301).

Attestation clause raises presumption of legality of will. — Proper attestation clause to a duly signed and attested will raises a presumption that the will was legally executed; however, this presumption is rebuttable by clear proof to the contrary. Newton v. Palmour, 245 Ga. 603, 266 S.E.2d 208 (1980) (decided under former Code 1933, § 113-301).

Guardian ad litem as competent witness. — Guardian ad litem is a com-

Signing and Attestation of Will (Cont'd)

petent witness to the will of the guardian's ward. Bagwell v. Estate of Gibson, 258 Ga. 785, 374 S.E.2d 732 (1989) (decided under former O.C.G.A. § 53-2-40).

Attestation sufficient to avoid summary judgment against probate. — Trial court erred in granting summary judgment pursuant to O.C.G.A. § 9-11-56 to will caveators in a will propounder's action seeking to probate a decedent's will, since the decedent had sufficiently signed the will on the signature line of the self-proving clause, pursuant to former O.C.G.A. § 53-2-40.1, and there existed two competent witness signatures which were sufficient for attestation purposes; accordingly, the statutory requirements for proper execution of a will under former O.C.G.A. § 53-2-40 appeared to have been met and a jury issue was raised as to whether, in fact, the requirements were met. Miles v. Bryant, 277 Ga. 362, 589 S.E.2d 86 (2003) (decided under former O.C.G.A. § 53-2-40).

Witness also signing as notary. — It was error to grant summary judgment to a caveator in a will contest in which the first of three witnesses signed both as a witness and as a notary. Even if the first witness did not intend to act as a witness, if the first witness and a second witness signed the will in the decedent's presence, then O.C.G.A. § 53-4-20(b), requiring two witnesses, was satisfied even if a third witness signed outside the decedent's presence; furthermore, although O.C.G.A. § 45-17-8(c)(1) disqualified a witness from also acting as a notary, the first witness's disqualification as a notary was immaterial because the will was not a self-proving one requiring a notary. Land v. Burkhalter, 283 Ga. 54, 656 S.E.2d 834 (2008).

Requirements of statute met. — Will met the requirements of O.C.G.A. § 53-4-20(b) because the will was executed by the testator and signed by two subscribing witnesses, the one surviving witness testified as to the will's due execution, and the caveators presented no evidence challenging the validity of the signatures or the testator's capacity. Peterson v. Harrell, 286 Ga. 546, 690 S.E.2d 151 (2010).

Codicil not properly executed. — Trial court erred in finding that a codicil to a testator's will was valid because the propounders failed to prove due execution of the codicil when the testator failed to sign or acknowledge the testator's signature on the first codicil in the presence of at least, and possibly both, subscribing witnesses pursuant to O.C.G.A. § 53-4-20(b); the testimony of one of the subscribing witnesses was unequivocal that the testator did not sign the first codicil in the witness's presence and did not acknowledge the testator's signature. Parker v. Melican, 286 Ga. 185, 684 S.E.2d 654 (2009).

Question as to whether requirements of attestation were met. — In a brother's action to probate a will, the trial court erred in granting summary judgment to the sister because a question of fact for a jury existed as to whether the testimony from the witnesses, and the presence of the witnesses' initials on each page along with the testator's signature met the requirement for attestation. Wilbur v. Floyd, 353 Ga. App. 864, 839 S.E.2d 675 (2020), cert. denied, 2020 Ga. LEXIS 788 (Ga. 2020).

Pleading and Practice

Propounder of will must prima facie prove factum of will. — When the court charged the substance of the provisions of the statute for the attestation of wills, it was not error, without request, to fail to charge the jury the exact language of the statute. Middleton v. Waters, 205 Ga. 847, 55 S.E.2d 359 (1949) (decided under former Code 1933, § 113-301).

In a proceeding to probate a will the burden is upon the propounder to prima facie prove the factum of the will, that is, that the will was executed with requisite formalities; that the testator executed the will freely and voluntarily, and was at the time of sound and disposing mind and memory. This burden carried, the onus of proving the will is not valid for one of the reasons alleged in the caveat shifts to the caveator. Bianchini v. Wilson, 220 Ga. 816, 141 S.E.2d 889 (1965) (decided under former Code 1933, § 113-301).

The propounder of a will carries the burden of proving a prima facie case by presenting the subscribing competent witnesses who testified that the testator signed the will in their presence, after the will had been read, and that the testator possessed the mentality to know what the testator was doing. Waters v. Arrendale, 223 Ga. 617, 157 S.E.2d 289 (1967) (decided under former Code 1933, § 113-301).

Burden of proof. — Trial court did not err in finding that a codicil to a testator's will was invalid because the court properly charged the jury that the caveators had no burden to prove the grounds of their caveats to the propounders' petition to probate codicils; because testamentary capacity and voluntary execution were necessary elements of the propounders' case, the burden of persuasion remained on the propounders to prove their assertions by a preponderance of the evidence, and in the absence of an asserted affirmative defense, the caveators had no duty to affirmatively prove anything but were required only to come forward with evidence to rebut the propounders' prima facie case as to essential elements. Parker v. Melican, 286 Ga. 185, 684 S.E.2d 654 (2009).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 113-301, are included in the annotations for this Code section.

Witnesses for holographic wills. — There is no exception to the requirement of two witnesses in favor of holographic wills. 1967 Op. Att'y Gen. No. 67-62 (rendered under former Code 1933, § 113-301).

Any writing expressing the intention of the testator and duly executed may be a will provided the writing is intended by such instrument to convey no interest until after death. 1967 Op. Att'y Gen. No. 67-302 (rendered under former Code 1933, § 113-301).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 170 et seq., 197 et seq., 216, 240, 245 et seq., 298, 302, 303, 306.

C.J.S. — 95 C.J.S., Wills, §§ 1, 194, 195, 214, 217 et seq., 253 et seq.

ALR. — Imputation to attesting witness of notice of contents of instrument, 4 A.L.R. 716.

Knowledge derived from family correspondence as qualifying one to testify as to genuineness of handwriting, 7 A.L.R. 261.

Effect of purported subscribing witness's denial or forgetfulness of signature by mark, 17 A.L.R. 1267.

Will as exclusive means of exercising power conferred by will to dispose of property, 20 A.L.R. 388.

Testator's name in body of instrument as sufficient signature where statute does not require will to be signed at end, 29 A.L.R. 891.

Manner of signing as affecting sufficiency of signature of testator, 31 A.L.R. 682; 42 A.L.R. 954; 114 A.L.R. 1110.

Duty of attesting witness with respect to testator's capacity, 35 A.L.R. 79.

Letter as a will or codicil, 54 A.L.R. 917; 40 A.L.R.2d 698.

Effect of testator's attempted physical alteration of will after execution, 62 A.L.R. 1367; 24 A.L.R.2d 514.

Admissibility of evidence other than testimony of subscribing witnesses to prove due execution of will, or testamentary capacity, 63 A.L.R. 1195.

Effect of illegibility of signature of testator or witness to will, 64 A.L.R. 208.

Presumption as to due execution of will from attestation, with or without attestation clause, 76 A.L.R. 617.

Codicil as affecting application of statutory provision to will, or previous codicil not otherwise subject, or as obviating objections to lack of testamentary capacity, undue influence, or defective execution otherwise fatal to will, 87 A.L.R. 836.

Necessity that attesting witnesses to will subscribe in presence of each other, 99 A.L.R. 554.

Probate of will or proceedings subsequent thereto as affecting right to probate later codicil or will, and rights and remedies of parties thereunder, 107 A.L.R. 249; 157 A.L.R. 1351.

Validity, construction, and application of codicil or other testamentary instrument authorizing certain person to change will or to make disposition of testator's property contrary to provisions of will, 108 A.L.R. 1098.

Retrospective application of statute concerning execution of wills, 111 A.L.R. 910.

Acknowledgment of signature by testator or witness to will as satisfying statutory requirement that testator or witness sign in the presence of each other, 115 A.L.R. 689.

Testamentary character of memorandum or other informal writing not testamentary on its face regarding ownership or disposition of specific personal property, 117 A.L.R. 1327.

Relative weight of testimony of attesting witnesses in support of mental competency of testator, 123 A.L.R. 88.

Changes by one other than testator after execution of holographic will as affecting its character as such, 124 A.L.R. 633.

Necessity of, and what amounts to, request on part of testator to the witnesses to attest or subscribe will, 125 A.L.R. 414.

Necessity that attesting witness to will not signed by testator in his presence shall have seen latter's signature on paper, 127 A.L.R. 384.

Codicil as effective to prevent lapse of legacy or devise in consequence of death of legatee or devisee after execution of will and before execution of codicil, 146 A.L.R. 1366.

Incorporation of extrinsic writings in will by reference, 173 A.L.R. 568.

Place of signature of holographic wills, 19 A.L.R.2d 926.

Codicil as validating will or codicil which was invalid or inoperative at time of its purported execution, 21 A.L.R.2d 821.

Codicil as reviving revoked will or codicil, 33 A.L.R.2d 922.

Interlineations and changes appearing on face of will, 34 A.L.R.2d 619.

Failure of attesting witness to write or state place of residence as affecting will, 55 A.L.R.2d 1053.

Codicil as reviving adeemed or satisfied bequest or devise, 58 A.L.R.2d 1072.

Competency of named executor as subscribing witness to will, 74 A.L.R.2d 283.

What constitutes the presence of the testator in the witnessing of his will, 75 A.L.R.2d 318.

Validity of will as affected by fact that witnesses signed before testator, 91 A.L.R.2d 737.

Statute of frauds: will or instrument in form of will as sufficient memorandum of contract to devise or bequeath, 94 A.L.R.2d 921.

Civil liability of witness falsely attesting signature to document, 96 A.L.R.2d 1346.

Validity of a will signed by testator with the assistance of another, 98 A.L.R.2d 824.

Validity of will signed by testator's mark, stamp, or symbol, or partial or abbreviated signature, 98 A.L.R.2d 837.

Sufficiency of testator's acknowledgment of signature from his conduct and the surrounding circumstances, 7 A.L.R.3d 317.

Revocation of will as affecting codicil and vice versa, 7 A.L.R.3d 1143.

What amounts to "last sickness" or the like within requirement that nuncupative will be made during last sickness, 8 A.L.R.3d 952.

Necessity of laying foundation for opinion of attesting witness as to mental condition of testator, 17 A.L.R.3d 503.

Probate where two or more testamentary documents, bearing the same date or undated, are proffered, 17 A.L.R.3d 603.

Wills: place of signature of attesting witness, 17 A.L.R.3d 705.

Effect upon testamentary nature of document of expression therein of intention to make more formal will, further disposition of property, or the like, 46 A.L.R.3d 938.

Enforcement of preference expressed by decedent as to disposition of his body after death, 54 A.L.R.3d 1037.

Wills: separate gifts to same person in same or substantially same amounts made in separate wills or codicils, as cumulative or substitutionary, 65 A.L.R.3d 1325.

Proper execution of self-proving affidavit as validating or otherwise curing defect in execution of will itself, 1 A.L.R.5th 965.

53-4-21. Knowledge of contents of will by testator.

Knowledge of the contents of a will by the testator is necessary to the validity of a will. If the testator can read, the testator's signature or acknowledgment of that signature is presumed to show such knowledge.

History. — Code 1981, § 53-4-21, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward the first two sentences of OCGA Sec. 53-2-42. Former OCGA Sec. 53-2-42 also stated that greater proof will be necessary to show that the testator knew the will's contents if the scrivener or the scrivener's immediate family receive substantial amounts under the will. The reference is repealed as unnecessary in that suspicious circumstances such as those described will result in closer scrutiny of the circumstances surrounding the will execution under the theories of duress and undue influence. Likewise, former OCGA Sec. 53-2-46, dealing with the competency required of an interpreter who is used to convey the wishes of the testator to the scrivener or the witnesses, is repealed as unnecessary.

JUDICIAL DECISIONS

Presumption testator knew contents of will. — Trial court did not err in granting a propounder's motion for summary judgment on the issue of whether a testator's will was properly executed because pursuant to O.C.G.A. § 53-4-21, the testator's signature on the will gave rise to a presumption that she knew the contents of the will; the mere fact that only portions of the will were read aloud to the testator was of no consequence. Strong v. Holden, 287 Ga. 482, 697 S.E.2d 189 (2010).

Because a parent's will was plain and unambiguous and did not contain a residue clause, the lapsed gift of the residue passed to the parent's three daughters by intestacy according to O.C.G.A. § 53-4-65(b); although the parent expressed disappointment with two daughters and left them specific bequests of $10.00 each, the parent did not express an intent to disinherit the daughters. Banner v. Vandeford, 293 Ga. 654, 748 S.E.2d 927 (2013).

Cited in Cames v. Joiner (In re Joiner), 319 B.R. 903 (Bankr. M.D. Ga. 2004).

53-4-22. Competency of witness.

(a) Any individual who is competent to be a witness and age 14 or over may witness a will.

(b) If a witness is competent at the time of attesting the will, the subsequent incompetence of the witness shall not prevent the probate of the will.

History. — Code 1981, § 53-4-22, enacted by Ga. L. 1996, p. 504, § 10.

Cross references. — Competency of witnesses generally, § 24-6-601 et seq.

Editor's notes. — The general provisions concerning the competency of witnesses, referred to in the Comment, are now found at O.C.G.A. § 24-6-601.

Law reviews. — For article, "Execution, Revocation and Revalidation of Wills: A Critique of Existing Statutory Formalities," see 11 Ga. L. Rev. 297 (1977).

COMMENT

Subsection (a) carries over the concept of competency of witnesses from former OCGA Sec. 53-2-45, adding that the witness to a will must be age 14 or over. (Case law indicates that an individual who is age 14 or over is presumed competent to witness a will.) The competency of witnesses is defined in OCGA Sec. 24-9-1 and Article 1 of Title 9 of the Code. Subsection (b) carries forward the concept of former OCGA Sec. 53-2-44 that the witness must be competent only at the time of attestation, not necessarily at the time of probate.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-305, and former O.C.G.A. § 53-2-42 are included in the annotations for this Code section.

Statute requires that a testator have knowledge of the contents of the will at the time of execution, not that the testator recall the contents at some subsequent time. If the latter were required no validly executed will would be secure against failure of memory or mental aberration which so often result as time goes by. White v. Irwin, 220 Ga. 836, 142 S.E.2d 255 (1965).

Failure to have will read back insufficient as proof of lack of knowledge. — When a will was written as directed by the testator, and the evidence shows that the testator wishes were carefully and thoroughly discussed in the process and expressed in the will, the fact that the will was not read back to the testator after the will was written, in the absence of any other evidence that the testator did not know the contents of the will, is ineffective as showing a lack of knowledge on the part of the testator. Whitfield v. Pitts, 205 Ga. 259, 53 S.E.2d 549 (1949) (decided under former Code 1933, § 113-305).

"Clear and convincing evidence" not required. — Former O.C.G.A. § 53-2-42 contained no "clear and convincing evidence" standard of proof of the testator's knowledge of the will's contents. Lowe v. Young, 260 Ga. 890, 400 S.E.2d 619 (1991) (decided under former O.C.G.A. § 53-2-42).

Scrivener's testimony. — When there was evidence that the will was read to the testator — who was mentally alert, coherent, able to speak and respond to questions — and that the testator verbally assented to the will, the fact that this was the scrivener's testimony did not vitiate the evidence, but merely went to the evidence's credibility, which was a jury issue. Lowe v. Young, 260 Ga. 890, 400 S.E.2d 619 (1991) (decided under former O.C.G.A. § 53-2-42).

Cited in Pitman v. Oliver, 184 Ga. 840, 193 S.E. 884 (1937); Davis v. Aultman, 199 Ga. 129, 33 S.E.2d 317 (1945); Bodeker v. Purdy, 209 Ga. 648, 74 S.E.2d 856 (1953); Howington v. Howington, 242 Ga. 767, 251 S.E.2d 514 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 169, 269, 370. 80 Am. Jur. 2d, Wills, §§ 840 et seq., 885. 81 Am. Jur. 2d, Witnesses, § 637.

C.J.S. — 95 C.J.S., Wills, §§ 171, 223, 260 et seq., 582 et seq., 629.

ALR. — Knowledge derived from family correspondence as qualifying one to testify as to genuineness of handwriting, 7 A.L.R. 261.

Competency of husband or wife of beneficiary as attesting witness to will, 25 A.L.R. 308.

Manner of signing as affecting sufficiency of signature of testator, 31 A.L.R. 682; 42 A.L.R. 954; 114 A.L.R. 1110.

Presumption as to due execution of will from attestation, with or without attestation clause, 76 A.L.R. 617.

Sufficiency, as to form, of signature to holographic will, 75 A.L.R.2d 895.

Sufficiency of testator's acknowledgment of signature from his conduct and the surrounding circumstances, 7 A.L.R.3d 317.

Wills: testator's illiteracy or lack of knowledge of language in which will is written as affecting its validity, 37 A.L.R.3d 889.

Wills: necessity that attesting witness realize instrument was intended as will, 71 A.L.R.3d 877.

53-4-23. Testamentary gift to witness or witness's spouse.

(a) If a subscribing witness is also a beneficiary under the will, the witness shall be competent; but the testamentary gift to the witness shall be void unless there are at least two other subscribing witnesses to the will who are not beneficiaries under the will.

(b) An individual may be a witness to a will by which a testamentary gift is given to that individual's spouse, the fact going only to the credibility of the witness.

History. — Code 1981, § 53-4-23, enacted by Ga. L. 1996, p. 504, § 10.

Cross references. — Competency of witnesses generally, § 24-6-601 et seq.

Law reviews. — For article discussing competency requirement for witnesses to a will in Georgia, see 11 Ga. L. Rev. 297 (1977).

COMMENT

This section carries over former OCGA Sec. 53-2-45.

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 269, 274. 80 Am. Jur. 2d, Wills, § 885. 81 Am. Jur. 2d, Witnesses, § 637.

C.J.S. — 95 C.J.S., Wills, § 260 et seq.

ALR. — Competency of husband or wife of beneficiary as attesting witness to will, 25 A.L.R. 308.

53-4-24. Self-proved will or codicil.

(a) At the time of its execution or at any subsequent date during the lifetime of the testator and the witnesses, a will or codicil may be made self-proved and the testimony of the witnesses in the probate regarding such will may be made unnecessary by the affidavits of the testator and the attesting witnesses made before a notary public. The affidavit and certificate provided in subsection (b) of this Code section shall be the only prerequisites of a self-proved will or codicil.

(b) The affidavit shall be evidenced by a certificate, affixed with the official seal of the notary public, that is attached or annexed to the will or codicil, in form and content substantially as follows:

STATE OF GEORGIA

COUNTY of _____

Before me, the undersigned authority, on this day personally appeared _____, _____, and _____, known to me to be the testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and all of said individuals being by me duly sworn, _____, testator, declared to me and to the witnesses in my presence that said instrument is the last will and testament or a codicil to the last will and testament of the testator and that the testator had willingly made and executed it as a free act and deed for the purposes expressed therein. The witnesses, each on oath, stated to me in the presence and hearing of the testator that the testator had declared to them that the instrument is the testator's last will and testament or a codicil to the testator's last will and testament and that the testator executed the instrument as such and wished each of them to sign it as a witness; and under oath each witness stated further that the witness had signed the same as witness in the presence of the testator and at the testator's request; that the testator was 14 years of age or over and of sound mind; and that each of the witnesses was then at least 14 years of age.

_____
Testator

_____
Witness

_____
Witness

Sworn to and subscribed before me by _____, testator, and sworn to and subscribed before me by _____ and _____, witnesses, this _____ day of _____, _____.

(SEAL)

(Signed)_____
(Official Capacity of Officer)

(c) A self-proved will or codicil may be admitted to probate without the testimony of any subscribing witness, but otherwise it shall be treated no differently from a will or codicil that is not self-proved. In particular, without limiting the generality of the foregoing sentence, a self-proved will or codicil may be contested, revoked, or amended in exactly the same fashion as a will or codicil that is not self-proved.

History. — Code 1981, § 53-4-24, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1999, p. 81, § 53.

Law reviews. — For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004).

COMMENT

This section combines and carries over former OCGA Sec. 53-2-40.1 and portions of former OCGA Sec. 53-2-5. The self-proving procedure described in this section is available for both wills and codicils. See Code Sec. 53-11-7 for an explanation of the term "notary public," which is used in subsection (a).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-2-40.1 are included in the annotations for this Code section.

Location of signature. — Even though the testator did not sign the last page of the will relating to the disposition of the testator's estate, the will was valid since the testator's signature appeared on the next page, the self-proving affidavit. Hickox v. Wilson, 269 Ga. 180, 496 S.E.2d 711 (1998) (decided under former O.C.G.A. § 53-2-40.1).

Trial court erred in granting summary judgment pursuant to O.C.G.A. § 9-11-56 to will caveators in a will propounder's action seeking to probate a decedent's will since the decedent had sufficiently signed the will on the signature line of the self-proving clause, pursuant to former O.C.G.A. § 53-2-40.1, and there existed two competent witness signatures which were sufficient for attestation purposes; accordingly, the statutory requirements for proper execution of a will under former O.C.G.A. § 53-2-40 appeared to have been met and a jury issue was raised as to whether, in fact, the requirements were met. Miles v. Bryant, 277 Ga. 362, 589 S.E.2d 86 (2003) (decided under former O.C.G.A. § 53-2-40.1).

Admission of self-proved will. — Under O.C.G.A. § 53-4-24(c), when a will is self-proved, it "may be admitted to probate without the testimony of any subscribing witness." In fact, compliance with the requirements of execution are presumed without the live testimony or affidavits of witnesses; that is, under O.C.G.A. § 53-5-21(a), the affidavit creates a presumption regarding the prima facie case, subject to rebuttal. Singelman v. Singelman, 273 Ga. 894, 548 S.E.2d 343 (2001).

Self-proving affidavit attached to a testator's will created a rebuttable presumption that the signature and attestation requirements were met and allowed the will to be admitted into evidence without the testimony of the witnesses to the will or other proof that the formalities for the will's execution were met. Duncan v. Moore, 275 Ga. 656, 571 S.E.2d 771 (2002).

In a sister's challenge to her brother's will, the probate court erred in finding that the will was not sufficiently proven due to the executor's failure to produce the witnesses; the will had an attached self-proving affidavit and could be admitted without other proof that formalities of execution were met, pursuant to O.C.G.A. § 53-4-24. Reeves v. Webb, 297 Ga. 405, 774 S.E.2d 641 (2015).

Ruling upholding the 2010 will was affirmed because subscribing witnesses stated in an affidavit that the testatrix was mentally competent when the will was executed, it was self-proved, and contained an affidavit complying with O.C.G.A. § 53-4-24, which created a presumption that the will was executed with the requisite testamentary formalities, including that the testatrix had sufficient mental capacity to do so, and the challenger failed to rebut that presumption. Woods v. Stonecipher, 349 Ga. App. 698, 824 S.E.2d 633 (2019).

Cited in Tuttle v. Ryan, 282 Ga. 652, 653 S.E.2d 50 (2007).

ARTICLE 4

JOINT OR MUTUAL WILLS

53-4-30. Contract concerning succession.

A contract made on or after January 1, 1998, that obligates an individual to make a will or a testamentary disposition, not to revoke a will or a testamentary disposition, or to die intestate shall be express and shall be in a writing that is signed by the obligor.

History. — Code 1981, § 53-4-30, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 7.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, "January 1, 1998," was substituted for "the effective date of this Code section".

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

COMMENT

This section adds the requirement that a contract concerning succession must be express and in a writing signed by the obligor.

JUDICIAL DECISIONS

No express written contract found. — Because the only references to mutuality in a joint will under O.C.G.A. § 53-4-31 were in the title of the instrument and in the attestation clause, those references were insufficient to constitute either an "express statement" required by O.C.G.A. § 53-2-51 or an express written "contract" requirement of O.C.G.A. § 53-4-30, and there was no clear and definite agreement so as to trigger the fraud exception; accordingly, the surviving wife's deed of gift of real property to a nephew was not precluded, and the will was revocable because there was no express written contract to the contrary. Hodges v. Callaway, 279 Ga. 789, 621 S.E.2d 428 (2005).

Decedent's son, grandson, and friend did not prove a written will contract meeting the requirements of O.C.G.A. § 53-4-30 because handwritten memorandum discovered after the decedent's death did not reflect the consideration the son, grandson, and friend described as part of the will contract and did not embody any promise on the decedent's part, but the notes simply stated the decedent's wishes as to the disposal of property and the handling of the estate; the signature is, in fact, a mandatory statutory requirement under O.C.G.A. § 53-4-30. Newton v. Lawson, 313 Ga. App. 29, 720 S.E.2d 353 (2011).

Decedent's son, grandson, and friend did not prove a written will contract meeting the requirements of O.C.G.A. § 53-4-30 because the decedent's 2000 will could not be relied upon to satisfy O.C.G.A. § 53-4-30 since it was not a written contract promising to make a will for valuable consideration and was revoked upon the decedent's execution of a will in 2004; the 2000 will was a revocable will reflecting the decedent's testamentary intent at the time the decedent executed the will, and the decedent changed the testamentary intent when the decedent executed the 2004 will. Newton v. Lawson, 313 Ga. App. 29, 720 S.E.2d 353 (2011).

A 1997 will made by a father and mother was merely joint, and it contained no contractual language indicating any intent of the father or the mother that the will should be considered irrevocable;

therefore, after the father's death, the mother could make a new will that disinherited her daughter. Oravec v. Phillips, 298 Ga. 846, 785 S.E.2d 295 (2016).

Court erred by granting summary judgment to executor on breach of oral contract to make will counterclaim. — Trial court erred by granting partial summary judgment to an executor on a counterclaim brought by two stepchildren of the decedent asserting breach of an oral contract to make a will as the alleged contract predated the written will mandate of O.C.G.A. § 53-4-30 and testimony was provided that the oral agreement was witnessed and that the decedent assented to the contract. Therefore, the executor was not entitled to summary judgment on the breach of contract claim. Rushin v. Ussery, 298 Ga. App. 830, 681 S.E.2d 263 (2009).

Argument and jury instruction properly allowed. — Trial court properly allowed argument and a jury instruction on O.C.G.A. § 53-4-30 as the parties agreed that an individual's former father-in-law promised to convey certain property to the individual and the ex-wife, upon the father-in-law's death; the jury could resolve any conflicting theories as to the ownership of the land and the applicability of O.C.G.A. §§ 23-2-131(a) and 23-2-132. Jackson v. Neese, 276 Ga. App. 724, 624 S.E.2d 139 (2005).

53-4-31. Definitions.

(a) A joint will is one will signed by two or more testators that deals with the distribution of the property of each testator. A joint will may be probated as each testator's will.

(b) Mutual wills are separate wills of two or more testators that make reciprocal dispositions of each testator's property.

History. — Code 1981, § 53-4-31, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article advocating restructuring or repeal of former Code 1933, § 113-104, see 11 Ga. L. Rev. 297 (1977). For annual survey of wills, trusts, guardianships, and fiduciary administration, see 58 Mercer L. Rev. 423 (2006).

For comment on Webb v. Smith, 220 Ga. 809, 141 S.E.2d 899 (1965), see 2 Ga. St. B.J. 258 (1965).

COMMENT

Subsection (a) of this section defines joint wills. (See OCGA Sec. 53-5-5, which requires that a will remain on file in the probate court once it is probated. In the case of a joint will, a certified copy of the joint will would be used upon the death of the second testator to die.) Subsection (b) changes the definition of mutual wills to refer only to the separate wills of two or more testators that contain reciprocal dispositions of property. The term "mutual will" under former OCGA Sec. 53-2-51 referred to one joint will or two or more separate wills that either were based on express contract or contained an express statement that they were "mutual wills".

JUDICIAL DECISIONS

Analysis

General Consideration
Joint Wills
Mutual Wills
Intervention of Equity to Enforce Valid Contract

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-104, and former O.C.G.A. § 53-2-51 are included in the annotations for this Code section.

Cited in Ricketson v. Fox, 247 Ga. 162, 274 S.E.2d 556 (1981).

Joint Wills

Joint will defined. — Joint will is one where the same instrument is made the will of two or more persons and is jointly signed by them. Such a will contained in a single instrument is the will of each of the makers, and at the death of one, may be probated as that one's will, and be again probated at the death of the other as the will of the latter. Such wills are usually executed to make testamentary disposition of joint property. Wills may be joint or mutual, or both joint and mutual. Lampkin v. Edwards, 222 Ga. 288, 149 S.E.2d 708 (1966) (decided under former Code 1933, § 113-104).

Joint will. — Because the only references to mutuality in a joint will under O.C.G.A. § 53-4-31 were in the title of the instrument and in the attestation clause, those references were insufficient to constitute either an "express statement" required by O.C.G.A. § 53-2-51, or an express written "contract" requirement of O.C.G.A. § 53-4-30, and there was no clear and definite agreement so as to trigger the fraud exception; accordingly, the surviving wife's deed of gift of real property to a nephew was not precluded, and the will was revocable because there was no express written contract to the contrary. Hodges v. Callaway, 279 Ga. 789, 621 S.E.2d 428 (2005).

Joint will was revocable after one spouse's death. — A 1997 will made by a father and mother was merely joint, and the will contained no contractual language indicating any intent of the father or mother that the will should be considered irrevocable; therefore, after the father's death, the mother could make a new will that disinherited her daughter. Oravec v. Phillips, 298 Ga. 846, 785 S.E.2d 295 (2016).

Mutual Wills

Mutual wills defined. — Mutual wills may be defined as the separate wills of two persons, which are reciprocal in their provisions. Lampkin v. Edwards, 222 Ga. 288, 149 S.E.2d 708 (1966) (decided under former Code 1933, § 113-104); Citizens & S. Nat'l Bank v. Leaptrot, 225 Ga. 783, 171 S.E.2d 555 (1969) (decided under former Code 1933, § 113-104).

Mutual wills are those which contain reciprocal provisions giving the separate property of each testator to the other and such wills are specifically recognized by the law. Lampkin v. Edwards, 222 Ga. 288, 149 S.E.2d 708 (1966) (decided under former Code 1933, § 113-104).

Mutual wills result from a mutual intention on the part of the makers thereof to make reciprocal testamentary gifts one to the other and are not dependent for their validity upon any consideration therefor. Lampkin v. Edwards, 222 Ga. 288, 149 S.E.2d 708 (1966) (decided under former Code 1933, § 113-104); Citizens & S. Nat'l Bank v. Leaptrot, 225 Ga. 783, 171 S.E.2d 555 (1969) (decided under former Code 1933, § 113-104).

Wills are mutual, whether jointly or separately executed, when each testator has full knowledge of the testamentary intentions of the other and when each with such knowledge and while acting in concert makes a reciprocal gift of one's separate estate to the other. Lampkin v. Edwards, 222 Ga. 288, 149 S.E.2d 708 (1966) (decided under former Code 1933, § 113-104).

Purpose of subsection (b) was to eliminate the uncertainty that had crept into the law through the practice of courts, on an ad hoc basis, of finding wills to be "mutual" by implication. Coker v. Mosely, 259 Ga. 781, 387 S.E.2d 135 (1990) (decided under former O.C.G.A. § 53-2-51).

Acknowledgment that survivor might make new will destroys mutuality. — Joint will in which the testators provided for a certain distribution in case of simultaneous death, or if the survivor did not make another will, recognized specifically that the survivor might make a new will to replace the joint will; thus, the will was not mutual. McPherson v. McPherson, 254 Ga. 122, 327 S.E.2d 204

(1985) (decided under former O.C.G.A. § 53-2-51).

Intention of persons to make mutual wills may be inferred from the facts and circumstances under which such wills were made, and an express agreement between testators to execute mutual wills is not essential to their validity. Lampkin v. Edwards, 222 Ga. 288, 149 S.E.2d 708 (1966) (decided under former Code 1933, § 113-104).

Requirement for express contract. — An oral agreement between husband and wife that the husband's children would inherit under the wife's will was not sufficient evidence of an express contract to make mutual wills. Smith v. Turner, 223 Ga. App. 371, 477 S.E.2d 663 (1996) (decided under former Code 1933, § 113-104).

Contract or agreement between joint testators may be made out from the promises made in the will. Webb v. Smith, 220 Ga. 809, 141 S.E.2d 899 (1965), for comment, see 2 Ga. St. B.J. 258 (1965) (decided under former Code 1933, § 113-104); Johnson v. Harper, 246 Ga. 124, 269 S.E.2d 16 (1980) (decided under former Code 1933, § 113-104).

Agreements to make wills are not established merely because two persons simultaneously make reciprocal testamentary dispositions in favor of each other, when the language of such wills contain nothing to the effect that the instruments are the result of a contract. Webb v. Smith, 220 Ga. 809, 141 S.E.2d 899 (1965), for comment, see 2 Ga. St. B.J. 258 (1965) (decided under former Code 1933, § 113-104).

Contract or agreement between the joint testators to execute mutual wills may be made out from the promises made in the will. Citizens & S. Nat'l Bank v. Leaptrot, 225 Ga. 783, 171 S.E.2d 555 (1969) (decided under former Code 1933, § 113-104).

Fact that separate wills, with reciprocal provisions, have been executed by two persons simultaneously, or about the same time, is not of itself evidence of a contract between the testators, but such a contract may appear from the terms of the will, by direct reference or by inference. Citizens & S. Nat'l Bank v. Leaptrot, 225 Ga. 783, 171 S.E.2d 555 (1969) (decided under former Code 1933, § 113-104).

Ample consideration for a husband's promise to devise property to his wife for life, provision to be made for a third person upon the death of the testator, is found in the promise of the wife to make a similar testamentary distribution on her part, when the proof is ample that the wife had property of her own. Citizens & S. Nat'l Bank v. Leaptrot, 225 Ga. 783, 171 S.E.2d 555 (1969) (decided under former Code 1933, § 113-104).

Joint and mutual will. — Trial court did not err when the court concluded that the will of a husband and wife was joint and mutual and that the husband and wife had an enforceable contract not to revoke that will because the husband and wife each agreed to give the other certain described real and personal property as valuable consideration if one or the other survived, and they also agreed that if they died simultaneously, or at the survivor's death, that the residue of the estate would go to their four children, all of whom were biologically the husband's children and two of whom were biologically the wife's children; when the husband died the wife, as the survivor, benefitted from the joint and mutual will when she probated it as the husband's last will and testament and conveyed the husband's entire estate to herself. Davis v. Parris, 289 Ga. 201, 710 S.E.2d 757 (2011).

Simultaneous execution of wills containing reciprocal dispositions. — General rule is that, if two persons execute wills at the same time, either by one or two instruments, making reciprocal dispositions in favor of each other, the mere execution of such wills does not impose such a legal obligation as will prevent revocation. Webb v. Smith, 220 Ga. 809, 141 S.E.2d 899 (1965), for comment, see 2 Ga. St. B.J. 258 (1965) (decided under former Code 1933, § 113-104).

It is the contract and not the mutual will which is irrevocable. Citizens & S. Nat'l Bank v. Leaptrot, 225 Ga. 783, 171 S.E.2d 555 (1969) (decided under former Code 1933, § 113-104).

Impact of divorce on mutual wills. — When the wills which the propounder

Mutual Wills (Cont'd)

and the testator made were mutual wills, then the revocation of the propounder's will by marriage would have revoked the other mutual will. King v. Bennett, 215 Ga. 345, 110 S.E.2d 772 (1959) (decided under former Code 1933, § 113-104).

Will made pursuant to an agreement between a husband and wife, and incorporated into the divorce decree between them, can be revoked by a subsequent will. Jones v. Jones, 231 Ga. 145, 200 S.E.2d 725 (1973) (decided under former Code 1933, § 113-104).

No express statement of mutual wills. — Under former O.C.G.A. § 53-2-51(b), as there was no express statement in both spouses' wills that the wills were mutual wills, the existence of mutual wills could not be established. Bandy v. Henderson, 284 Ga. 692, 670 S.E.2d 792 (2008) (decided under former O.C.G.A. § 53-2-51).

Intervention of Equity to Enforce Valid Contract

Interposition of equity necessary to prevent fraud where mutual wills based on valid contract. — When the mutual wills are the result of a contract based upon a valid consideration, and when, after the death of one of the parties, the survivor has accepted benefits under the will of the other which was executed pursuant to an agreement, equity will interpose to prevent fraud. This can be accomplished only through a court of equity, as the probate court has no jurisdiction to enforce such agreement. Citizens & S. Nat'l Bank v. Leaptrot, 225 Ga. 783, 171 S.E.2d 555 (1969) (decided under former Code 1933, § 113-104).

Existence and proof of contract required to invoke intervention of equity. — To enable one to invoke the intervention of equity, it is not sufficient that there are wills simultaneously made, and similar in their reciprocal provisions; but the existence of a clear and definite contract must be alleged and proved, either by evidence of an express agreement, or by unequivocal circumstances. Webb v. Smith, 220 Ga. 809, 141 S.E.2d 899 (1965) (decided under former Code 1933, § 113-104); Citizens & S. Nat'l Bank v. Leaptrot, 225 Ga. 783, 171 S.E.2d 555 (1969) (decided under former Code 1933, § 113-104).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, § 670.

C.J.S. — 97 C.J.S., Wills, §§ 2026, 2027, 2029 et seq.

ALR. — Right to revoke will executed pursuant to contract, 3 A.L.R. 172.

Right of beneficiary to enforce contract between third persons to provide for him by will, 33 A.L.R. 739; 73 A.L.R. 1395.

Inequality of estates as affecting joint and mutual wills, 148 A.L.R. 756.

Joint, mutual, and reciprocal wills, 169 A.L.R. 9.

Right of party to joint or mutual will, made pursuant to agreement as to disposition of property at death, to dispose of such property during life, 85 A.L.R.3d 8.

53-4-32. Effect of execution.

The execution of a joint will or of mutual wills does not create a presumption of a contract not to revoke the will or wills.

History. — Code 1981, § 53-4-32, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section clarifies that the execution of joint or mutual wills does not in and of itself create a presumption of a contract that the surviving testator will not

revoke his or her will. See Code. Sec. 53-4-30 for the requirements for making a valid contract not to revoke a will.

JUDICIAL DECISIONS

Joint will was revocable after one spouse's death. — A 1997 will made by a father and mother was merely joint, and the will contained no contractual language indicating any intent of the father or mother that the will should be considered irrevocable; therefore, after the father's death, the mother could make a new will that disinherited her daughter. Oravec v. Phillips, 298 Ga. 846, 785 S.E.2d 295 (2016).

53-4-33. Revocation.

(a) A joint will or mutual wills may be revoked by any testator in the same manner as any other will.

(b) Revocation of a joint will or a mutual will by one of the testators shall not revoke the will of any other testator.

History. — Code 1981, § 53-4-33, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article advocating restructuring or repeal of former Code 1933, § 113-104, see 11 Ga. L. Rev. 297 (1977).

For comment on Webb v. Smith, 220 Ga. 809, 141 S.E.2d 899 (1965), see 2 Ga. St. B.J. 258 (1965).

COMMENT

This section clarifies that joint wills and mutual wills may be revoked in the same manner as any other wills and changes former OCGA Sec. 53-2-51 so that the revocation of one joint will or mutual wills shall not result in the revocation of the other testator's portion of the joint will or of the other testator's mutual will.

JUDICIAL DECISIONS

Analysis

General Consideration
Joint Wills
Mutual Wills
Intervention of Equity to Enforce Valid Contract

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-104, and former O.C.G.A. § 53-2-51 are included in the annotations for this Code section.

Cited in Ricketson v. Fox, 247 Ga. 162, 274 S.E.2d 556 (1981).

Joint Wills

Joint will defined. — Joint will is one where the same instrument is made the will of two or more persons and is jointly signed by them. Such a will contained in a single instrument is the will of each of the makers, and at the death of one, may be probated as that one's will, and be again probated at the death of the other as the

Joint Wills (Cont'd)

will of the latter. Such wills are usually executed to make testamentary disposition of joint property. Wills may be joint or mutual, or both joint and mutual. Lampkin v. Edwards, 222 Ga. 288, 149 S.E.2d 708 (1966) (decided under former Code 1933, § 113-104).

Mutual Wills

Mutual wills defined. — Mutual wills may be defined as the separate wills of two persons, which are reciprocal in their provisions. Lampkin v. Edwards, 222 Ga. 288, 149 S.E.2d 708 (1966) (decided under former Code 1933, § 113-104); Citizens & S. Nat'l Bank v. Leaptrot, 225 Ga. 783, 171 S.E.2d 555 (1969) (decided under former Code 1933, § 113-104).

Mutual wills are those which contain reciprocal provisions giving the separate property of each testator to the other and such wills are specifically recognized by the law. Lampkin v. Edwards, 222 Ga. 288, 149 S.E.2d 708 (1966) (decided under former Code 1933, § 113-104).

Mutual wills result from a mutual intention on the part of the makers thereof to make reciprocal testamentary gifts one to the other and are not dependent for their validity upon any consideration therefor. Lampkin v. Edwards, 222 Ga. 288, 149 S.E.2d 708 (1966) (decided under former Code 1933, § 113-104); Citizens & S. Nat'l Bank v. Leaptrot, 225 Ga. 783, 171 S.E.2d 555 (1969) (decided under former Code 1933, § 113-104).

Wills are mutual, whether jointly or separately executed, when each testator has full knowledge of the testamentary intentions of the other and when each with such knowledge and while acting in concert makes a reciprocal gift of one's separate estate to the other. Lampkin v. Edwards, 222 Ga. 288, 149 S.E.2d 708 (1966) (decided under former Code 1933, § 113-104).

Purpose of subsection (b) was to eliminate the uncertainty that had crept into the law through the practice of courts, on an ad hoc basis, of finding wills to be "mutual" by implication. Coker v. Mosely, 259 Ga. 781, 387 S.E.2d 135 (1990) (decided under former O.C.G.A. § 53-2-51).

Acknowledgment that survivor might make new will destroys mutuality. — Joint will in which the testators provided for a certain distribution in case of simultaneous death, or if the survivor did not make another will, recognized specifically that the survivor might make a new will to replace the joint will; thus, the will was not mutual. McPherson v. McPherson, 254 Ga. 122, 327 S.E.2d 204 (1985) (decided under former O.C.G.A. § 53-2-51).

Intention of persons to make mutual wills may be inferred from the facts and circumstances under which such wills were made, and an express agreement between testators to execute mutual wills is not essential to their validity. Lampkin v. Edwards, 222 Ga. 288, 149 S.E.2d 708 (1966) (decided under former Code 1933, § 113-104).

Requirement for express contract. — An oral agreement between husband and wife that the husband's children would inherit under the wife's will was not sufficient evidence of an express contract to make mutual wills. Smith v. Turner, 223 Ga. App. 371, 477 S.E.2d 663 (1996) (decided under former Code 1933, § 113-104).

Contract or agreement between joint testators may be made out from the promises made in the will. Webb v. Smith, 220 Ga. 809, 141 S.E.2d 899 (1965), for comment, see 2 Ga. St. B.J. 258 (1965) (decided under former Code 1933, § 113-104); Johnson v. Harper, 246 Ga. 124, 269 S.E.2d 16 (1980) (decided under former Code 1933, § 113-104).

Contract or agreement between the joint testators to execute mutual wills may be made out from the promises made in the will. Citizens & S. Nat'l Bank v. Leaptrot, 225 Ga. 783, 171 S.E.2d 555 (1969) (decided under former Code 1933, § 113-104).

Agreements to make wills are not established merely because two persons simultaneously make reciprocal testamentary dispositions in favor of each other, when the language of such wills contain nothing to the effect that the instruments are the result of a contract. Webb v. Smith, 220 Ga. 809, 141 S.E.2d 899 (1965), for comment, see 2 Ga. St. B.J. 258 (1965) (de-

cided under former Code 1933, § 113-104).

Fact that separate wills, with reciprocal provisions, have been executed by two persons simultaneously, or about the same time, is not of itself evidence of a contract between the testators, but such a contract may appear from the terms of the will, by direct reference or by inference. Citizens & S. Nat'l Bank v. Leaptrot, 225 Ga. 783, 171 S.E.2d 555 (1969) (decided under former Code 1933, § 113-104).

Ample consideration for a husband's promise to devise property to his wife for life, provision to be made for a third person upon the death of the testator, is found in the promise of the wife to make a similar testamentary distribution on her part, when the proof is ample that the wife had property of her own. Citizens & S. Nat'l Bank v. Leaptrot, 225 Ga. 783, 171 S.E.2d 555 (1969) (decided under former Code 1933, § 113-104).

Simultaneous execution of wills containing reciprocal dispositions. — General rule is that, if two persons execute wills at the same time, either by one or two instruments, making reciprocal dispositions in favor of each other, the mere execution of such wills does not impose such a legal obligation as will prevent revocation. Webb v. Smith, 220 Ga. 809, 141 S.E.2d 899 (1965), for comment, see 2 Ga. St. B.J. 258 (1965) (decided under former Code 1933, § 113-104).

It is the contract and not the mutual will which is irrevocable. Citizens & S. Nat'l Bank v. Leaptrot, 225 Ga. 783, 171 S.E.2d 555 (1969) (decided under former Code 1933, § 113-104).

Impact of divorce on mutual wills. — When the wills which the propounder and the testator made were mutual wills, then the revocation of the propounder's will by marriage would have revoked the other mutual will. King v. Bennett, 215 Ga. 345, 110 S.E.2d 772 (1959) (decided under former Code 1933, § 113-104).

A will made pursuant to an agreement between a husband and wife, and incorporated into the divorce decree between them, can be revoked by a subsequent will. Jones v. Jones, 231 Ga. 145, 200 S.E.2d 725 (1973) (decided under former Code 1933, § 113-104).

No express statement of mutual wills. — Under former O.C.G.A. § 53-2-51(b), as there was no express statement in both spouses' wills that the wills were mutual wills, the existence of mutual wills could not be established. Bandy v. Henderson, 284 Ga. 692, 670 S.E.2d 792 (2008) (decided under former O.C.G.A. § 53-2-51).

Intervention of Equity to Enforce Valid Contract

Interposition of equity necessary to prevent fraud where mutual wills based on valid contract. — When the mutual wills are the result of a contract based upon a valid consideration, and when, after the death of one of the parties, the survivor has accepted benefits under the will of the other which was executed pursuant to an agreement, equity will interpose to prevent fraud. This can be accomplished only through a court of equity, as the probate court has no jurisdiction to enforce such agreement. Citizens & S. Nat'l Bank v. Leaptrot, 225 Ga. 783, 171 S.E.2d 555 (1969) (decided under former Code 1933, § 113-104).

Existence and proof of contract required to invoke intervention of equity. — To enable one to invoke the intervention of equity, it is not sufficient that there are wills simultaneously made, and similar in their reciprocal provisions; but the existence of a clear and definite contract must be alleged and proved, either by evidence of an express agreement, or by unequivocal circumstances. Webb v. Smith, 220 Ga. 809, 141 S.E.2d 899 (1965) (decided under former Code 1933, § 113-104); Citizens & S. Nat'l Bank v. Leaptrot, 225 Ga. 783, 171 S.E.2d 555 (1969) (decided under former Code 1933, § 113-104).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, § 670.

C.J.S. — 97 C.J.S., Wills, §§ 2026, 2027, 2029 et seq.

ALR. — Right to revoke will executed pursuant to contract, 3 A.L.R. 172.

Right of beneficiary to enforce contract between third persons to provide for him by will, 33 A.L.R. 739; 73 A.L.R. 1395.

Inequality of estates as affecting joint and mutual wills, 148 A.L.R. 756.

Joint, mutual, and reciprocal wills, 169 A.L.R. 9.

Right of party to joint or mutual will, made pursuant to agreement as to disposition of property at death, to dispose of such property during life, 85 A.L.R.3d 8.

ARTICLE 5

REVOCATION AND REPUBLICATION

53-4-40. Power of testator.

A will may be changed or revoked by the testator at any time prior to the testator's death.

History. — Code 1981, § 53-4-40, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article discussing types of unintended revocation in Georgia, see 14 Ga. B.J. 281 (1952). For article analyzing the Georgia law relating to revocation and republication of wills, comparing it with the laws of other states, and suggesting some changes, see 11 Ga. L. Rev. 297 (1977). For annual survey of law on wills, trusts, guardianships, and fiduciary administration, see 62 Mercer L. Rev. 365 (2010).

COMMENT

This section carries forward the first sentence of former OCGA Sec. 53-2-70. The second sentence of former OCGA Sec. 53-2-70 is repealed as unnecessary in light of the new section on joint and mutual wills contained in the preceding article.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-401, are included in the annotations for this Code section.

No revocation. — Trial court erred in denying a widow's motion for summary judgment affirming an order admitting a decedent's 2001 will to probate as the 2001 will was not expressly revoked since there was no evidence of a subsequent will or other written instrument that was executed, subscribed, and attested with the same formality as a will, which contained a statement expressly revoking earlier wills; there was no implied revocation of the 2001 will since an implied revocation by a subsequent inconsistent will would take effect only when a subsequent will became operative, and then was only effective as to inconsistencies between the later testamentary instrument and an earlier testamentary instrument, so the subsequent inconsistent will had to be a written document, and there was no written subsequent inconsistent will. Harper v. Harper, 281 Ga. 25, 635 S.E.2d 711 (2006).

Intentional obliteration of pertinent parts of will operates as revocation. — If testator, three years after the execution of a will, took a pen and obliterated the pertinent and material parts thereof, canceling the will and expressing the testator's intention in this respect, then the will was no longer effective, and when testator died the will was just so much paper. Cummings v. Cummings, 89 Ga. App. 529, 80 S.E.2d 204 (1954) (decided under former Code 1933, § 113-401).

Cancellation of material part of will

raises presumption of revocation. — When a paper found among a decedent's papers is offered for probate as a will, and appears to have been canceled or obliterated in a material part, a presumption arises that the cancellations or obliterations were made by the deceased, and that the deceased intended the papers to operate as a revocation. King v. Bennett, 215 Ga. 345, 110 S.E.2d 772 (1959) (decided under former Code 1933, § 113-401).

If the will offered for probate has been revoked for any reason, it is not the will of the testator, and a judgment refusing it probate must be rendered. Payne v. Payne, 229 Ga. 822, 194 S.E.2d 458 (1972) (decided under former Code 1933, § 113-401).

Cited in Morris v. Bullock, 185 Ga. 12, 194 S.E. 201 (1937); Regents of Univ. Sys. v. Trust Co., 186 Ga. 498, 198 S.E. 345 (1938); Driver v. Sheffield, 211 Ga. 316, 85 S.E.2d 766 (1955); Friedman v. Cohen, 215 Ga. 859, 114 S.E.2d 24 (1960); Lampkin v. Edwards, 222 Ga. 288, 149 S.E.2d 708 (1966); Simmons v. Davis, 240 Ga. 282, 240 S.E.2d 33 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 324, 325, 469, 470, 667, 709, 710.

C.J.S. — 95 C.J.S., Wills, §§ 1, 386.

ALR. — Right to revoke will executed pursuant to contract, 3 A.L.R. 172.

Validity, construction, and effect of provisions of will relating to its modification or revocation, 72 A.L.R. 871.

Admissibility of declarations by testator on issue of revocation of will, 79 A.L.R. 1493; 172 A.L.R. 354.

Necessity that physical destruction or mutilation of will be done in testator's presence in order to effect revocation, 100 A.L.R. 1520.

Inequality of estates as affecting joint and mutual wills, 148 A.L.R. 756.

Conflict of laws respecting revocation of will, 9 A.L.R.2d 1412.

Destruction or cancellation of one copy of will executed in duplicate, as revocation of other copy, 17 A.L.R.2d 805.

Wills: revocation as affected by invalidity of some or all of the dispositive provisions of later will, 28 A.L.R.2d 526.

Codicil as reviving revoked will or codicil, 33 A.L.R.2d 922.

Interlineations and changes appearing on face of will, 34 A.L.R.2d 619.

Spouse's right to take under other spouse's will as affected by antenuptial or postnuptial agreement or property settlement, 53 A.L.R.2d 475.

Construction and effect of statute providing that agreement made by a testator for sale or transfer of property disposed of by will previously made does not revoke or adeem such disposition, 62 A.L.R.2d 958.

Revocation of will as affecting codicil and vice versa, 7 A.L.R.3d 1143.

Admissibility of testator's declarations on issue of revocation of will, in his possession at time of his death, by mutilation, alteration, or cancellation, 28 A.L.R.3d 994.

Revocation of witnessed will by holographic will or codicil, where statute requires revocation by instrument of equal formality as will, 49 A.L.R.3d 1223.

Right of party to joint or mutual will, made pursuant to agreement as to disposition of property at death, to dispose of such property during life, 85 A.L.R.3d 8.

Establishment and effect, after death of one of the makers of joint, mutual, or reciprocal will, of agreement not to revoke will, 17 A.L.R.4th 167.

Sufficiency of evidence of nonrevocation of lost will not shown to have been inaccessible to testator—modern cases, 70 A.L.R.4th 323.

53-4-41. Intent.

In all cases of revocation, the intent to revoke is necessary.

History. — Code 1981, § 53-4-41, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward the first sentence of former OCGA Sec. 53-2-71. The second section of the former Code section, which provided that an express revocation clause would not act as a revocation if such was not the testator's intent, is repealed as unnecessary.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-405, are included in the annotations for this Code section.

Cited in Graham v. Stansell, 218 Ga. 832, 131 S.E.2d 103 (1963); Howard v. Cotton, 223 Ga. 118, 153 S.E.2d 557 (1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, § 508.

C.J.S. — 95 C.J.S., Wills, § 390.

ALR. — Effect of testator's attempted physical alteration of will after execution, 62 A.L.R. 1367; 24 A.L.R.2d 514.

Revocation by ratification or adoption of physical destruction or mutilation of will without testator's knowledge or consent in first instance, 99 A.L.R. 524.

Necessity that physical destruction or mutilation of will be done in testator's presence in order to effect revocation, 100 A.L.R. 1520.

Destruction or cancellation of one copy of will executed in duplicate, as revocation of other copy, 17 A.L.R.2d 805.

Revocation of will as affecting codicil and vice versa, 7 A.L.R.3d 1143.

Revocation of witnessed will by holographic will or codicil, where statute requires revocation by instrument of equal formality as will, 49 A.L.R.3d 1223.

Testator's failure to make new will, following loss of original will by fire, theft, or similar casualty, as constituting revocation of original will, 61 A.L.R.3d 958.

53-4-42. Express or implied revocation.

(a) A revocation may be express or implied.

(b) An express revocation occurs when the testator by writing or action expressly annuls a will. An express revocation takes effect instantly.

(c) An implied revocation results from the execution of a subsequent inconsistent will that does not by its terms expressly revoke the previous will. An implied revocation takes effect only when the subsequent inconsistent will becomes effective. If the subsequent inconsistent will fails to become effective from any cause, the implied revocation is not completed.

History. — Code 1981, § 53-4-42, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward the provisions of former OCGA Sec. 53-2-72. This section changes the former law by deleting the phrase in former OCGA Sec.

53-2-72(b) that would allow an express revocation to become effective "independently of the validity or ultimate fate of the will or other instrument containing the revocation." (This change is in accord with the provisions of Code Sec. 53-4-45, which explain the result that occurs when an instrument that contains an express revocation is itself later revoked.) As is indicated by Code Sec. 53-1-2, the term "will" includes the term "codicil". See Code Sec. 53-4-47 for the effect of an implied revocation.

JUDICIAL DECISIONS

Analysis

General Consideration
Express Revocation
Implied Revocation

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-402, are included in the annotations for this Code section.

Cited in Payne v. Payne, 213 Ga. 613, 100 S.E.2d 450 (1957); Jones v. Jones, 231 Ga. 145, 200 S.E.2d 725 (1973).

Express Revocation

Express revocation. — If testator, three years after the execution of a will, took a pen and obliterated the pertinent and material parts thereof, canceling the will and expressing the testator's intention in this respect, then the will was no longer effective, and when testator died the will was just so much paper. Cummings v. Cummings, 89 Ga. App. 529, 80 S.E.2d 204 (1954) (decided under former Code 1933, § 113-402).

No revocation. — Trial court erred in denying a widow's motion for summary judgment affirming an order admitting a decedent's 2001 will to probate as the 2001 will was not expressly revoked since there was no evidence of a subsequent will or other written instrument that was executed, subscribed, and attested with the same formality as a will, which contained a statement expressly revoking earlier wills; there was no implied revocation of the 2001 will since an implied revocation by a subsequent inconsistent will would take effect only when a subsequent will became operative, and then was only effective as to inconsistencies between the later testamentary instrument and an earlier testamentary instrument, so the subsequent inconsistent will had to be a written document, and there was no written subsequent inconsistent will. Harper v. Harper, 281 Ga. 25, 635 S.E.2d 711 (2006).

Implied Revocation

Implied revocation. — When the testator makes a different disposition of certain personal property bequeathed by the later will, this constitutes a revocation of the item as to this property in the former will. Cummings v. Cummings, 89 Ga. App. 529, 80 S.E.2d 204 (1954) (decided under former Code 1933, § 113-402).

If the testator gave a ring to the testator's son by will, the testator could revoke the bequest either by conveying the ring and giving the ring to another prior to the testator's death, so that the ring did not remain a part of the testator's estate when the testator died, or the testator could revoke this bequest in the will, or revoke the entire will. Cummings v. Cummings, 89 Ga. App. 529, 80 S.E.2d 204 (1954) (decided under former Code 1933, § 113-402).

Probate court properly denied admission to probate for a 1991 will due to an implied revocation by the 2001 will, pursuant to O.C.G.A. § 53-4-42(c), as the testator's act of replacing specific bequests in the first will with $100 bequest in the later will, and then changing the testator's wishes regarding a residuary clause, from all to the testator's then wife if she survived to a division into three in the later will, impliedly revoked the first will

Implied Revocation (Cont'd)

by the later will. Mitchell v. Mitchell, 279 Ga. 282, 612 S.E.2d 274 (2005).

Lapsed will is not tantamount to revoked will. — Subsequent will does not amount to a revocation of a former will by implication if the sole legatee of the subsequent will dies before the testator and the will therefore lapses before the death of the testator and fails. Miller v. Marchman, 214 Ga. 355, 104 S.E.2d 888 (1958) (decided under former Code 1933, § 113-402).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 471, 474, 479, 487.

C.J.S. — 95 C.J.S., Wills, § 398 et seq.

ALR. — Necessity that later will refer to earlier will in order to effect a revocation under statutes providing that a will may be revoked by a subsequent will declaring the revocation, 28 A.L.R. 691.

Necessity that physical destruction or mutilation of will be done in testator's presence in order to effect revocation, 100 A.L.R. 1520.

Possibility of avoiding or limiting effect of clause in later will purporting to revoke all former wills, 125 A.L.R. 936.

Admissibility of declarations by testator on issue of revocation of will, 172 A.L.R. 354.

Destruction or cancellation of one copy of will executed in duplicate, as revocation of other copy, 17 A.L.R.2d 805.

Wills: revocation as affected by invalidity of some or all of the dispositive provisions of later will, 28 A.L.R.2d 526.

Implied revocation of will by later will or codicil, 59 A.L.R.2d 11.

Revocation of will as affecting codicil and vice versa, 7 A.L.R.3d 1143.

Revocation of will by nontestamentary writing, 22 A.L.R.3d 1346.

Revocation of witnessed will by holographic will or codicil, where statute requires revocation by instrument of equal formality as will, 49 A.L.R.3d 1223.

53-4-43. Subsequent will or other written instrument.

An express revocation may be effected by a subsequent will or other written instrument that is executed, subscribed, and attested with the same formality as required for a will.

History. — Code 1981, § 53-4-43, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward subsection (a) of former OCGA Sec. 53-2-73. Subsection (b) of former OCGA Sec. 53-2-73 is replaced by Code Sec. 53-4-45. Section 53-4-45 describes the result when a subsequent will or other writing that revokes a will is itself revoked.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 3918, and former Code 1933, § 113-403, are included in the annotations for this Code section.

Unattested statements in will lack formality required to revoke. — While statements made in the handwriting of the deceased on the margin of will opposite items obliterated or canceled, designating a contrary disposition of the property covered by such items, but unattested, as well as a general unat-

tested statement written on the cover of the will declaring that the will was to be ineffective, and indicating a different testamentary scheme, would not operate as an express revocation in writing of the will, such declarations made in the handwriting of the testator would tend to support presumption of law that the material obliterations or cancellations were made by the testator for the purpose of revoking the will. Singleton v. Shewmake, 184 Ga. 785, 193 S.E. 232 (1917) (decided under former Civil Code 1910, § 3918).

Probate of a former will may be defeated upon proof of the execution of a later writing by the testator, which contained a clause revoking the prior will, and of the loss or destruction of the later instrument, without proof of the rest of the contents of the lost or destroyed instrument. Driver v. Sheffield, 211 Ga. 316, 85 S.E.2d 766 (1955) (decided under former Code 1933, § 113-403).

While revocation of a will cannot be established by proof of parol declarations by the testator, a clause in a later written instrument, properly executed by the testator, expressly revoking a former will is not rendered ineffective merely by the loss or destruction of the instrument which contains it, and proof of the revocation clause in a later lost or destroyed will may be made by parol. Driver v. Sheffield, 211 Ga. 316, 85 S.E.2d 766 (1955) (decided under former Code 1933, § 113-403).

Will revoked by subsequent will revived only by republication. — When a will has been expressly revoked by a subsequent will executed with the same formality and attested by the same number of witnesses as are requisite for the execution of a will, the revocation or destruction of the latter does not per se revive the former, but the former will can be revived only by republication. Driver v. Sheffield, 211 Ga. 316, 85 S.E.2d 766 (1955) (decided under former Code 1933, § 113-403).

No revocation. — Trial court erred in denying a widow's motion for summary judgment affirming an order admitting a decedent's 2001 will to probate as the 2001 will was not expressly revoked since there was no evidence of a subsequent will or other written instrument that was executed, subscribed, and attested with the same formality as a will, which contained a statement expressly revoking earlier wills; there was no implied revocation of the 2001 will since an implied revocation by a subsequent inconsistent will would take effect only when a subsequent will became operative, and then was only effective as to inconsistencies between the later testamentary instrument and an earlier testamentary instrument, so the subsequent inconsistent will had to be a written document, and there was no written subsequent inconsistent will. Harper v. Harper, 281 Ga. 25, 635 S.E.2d 711 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 484, 603.

C.J.S. — 95 C.J.S., Wills, § 398 et seq.

ALR. — Necessity that later will refer to earlier will in order to effect a revocation under statutes providing that a will may be revoked by a subsequent will declaring the revocation, 28 A.L.R. 691.

Revocation of later will as reviving earlier will, 28 A.L.R. 911; 162 A.L.R. 1072.

Competency of attesting witness who is not benefited by will except as it revokes an earlier will, 64 A.L.R. 1306.

Necessity that physical destruction or mutilation of will be done in testator's presence in order to effect revocation, 100 A.L.R. 1520.

Possibility of avoiding or limiting effect of clause in later will purporting to revoke all former wills, 125 A.L.R. 936.

Admissibility of declarations by testator on issue of revocation of will, 172 A.L.R. 354.

Destruction or cancellation of one copy of will executed in duplicate, as revocation of other copy, 17 A.L.R.2d 805.

Effect of testator's attempted physical alteration of will after execution, 24 A.L.R.2d 514.

Wills: revocation as affected by invalidity of some or all of the dispositive provisions of later will, 28 A.L.R.2d 526.

Revocation of will as affecting codicil and vice versa, 7 A.L.R.3d 1143.

Revocation of will by nontestamentary writing, 22 A.L.R.3d 1346.

Admissibility of testator's declarations on issue of revocation of will, in his possession at time of his death, by mutilation, alteration, or cancellation, 28 A.L.R.3d 994.

Revocation of witnessed will by holographic will or codicil, where statute requires revocation by instrument of equal formality as will, 49 A.L.R.3d 1223.

Claim for punitive damages in tort action as surviving death of tortfeasor or person wronged, 30 A.L.R.4th 707.

Sufficiency of evidence that will was not accessible to testator for destruction, in proceeding to establish lost will, 86 A.L.R.3d 980.

Revocation of prior will by revocation clause in lost will or other lost instrument, 31 A.L.R.4th 306.

Ademption or revocation of specific devise or bequest by guardian, committee, conservator, or trustee of mentally or physically incompetent testator, 84 A.L.R.4th 462.

53-4-44. Destruction or obliteration of will or material portion thereof.

An express revocation may be effected by any destruction or obliteration of the will done by the testator with an intent to revoke or by another at the testator's direction. The intent to revoke shall be presumed from the obliteration or cancellation of a material portion of the will, but such presumption may be overcome by a preponderance of the evidence.

History. — Code 1981, § 53-4-44, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 15.

Law reviews. — For article surveying developments in Georgia wills, trusts, and administration of estates law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 307 (1981). For article, "Wills, Trusts, and Administration of Estates," see 53 Mercer L. Rev. 499 (2001). For annual survey of law on wills, trusts, guardianships, and fiduciary administration, see 62 Mercer L. Rev. 365 (2010).

COMMENT

This section carries forward the provisions of former OCGA Sec. 53-2-74, with the exception of the last sentence (dealing with the presumption when an immaterial portion of the will is revoked), which is repealed as unnecessarily repetitious. The new Code section also deletes the reference to duplicates of wills.

JUDICIAL DECISIONS

Analysis

General Consideration
Pleading and Practice
1. Presumption of Revocation
2. Proof Required to Rebut Presumption
3. Burden of Proof
4. Doctrine of Dependent Relative Revocation

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 3919, former Code 1933, § 113-404, and former O.C.G.A. § 53-2-74 are included in the annotations for this Code section.

Statute requires intent to revoke and actual destruction of will. — An intention to revoke a will and actual destruction of the will are both necessary to effect a revocation which provides for express revocation by any destruction or obliteration of the will. Payne v. Payne, 213 Ga. 613, 100 S.E.2d 450 (1957) (decided under former Code 1933, § 113-404).

Destroying of a will without intention to revoke the will would not revoke the will, neither would the intention to destroy a will without actually doing so revoke the will; there must be both. Payne v. Payne, 213 Ga. 613, 100 S.E.2d 450 (1957) (decided under former Code 1933, § 113-404).

Reason that the intention of the testator in making marks or in writing a new instrument is material is that joint operation of act and intention is necessary to revoke a will. Carter v. First United Methodist Church, 246 Ga. 352, 271 S.E.2d 493 (1980) (decided under former Code 1933, § 113-404).

Question of whether or not canceled provision is "material" is one of law. Carter v. First United Methodist Church, 246 Ga. 352, 271 S.E.2d 493 (1980) (decided under former Code 1933, § 113-404).

Drawing of pencil lines through provisions of a will is a sufficient "canceling." Carter v. First United Methodist Church, 246 Ga. 352, 271 S.E.2d 493 (1980) (decided under former Code 1933, § 113-404).

How far the cancellation or obliteration must extend before presumption of revocation will arise is not settled. Ellis v. O'Neal, 175 Ga. 652, 165 S.E. 751 (1932) (decided under former Civil Code 1910, § 3919).

"Material" obliteration. — Obliteration of the names of two of the four beneficiaries, whom the testator designated were to take "equally, share and share alike, per stirpes," was material because the obliteration directly affected the distribution of all property in the estate. This finding of a material obliteration gave rise to a rebuttable presumption under O.C.G.A. § 53-4-44 that the testator intended to revoke the entire will. Lovell v. Anderson, 272 Ga. 675, 533 S.E.2d 64 (2000).

Markings on a will described as smudges or a water stain, and that did not obscure names thereon, were not sufficient evidence of actual cancellation or obliteration to prove revocation. Wells v. Jackson, 265 Ga. 181, 453 S.E.2d 690 (1995) (decided under former O.C.G.A. § 53-2-74).

Will found among testator's effects in vehicle. — Because a vehicle may be particularly personal to the vehicle's owner, it may be a repository for a testator's effects; thus, a caveator satisfied the requisite burden for purposes of summary judgment through the presumption of revocatory intent found in O.C.G.A.§ 53-4-44 and the common law presumption that the testator made the obliterations to the will when the will was found in the testator's pick-up truck along with other personal items. Lovell v. Anderson, 272 Ga. 675, 533 S.E.2d 64 (2000).

No proof of revocation. — Probate court did not err in granting summary judgment on the issue of revocation as there was no evidence the will was destroyed or revoked by another document. Milbourne v. Milbourne, 301 Ga. 111, 799 S.E.2d 785 (2017).

Cited in Jones v. Jones, 231 Ga. 145, 200 S.E.2d 725 (1973); Richards v. Tolbert, 232 Ga. 678, 208 S.E.2d 486 (1974); Havird v. Schlachter, 266 Ga. 718, 470 S.E.2d 657 (1996); Horton v. Burch, 267 Ga. 1, 471 S.E.2d 879 (1996); Lovell v. Anderson, 272 Ga. 675, 533 S.E.2d 64 (2000).

Pleading and Practice

1. Presumption of Revocation

Presumption of intent to revoke inferred from cancellation of material parts of will. — When an instrument found among a decedent's papers was offered for probate as decedent's will, and

Pleading and Practice (Cont'd)
1. Presumption of Revocation (Cont'd)

appeared to have been canceled or obliterated by marks drawn diagonally across certain material items thereof, the obliteration of which affected the testamentary scheme, a presumption arose that such cancellations or obliterations were made by the deceased, and that the deceased intended the markings to operate as a total revocation of the will. Singleton v. Shewmake, 184 Ga. 785, 193 S.E. 232 (1917) (decided under former Code 1933, § 113-404); King v. Bennett, 215 Ga. 345, 110 S.E.2d 772 (1959) (decided under former Code 1933, § 113-404).

When a will has been canceled or obliterated in a material part, a presumption of revocation arises, and the burden is on the propounder to show that no revocation was intended. Langan v. Cheshire, 208 Ga. 107, 65 S.E.2d 415 (1951) (decided under former Code 1933, § 113-404).

From destruction or cancellation of duplicate will. — Statements made in the handwriting of the deceased on the margin of a will opposite items obliterated or canceled, designating a contrary disposition of the property covered by such items, would tend to support the presumption of law that the material obliterations or cancellations were made by the testator for the purpose of revoking the will. Singleton v. Shewmake, 184 Ga. 785, 193 S.E. 232 (1917) (decided under former Civil Code 1910, § 3919).

When a testator who has executed a will in duplicate cancels or destroys one of the duplicates, the presumption is that the testator meant thereby to revoke the will. King v. Bennett, 215 Ga. 345, 110 S.E.2d 772 (1959) (decided under former Code 1933, § 113-404).

Statute plainly indicates that, when there has been a multiple execution of a will, the destruction of one of the executed copies by the maker of the will with intention to revoke the will has the effect of revoking all of the copies, and the same presumption of intention to revoke arises from the destruction of one of the duplicates as would arise if the destroyed copy were the only one. King v. Bennett, 215 Ga. 345, 110 S.E.2d 772 (1959) (decided under former Code 1933, § 113-404).

When the will when found among the papers of the testator was torn in four pieces, with the signature torn from the will, and missing, this certainly shows the will's cancellation in a material portion, the signature of a will being essential to the will's validity. This evidence of the condition of the original will, which was in the custody of the testator until the testator's death, and found among the testator's papers shortly after the testator's death, raised a presumption that the cancellation was done by the testator and that the testator intended to revoke the will. King v. Bennett, 215 Ga. 345, 110 S.E.2d 772 (1959) (decided under former Code 1933, § 113-404).

In a will contest the cross-propounders, in seeking to probate a copy of a material portion of a will, the original of which portion they asserted had been destroyed, had the burden of overcoming the presumption that the destruction had been done by the testator personally with the intention to revoke, and the trial judge erred in failing to instruct the jury that the burden rested on the cross-propounders to prove that the copy offered by them was in substance and intent the same as the original. Sheffield v. Sheffield, 215 Ga. 546, 111 S.E.2d 218 (1959) (decided under former Code 1933, § 113-404).

Presumption that testator made cancellations or obliterations. — When the paper is found among the testator's effects, there is also a presumption that the testator made the cancellations or obliterations. Ellis v. O'Neal, 175 Ga. 652, 165 S.E. 751 (1932) (decided under former Civil Code 1910, § 3919); Carter v. First United Methodist Church, 246 Ga. 352, 271 S.E.2d 493 (1980) (decided under former Code 1933, § 113-404).

When there is no direct or circumstantial evidence that alterations in a will were made after the execution of the will, it must be presumed that the alterations were made by the testator, if the will was in the testator's custody until the time of the testator's death. Jordan v. Hayes, 225 Ga. 697, 171 S.E.2d 496 (1969) (decided under former Code 1933, § 113-404).

Burden is on the caveators to show that alterations in a will were not made prior to the execution of the will. Jordan v. Hayes, 225 Ga. 697, 171 S.E.2d 496 (1969) (decided under former Code 1933, § 113-404).

When there is no contention that alterations in an instrument were not made by the maker of the instrument, and there is no evidence that the alterations were made subsequently to the instrument's signing, the presumption of law is that the alterations were made prior to the signing. Jordan v. Hayes, 225 Ga. 697, 171 S.E.2d 496 (1969) (decided under former Code 1933, § 113-404).

2. Proof Required to Rebut Presumption

Proof required to rebut presumption of revocation generally. — When there was no dispute as to the cancellation of material parts of the will and as to written declarations by the testator declaring the testator's will ineffective and no evidence to indicate that the testator intended to revoke only the canceled items, the statutory presumption as to a revocation of the entire will was not rebutted. Singleton v. Shewmake, 184 Ga. 785, 193 S.E. 232 (1917) (decided under former Civil Code 1910, § 3919).

Presumption of revocation may be rebutted, among other ways, by proof that a will was lost or destroyed prior to the death of the testator without the testator's consent, and that, when evidence to such effect is submitted, the question whether the presumption has been overcome is for determination by the jury, in view of all of the evidence and circumstances in the case, and the credibility attributed by the jury to the witnesses. Saliba v. Saliba, 202 Ga. 791, 44 S.E.2d 744 (1947) (decided under former Code 1933, § 113-404).

Judge may instruct the jury to the effect that the presumption in favor of revocation may be rebutted by showing that the will was not destroyed by the testator, or that if the testator did destroy the will, the testator did not thereby intend to revoke the will; provided only that such an instruction, like others, must be supported by sufficient evidence. Saliba v. Saliba, 202 Ga. 791, 44 S.E.2d 744 (1947) (decided under former Code 1933, § 113-404).

Presumption must be rebutted by evidence showing the obliterations and cancellations were not done with the intent to revoke the whole will. Howard v. Cotton, 223 Ga. 118, 153 S.E.2d 557 (1967) (decided under former Code 1933, § 113-404).

Declarations of testator are admissible in evidence to support or to rebut a presumption of revocation. King v. Bennett, 215 Ga. 345, 110 S.E.2d 772 (1959) (decided under former Code 1933, § 113-404).

When the revocation of a will must be presumed because of the will's destruction in a material part, declarations of the testator are admissible to support or rebut the presumption that the destruction was the act of the testator with the intention to revoke. King v. Bennett, 215 Ga. 345, 110 S.E.2d 772 (1959) (decided under former Code 1933, § 113-404).

Presumption of revocation not raised. — In a suit asserting undue influence and seeking revocation of a testator's will, the trial court did not err in granting summary judgment to the defendant on the issue of revocation during the presentation of the plaintiff's case-in-chief because, under the change set forth in O.C.G.A. § 53-4-44 from O.C.G.A. § 53-2-74, the obliteration involved in the case, not being made on the original will, did not raise the presumption of revocation. Since the presumption was essential to the plaintiff's claim of revocation, the trial court did not err in granting summary judgment to the defendant on that claim. Morrison v. Morrison, 282 Ga. 866, 655 S.E.2d 571 (2008).

Will not revoked by cancelling portions. — Testator only indicated a desire to cancel certain portions of the testator's will, but the testator did not indicate an intent to revoke the will; the testator struck through the names of all successor beneficiaries of a trust estate as well as language nominating a certain person as a successor trustee, the testator initialed these struck through parts, and the testator named a certain person as the testator's successor beneficiary, but the testator made no other changes to the will.

Pleading and Practice (Cont'd)
2. Proof Required to Rebut Presumption (Cont'd)

Peterson v. Harrell, 286 Ga. 546, 690 S.E.2d 151 (2010).

3. Burden of Proof

Statute places burden of proof on propounder to rebut presumption of revocation. — When alterations appear on the face of a will, and other alterations on portions of the will which have previously been incorporated in a codicil, the alterations are material as regards the codicil, since the alterations concern the very purpose and subject matter of the codicil, but if the alterations and obliterations not incorporated by, and later to, the codicil were not intended as a revocation of the codicil, the burden was on the propounders to show that fact. Langan v. Cheshire, 208 Ga. 107, 65 S.E.2d 415 (1951) (decided under former Code 1933, § 113-404).

Burden is placed upon the propounder to rebut the presumption with evidence showing no intention to revoke. Howard v. Cotton, 223 Ga. 118, 153 S.E.2d 557 (1967) (decided under former Code 1933, § 113-404).

As a general rule, the burden is on a person attacking a paper offered for probate as a will to sustain the grounds of the propounder's attack. But by express provision, when a will has been canceled or obliterated in a material part, a presumption of revocation arises, and the burden is on the propounder to show that no revocation was intended. Carter v. First United Methodist Church, 246 Ga. 352, 271 S.E.2d 493 (1980) (decided under former Code 1933, § 113-404).

4. Doctrine of Dependent Relative Revocation

Doctrine of dependent relative revocation. — Doctrine of dependent relative revocation (conditional revocation) is a doctrine of presumed intention, and has grown up as a result of an effort which courts always make to arrive at the real intention of the testator. Carter v. First United Methodist Church, 246 Ga. 352, 271 S.E.2d 493 (1980) (decided under former Code 1933, § 113-404).

Rebuttal by propounder shifts burden of proof to caveator. — Evidence that old will, with pencil lines drawn through property disposition provisions, was found among testator's personal papers folded together with later writing making a somewhat different disposition of the testator's property was some evidence tending to establish that the cancellation and the making of a new will were parts of one scheme, and the revocation of the old will was so related to the making of the new as to be dependent upon it; this evidence was sufficient to rebut the statutory presumption of revocation and to give rise to a presumption in favor of the propounder under the doctrine of dependent relative revocation or conditional revocation, thus shifting the burden of proof to the caveator to prove, in essence, that decedent would have preferred intestacy. Carter v. First United Methodist Church, 246 Ga. 352, 271 S.E.2d 493 (1980) (decided under former Code 1933, § 113-404).

No presumption canceled will preferred instead of intestacy. — No mere presumption that the testator would have preferred canceled will instead of intestacy will be allowed to defeat testator's intention when it has been made to appear. Carter v. First United Methodist Church, 246 Ga. 352, 271 S.E.2d 493 (1980) (decided under former Code 1933, § 113-404).

For articulation of the doctrine of dependent relative revocation (conditional revocation), see Carter v. First United Methodist Church, 246 Ga. 352, 271 S.E.2d 493 (1980) (decided under former Code 1933, § 113-404).

Failure to apply doctrine of dependent relative revocation. — Trial court did not err by failing to apply the doctrine of dependent relative revocation to revive the decedent's 1988 will because based on the attorney's trial testimony, the trial court properly found that the markings on the original 1988 will that the decedent brought to a June 2004 meeting with the attorney were so extensive that it could not be determined, even by an experienced lawyer, what decedent intended to

remove and what, if anything, was intended to remain. Mosley v. Lancaster, 296 Ga. 862, 770 S.E.2d 873 (2015).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 507 et seq., 522, 572.

C.J.S. — 95 C.J.S., Wills, §§ 390, 410, 411, 412.

ALR. — Effect of testator's attempted physical alteration of will after execution, 62 A.L.R. 1367; 24 A.L.R.2d 514.

Revocation by ratification or adoption of physical destruction or mutilation of will without testator's knowledge or consent in first instance, 99 A.L.R. 524.

Necessity that physical destruction or mutilation of will be done in testator's presence in order to effect revocation, 100 A.L.R. 1520.

Destruction or cancellation of one copy of will executed in duplicate, as revocation of other copy, 17 A.L.R.2d 805.

Revocation of will as affecting codicil and vice versa, 7 A.L.R.3d 1143.

Admissibility of testator's declarations on issue of revocation of will, in his possession at time of his death, by mutilation, alteration, or cancellation, 28 A.L.R.3d 994.

Testator's failure to make new will, following loss of original will by fire, theft, or similar casualty, as constituting revocation of original will, 61 A.L.R.3d 958.

Sufficiency of evidence that will was not accessible to testator for destruction, in proceeding to establish lost will, 86 A.L.R.3d 980.

Ademption or revocation of specific devise or bequest by guardian, committee, conservator, or trustee of mentally or physically incompetent testator, 84 A.L.R.4th 462.

53-4-45. Revival or republication of previous will.

(a) If a will or other written instrument that expressly revoked a previous will in its entirety is revoked by a later will or other written instrument, as described in Code Section 53-4-43, the previous will remains revoked unless it is revived. The previous will is revived if it appears from the terms of the later will or other written instrument that the testator intended the previous will to take effect.

(b) If a will or other written instrument that expressly revoked a previous will in its entirety is revoked by an act, as described in Code Section 53-4-44, the previous will remains revoked unless it is revived. The previous will is revived if it appears from the circumstances of the revocation of the will or other written instrument or from the testator's contemporaneous or subsequent declarations that the testator intended the previous will to take effect.

(c) If a will or other written instrument that expressly revoked or amended a previous will in part is revoked by a later will or other written instrument, as described in Code Section 53-4-43, the revoked or amended part of the previous will is revived to the extent it appears from the terms of the later will or other written instrument that the testator intended the previous will to take effect.

(d) If a will or other written instrument that expressly revoked or amended a previous will in part is revoked by an act, as described in

Code Section 53-4-44, the revoked or amended part of the previous will is revived unless it is evident from the circumstances of the revocation of the will or other written instrument or from the testator's contemporaneous or subsequent declarations that the testator did not intend the revoked or amended part of the previous will to take effect as executed.

(e) If a will or other written instrument that expressly revoked a previous will in whole or in part is revoked by a later will or other written instrument, as described in Code Section 53-4-43, or by an act, as described in Code Section 53-4-44, and the previous will or any revoked or amended portion is not revived in accordance with the provisions of this Code section, the previous will may be republished in whole or in part in accordance with Code Section 53-4-50.

History. — Code 1981, § 53-4-45, enacted by Ga. L. 1996, p. 504, § 10.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, "Code Section" was substituted for "Code" in subsections (c) and (d).

COMMENT

This new Code section replaces former OCGA Sec. 53-2-73(b). The section is relevant in cases in which a previous will or part of a previous will has been expressly revoked or amended by a will or other written instrument ("revoking instrument") and subsequently that revoking instrument is itself revoked. (This Code section is not necessary in the case of an implied revocation because, as stated in Code Sec. 53-4-42, an implied revocation only becomes effective if the revoking instrument is still in place when the testator dies.) The revocation of the revoking instrument may occur by way of a subsequent will or other formal writing (as described in Code Sec. 53-4-43) or by an act of revocation (as described in Code Sec. 53-4-44). If the revoking instrument had revoked the previous will in its entirety, the presumption is that the previous will remains revoked (that is, the previous will is not revived) when the revoking instrument is itself revoked. This presumption may be overcome if the terms of the will or other writing that revokes the revoking instrument or the circumstances surrounding the act of revocation of the revoking instrument (including statements made by the testator) indicate that the testator intended to revive the previous will. If the previous will had been only partially revoked or amended by the revoking instrument, the previous will is presumed to be revived when the revoking instrument is revoked unless the terms of the formal writing that revokes the revoking instrument or the circumstances surrounding the act of revocation of the revoking instrument (including statements made by the testator) indicate that the testator intended that the revoked or amended provisions would not be revived. Subsection (e) provides that, even if the previous will or a portion of the previous will is not revived by virtue of the application of the first four subsections, it is still possible to republish the previous will, using the procedure described in Code Sec. 53-4-50. This new Code section is meant to supplement rather than replace the doctrine of dependent relative revocation as it has developed in the Georgia case law.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 3918, and former Code 1933, § 113-403,

are included in the annotations for this Code section.

Unattested statements in will lack formality required to revoke. — While statements made in the handwriting of the deceased on the margin of will opposite items obliterated or canceled, designating a contrary disposition of the property covered by such items, but unattested, as well as a general unattested statement written on the cover of the will declaring that the will was to be ineffective, and indicating a different testamentary scheme, would not operate as an express revocation in writing of the will, such declarations made in the handwriting of the testator would tend to support presumption of law that the material obliterations or cancellations were made by the testator for the purpose of revoking the will. Singleton v. Shewmake, 184 Ga. 785, 193 S.E. 232 (1917) (decided under former Civil Code 1910, § 3918).

Probate of a former will may be defeated upon proof of the execution of a later writing by the testator, which contained a clause revoking the prior will, and of the loss or destruction of the later instrument, without proof of the rest of the contents of the lost or destroyed instrument. Driver v. Sheffield, 211 Ga. 316, 85 S.E.2d 766 (1955) (decided under former Code 1933, § 113-403).

While revocation of a will cannot be established by proof of parol declarations by the testator, a clause in a later written instrument, properly executed by the testator, expressly revoking a former will is not rendered ineffective merely by the loss or destruction of the instrument which contains it, and proof of the revocation clause in a later lost or destroyed will may be made by parol. Driver v. Sheffield, 211 Ga. 316, 85 S.E.2d 766 (1955) (decided under former Code 1933, § 113-403).

Will revoked by subsequent will revived only by republication. — When a will has been expressly revoked by a subsequent will executed with the same formality and attested by the same number of witnesses as are requisite for the execution of a will, the revocation or destruction of the latter does not per se revive the former, but the former will can be revived only by republication. Driver v. Sheffield, 211 Ga. 316, 85 S.E.2d 766 (1955) (decided under former Code 1933, § 113-403).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 484, 603.

C.J.S. — 95 C.J.S., Wills, § 398 et seq.

ALR. — Necessity that later will refer to earlier will in order to effect a revocation under statutes providing that a will may be revoked by a subsequent will declaring the revocation, 28 A.L.R. 691.

Revocation of later will as reviving earlier will, 28 A.L.R. 911; 162 A.L.R. 1072.

Competency of attesting witness who is not benefited by will except as it revokes an earlier will, 64 A.L.R. 1306.

Necessity that physical destruction or mutilation of will be done in testator's presence in order to effect revocation, 100 A.L.R. 1520.

Possibility of avoiding or limiting effect of clause in later will purporting to revoke all former wills, 125 A.L.R. 936.

Admissibility of declarations by testator on issue of revocation of will, 172 A.L.R. 354.

Destruction or cancellation of one copy of will executed in duplicate, as revocation of other copy, 17 A.L.R.2d 805.

Effect of testator's attempted physical alteration of will after execution, 24 A.L.R.2d 514.

Wills: revocation as affected by invalidity of some or all of the dispositive provisions of later will, 28 A.L.R.2d 526.

Revocation of will as affecting codicil and vice versa, 7 A.L.R.3d 1143.

Revocation of will by nontestamentary writing, 22 A.L.R.3d 1346.

Admissibility of testator's declarations on issue of revocation of will, in his possession at time of his death, by mutilation, alteration, or cancellation, 28 A.L.R.3d 994.

Revocation of witnessed will by holographic will or codicil, where statute requires revocation by instrument of equal formality as will, 49 A.L.R.3d 1223.

Claim for punitive damages in tort action as surviving death of tortfeasor or person wronged, 30 A.L.R.4th 707.

Sufficiency of evidence that will was not accessible to testator for destruction, in proceeding to establish lost will, 86 A.L.R.3d 980.

Revocation of prior will by revocation clause in lost will or other lost instrument, 31 A.L.R.4th 306.

Ademption or revocation of specific devise or bequest by guardian, committee, conservator, or trustee of mentally or physically incompetent testator, 84 A.L.R.4th 462.

53-4-46. Presumption of intent.

(a) A presumption of intent to revoke arises if the original of a testator's will cannot be found to probate.

(b) A copy of a will may be offered for probate in accordance with Chapter 5 of this title in lieu of the original will if the original cannot be found to probate, provided that the copy is proved by a preponderance of the evidence to be a true copy of the original will and that the presumption of intent to revoke set forth in subsection (a) of this Code section is rebutted by a preponderance of the evidence.

History. — Code 1981, § 53-4-46, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 16.

Law reviews. — For article advocating repeal or amendment of this Code section, see 11 Ga. L. Rev. 297 (1977). For article, "Wills, Trusts, and Administration of Estates," see 53 Mercer L. Rev. 499 (2001).

COMMENT

This Code section replaces former OCGA Sec. 53-3-6.

JUDICIAL DECISIONS

Analysis

General Provisions
Probate of Copy of Will
1. In General
Proof Required
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General Provisions

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 2396, former Civil Code 1895, § 3289, former Civil Code 1910, § 3863, former Code 1933, § 136-611, and former O.C.G.A. § 53-3-6 are included in the annotations for this Code section.

Construction. — To the extent Lyons v. Bloodworth, 199 Ga. 44 (1945) involves a burden of proof other than preponderance of the evidence to overcome the presumption of revocation, it has been superseded by the Georgia General Assembly's 1996 enactment of O.C.G.A. § 54-4-46(b), specifying preponderance of the evidence as the burden of proof. Johnson v. Fitzgerald, 294 Ga. 160, 751 S.E.2d 313 (2013).

Finding that presumption rebutted upheld in absence of transcript from probate court. — State's highest court accepted a probate court's findings that a child's evidence that the parent's will had been revoked lacked credibility, that the

presumption of revocation had been rebutted, and that the proffered copy was a true copy as the child did not provide the state's highest court with a transcript of the probate court hearing. Tanksley v. Parker, 278 Ga. 877, 608 S.E.2d 596 (2005).

Cited in Batton v. Watson, 13 Ga. 63, 58 Am. Dec. 504 (1853); Ponce v. Underwood, 53 Ga. 601 (1876); Hartz v. Sobel, 136 Ga. 565, 71 S.E. 995, 38 L.R.A. (n.s.) 797, 1912D Ann. Cas. 165 (1911); Smith v. Smith, 151 Ga. 150, 106 S.E. 95 (1921); Bond v. Reid, 152 Ga. 481, 110 S.E. 281 (1922); Walden v. Mahnks, 178 Ga. 825, 174 S.E. 538 (1934); Callaway v. Callaway, 192 Ga. 25, 14 S.E.2d 473 (1941); Lyons v. Bloodworth, 199 Ga. 44, 33 S.E.2d 314 (1945); Baker v. Henderson, 208 Ga. 698, 69 S.E.2d 278 (1952); Woo v. Markwalter, 210 Ga. 156, 78 S.E.2d 473 (1953); Dockery v. Findley, 216 Ga. 807, 120 S.E.2d 608 (1961); Payne v. Payne, 229 Ga. 822, 194 S.E.2d 458 (1972); Helms v. Robertson, 236 Ga. 297, 223 S.E.2d 636 (1976); Melton v. Shaw, 237 Ga. 250, 227 S.E.2d 326 (1976); Hanners v. Sistrunk, 245 Ga. 293, 264 S.E.2d 224 (1980); McBride v. Jones, 268 Ga. 869, 494 S.E.2d 319 (1998); Murchison v. Smith, 270 Ga. 169, 508 S.E.2d 641 (1998).

Probate of Copy of Will

1. In General

Will lost before testator's death. — Plain meaning of former Code 1933, § 53-3-6 was that when a will was lost before the death of the testator, a copy may not be probated. Woods v. Giedd, 257 Ga. 152, 356 S.E.2d 211 (1987) (decided under former O.C.G.A. § 53-3-6).

Issue of fact as to when will lost. — Genuine issue of fact as to whether a will was in a safe-deposit box at the time the box was opened, and thus could have been lost after the testator's death, precluded summary judgment against the propounders of an unsigned copy of the will. Woods v. Giedd, 257 Ga. 152, 356 S.E.2d 211 (1987) (decided under former O.C.G.A. § 53-3-6).

Section exhaustive. — There is no law for probating a copy of a will, except when the will has been lost or destroyed after the death of the testator, or without the testator's consent, under this statute. Godwin v. Godwin, 129 Ga. 67, 58 S.E. 652 (1907) (decided under former Civil Code 1895, § 3289).

Carbon copy of will may be probated as original will. — When the document sought to be probated was a carbon copy, but it was executed with the same formality as the original will at the same time, and its provisions were identical with those of the original will, and the propounder seeks to probate it as an original will, and not as the copy of a lost or destroyed will, it should properly be admitted to probate, unless it was revoked by the testator during the testator's lifetime. King v. Bennett, 215 Ga. 345, 110 S.E.2d 772 (1959) (decided under former Code 1933, § 113-611).

Proof Required

Standard of proof. — "Preponderance of the evidence" is the correct standard applied to overcome the presumption of revocation when an original will cannot be produced. Warner v. Reynolds, 273 Ga. 802, 546 S.E.2d 520 (2001).

Proof required to probate copy of destroyed or lost will. — In order to probate an alleged copy of a lost or destroyed will, it is necessary to prove, among other things, that the copy is in substance and intent the same as the original. Woodruff v. Woodruff, 182 Ga. 895, 187 S.E. 391 (1936) (decided under former Code 1933, § 113-611).

When cross-propounders contended that certain items of the will as originally executed by the testator had been deleted, changed, and destroyed, and sought to set up, establish, and probate what the cross-propounders contended to be a true copy of these items of the will as originally executed by the testator, the burden rested upon the cross-propounders of proving that the copy was in substance and intent the same as the original, and it was error for the court to fail to so instruct the jury. Nassau v. Sheffield, 211 Ga. 66, 84 S.E.2d 4 (1954) (decided under former Code 1933, § 113-611).

If a will was duly executed, and when propounded for probate it appears that certain provisions thereof have been

Proof Required (Cont'd)

changed, altered, or destroyed by a third person without the knowledge or consent of the testator, and it can be shown by the will itself, or by extrinsic evidence, what such stricken or destroyed provisions were, they can be restored, and the will as originally executed admitted to probate. Nassau v. Sheffield, 211 Ga. 66, 84 S.E.2d 4 (1954) (decided under former Code 1933, § 113-611).

Proof of execution not limited to testimony of subscribing witnesses. — Provision of former Code 1933, § 113-611, as to clear proof "by the subscribing witnesses and other evidence" no more limits proof of the execution of a will to the testimony of the subscribing witnesses than did former Code 1933, § 113-602, relating to probate in solemn form. Since former Code 1933, § 113-611 as to probate of a copy follows the procedure for probating an original will, except that it adds the clear-proof rule, there was no error in giving in charge the basic rule of former Code 1933, § 113-601. Saliba v. Saliba, 202 Ga. 791, 44 S.E.2d 744 (1947) (decided under former Code 1933, § 113-611).

Self-proving affidavit. — Proof of the execution of a will in case of probate in solemn form and proof of the execution of a will in a case to establish and probate a copy where the will is missing may be made in precisely the same manner and by the same character of evidence; and in both evidence other than the testimony of the subscribing witnesses, after the available witnesses have been produced at the hearing, is admissible for the purpose of proving the execution of the will, and in each this may be done despite the testimony of the witnesses against the will. Fletcher v. Gillespie, 201 Ga. 377, 40 S.E.2d 45 (1946) (decided under former Code 1933, § 113-611).

Statutory provision that the copy of a missing will be "clearly proved to be such by the subscribing witnesses and other evidence" does not limit proof of the execution of a will to the testimony of the subscribing witnesses. Fletcher v. Gillespie, 201 Ga. 377, 40 S.E.2d 45 (1946) (decided under former Code 1933, § 113-611).

In a will contest case where the testator's niece contested a will including her own daughter as a beneficiary, the later lost or destroyed will could be validated under former O.C.G.A. § 53-3-6(a) by uncontroverted evidence from the notary public who notarized the affidavit regarding the execution by the testator of a self-proving affidavit. Westmoreland v. Tallent, 274 Ga. 172, 549 S.E.2d 113 (2001) (decided under former O.C.G.A. § 53-3-6).

Proof provided to admit copy. — Probate court properly admitted a copy of a will for probate because the propounding executor had rebutted the presumption of revocation under O.C.G.A. § 53-4-46 with evidence of a trust agreement that was named in the will and by evidence of prior wills, which showed a consistent testamentary scheme. Johnson v. Fitzgerald, 294 Ga. 160, 751 S.E.2d 313 (2013).

Presumption of Revocation

1. In General

Presumption of revocation generally. — In every case when it is sought to have admitted to probate and record a copy of a lost or destroyed will in lieu of the original, the propounder is confronted with the presumption that the will was revoked by the testator. Saliba v. Saliba, 202 Ga. 791, 44 S.E.2d 744 (1947) (decided under former Code 1933, § 113-611).

In a will contest the cross-propounders, in seeking to probate a copy of a material portion of a will, the original of which portion the cross-propounders asserted had been destroyed, had the burden of overcoming the presumption that the destruction had been done by the testator personally with the intention to revoke, and the trial judge erred in failing to instruct the jury that the burden rested on the cross-propounders to prove that the copy offered by the cross-propounders was in substance and intent the same as the original. Sheffield v. Sheffield, 215 Ga. 546, 111 S.E.2d 218 (1959) (decided under former Code 1933, § 113-611).

When a will was lost, the presumption arose that the will was revoked, the trial court erred as a matter of law when

the court held that there must first be evidence of the condition of the will before the presumption is raised. Horton v. Burch, 267 Ga. 1, 471 S.E.2d 879 (1996) (decided under former O.C.G.A. § 53-3-6).

Revocation of prior will found. — Trial court properly determined that a decedent's 1998 will was revoked as the executor, who filed the will for probate, failed to rebut the presumption of revocation since the original was never found and evidence was presented that the decedent altered and made changes to the 1998 will based on consulting an attorney to make a new one and having two copies showing alterations and changes indicated on the copies. Mincey v. Deckle, 283 Ga. 579, 662 S.E.2d 126 (2008).

Requirements not satisfied for intent to revoke. — It was error for the superior court to direct a verdict in favor of a propounder because under O.C.G.A. § 53-4-46, the propounder was required to prove that the propounder's mother did not deliberately discard or destroy the original of the will with the purpose of revoking the will, but the propounder did not satisfy the propounder's statutory duty, and the propounder should have filed a petition to probate a copy of a will in lieu of a lost original, which would have notified the probate court of the appropriate standards and burdens of proof; the plain language of O.C.G.A. § 53-4-46(b) clearly requires that the presumption of intent to revoke be rebutted in order for a copy of a will to be probated, and Georgia law does not allow a propounder to probate a will without fulfilling the pertinent evidentiary requirements, even when no caveat has been filed. Tudor v. Bradford, 289 Ga. 28, 709 S.E.2d 235 (2011).

2. Rebuttal

Statute is awkwardly expressed, but, properly construed, the words "in every such case" refer to every case wherein it is sought to have admitted to probate and record a copy of a lost or destroyed will in lieu of an original; and therefore, when it is sought to prove and establish a will not to be found at the death of the testator, the propounder is confronted with the presumption that the will was revoked by the testator, and that presumption must be rebutted by proof. Harris v. Camp, 138 Ga. 752, 76 S.E. 40 (1912) (decided under former Civil Code 1910, § 3863).

Method of rebutting presumption of revocation. — On the trial of an application for the probate of a copy of an alleged lost will, the declaration of an heir of the decedent, to the effect that an original will had existed and that the heir had destroyed the will, is not, unless the declarant be a party to the proceeding, admissible in evidence in favor of the propounders. Under such circumstances, the declaration is mere hearsay and is not sufficient to rebut the presumption of revocation. Scott v. Maddox, 113 Ga. 795, 39 S.E. 500, 84 Am. St. R. 263 (1901) (decided under former Civil Code 1895, § 3289).

While the statute is awkwardly expressed, the rule is that a universal presumption of revocation may be rebutted in a number of ways: first, by proof that the will was lost or destroyed subsequently to the death of the testator; or, second, the presumption of revocation may be overcome by showing that the will was destroyed prior to death, provided however it will be also shown, for example, that the testator did not have possession of the instrument after the instrument's execution, or that while the will was still in existence the testator had lost the testator's testamentary capacity to annul the will, and that such mental incapacity continued up to the time of the testator's death. Saliba v. Saliba, 201 Ga. 577, 40 S.E.2d 511 (1946) (decided under former Code 1933, § 113-611).

Presumption of revocation may be rebutted, among other ways, by proof that a will was lost or destroyed prior to the death of the testator without the testator's consent, and that, when evidence to such effect is submitted, the question whether the presumption has been overcome is for determination by the jury, in view of all of the evidence and circumstances in the case, and the credibility attributed by the jury to the witnesses. Saliba v. Saliba, 202 Ga. 791, 44 S.E.2d 744 (1947) (decided under former Code 1933, § 113-611).

Declarations of the testator are admissible in evidence either to support or to rebut the presumption of revocation,

Presumption of Revocation (Cont'd)
2. Rebuttal (Cont'd)

although made at any time between the making of the will and the death of the testator, and although the declarations are not shown to have accompanied any particular act of revocation or attempted revocation; their admissibility not depending upon res gestae. Saliba v. Saliba, 202 Ga. 791, 44 S.E.2d 744 (1947) (decided under former Code 1933, § 113-611); Jackson v. Lamb, 121 Ga. App. 44, 172 S.E.2d 449 (1970) (decided under former Code 1933, § 113-611).

Presumption of revocation may be rebutted by circumstantial evidence as well as by direct evidence, and the facts and circumstances surrounding the making of a will were relevant for the purpose of showing that the testator had made a will that would inure to the benefit of the propounder, infant child of the testator's deceased brother; and also as showing circumstances tending to illustrate the probability or improbability of later revoking such will. Saliba v. Saliba, 202 Ga. 791, 44 S.E.2d 744 (1947) (decided under former Code 1933, § 113-611).

Rebuttal of the presumption of revocation of a will when only a copy is found could be made by circumstantial as well as by direct evidence, and when the direct evidence traces a will into the custody of the testator and there stops, it seems that the propounder can only assert that whatever may have happened to the will after the will's delivery to the testator, the testator did not revoke the will, and then submit circumstantial evidence, including declarations of the testator, if any, in support of such assertion. Saliba v. Saliba, 202 Ga. 791, 44 S.E.2d 744 (1947) (decided under former Code 1933, § 113-611).

Existence of sufficient rebuttal is question for jury. — Contents of the will must be proved and the presumption of revocation by the testator, which is raised by the latter clause of this statute be rebutted by such evidence as clearly satisfies the conscience of the jury, but this may be done by the subscribing witnesses, or any other competent testimony. Kitchens v. Kitchens, 39 Ga. 168, 99 Am. Dec. 453 (1869) (decided under former Code 1868, § 2396). See also Mosely v. Carr, 70 Ga. 333 (1883) (decided under former Code 1882, § 2431); Burge v. Hamilton, 72 Ga. 568 (1884) (decided under Code 1882, § 2431); Gillis v. Gillis, 96 Ga. 1, 23 S.E. 107, 51 Am. St. R. 121, 30 L.R.A. 143 (1895) (decided under former Civil Code 1895, § 3289); Harris v. Camp, 138 Ga. 752, 76 S.E. 40 (1912) (decided under former Civil Code 1910, § 3863).

Superior court erred in instructing the jury in a suit to probate a copy of a will, that, if the jury believes the alleged testator did not intentionally destroy the testator's will, then the form of their verdict would be, "We, the jury, find in favor of the will;" the error being that the case could not be concluded in favor of the propounder by a mere finding that the testator did not intentionally revoke the testator's will, but, over and beyond that, it would be necessary to find that the propounder had clearly proved the alleged copy "to be such." Saliba v. Saliba, 202 Ga. 791, 44 S.E.2d 744 (1947) (decided under former Code 1933, § 113-611).

Judge may instruct the jury to the effect that the presumption in favor of revocation may be rebutted by showing that the will was not destroyed by the testator, or that if the testator did destroy the will, the testator did not thereby intend to revoke the will; provided only that such an instruction, like others, must be supported by sufficient evidence. Saliba v. Saliba, 202 Ga. 791, 44 S.E.2d 744 (1947) (decided under former Code 1933, § 113-611).

Whether or not the presumption is rebutted by the evidence offered by the propounder is for the determination of the jury. Williams v. Swint, 239 Ga. 66, 235 S.E.2d 489 (1977) (decided under former Code 1933, § 113-611).

When evidence is submitted by a proponent of a will in an attempt to overcome a presumption of revocation, the question whether the presumption has been overcome is for determination by the jury in view of all the evidence and circumstances in the case, and the credibility attributed by the jury to the witnesses. Williams v. Swint, 239 Ga. 66, 235 S.E.2d 489 (1977) (decided under former Code 1933, § 113-611).

Question of whether the propounders carried the burden of overcoming the presumption that the original will was revoked was for the jury, and in reviewing the jury verdict, the evidence must be accepted which is most favorable to the party in whose favor the verdict was rendered. Hill v. Cochran, 258 Ga. 473, 371 S.E.2d 94 (1988) (decided under former O.C.G.A. § 53-3-6).

Presumption not rebutted. — Testator's fiance failed to rebut the presumption that the testator destroyed and intended to revoke the testator's original will created by O.C.G.A. § 53-4-46(a) although the testator's relationship with the testator's daughter was strained because the testator had control of the will, the lock box in which the will was kept had been broken into, and the testator had expressed dissatisfaction with the testator's fiance. Britt v. Sands, 294 Ga. 426, 754 S.E.2d 58 (2014).

Trial court did not err by failing to apply the doctrine of dependent relative revocation to revive the decedent's 1988 will because based on the attorney's trial testimony, the trial court properly found that the markings on the original 1988 will that the decedent brought to a June 2004 meeting with the attorney were so extensive that it could not be determined, even by an experienced lawyer, what the decedent intended to remove and what, if anything, was intended to remain. Mosley v. Lancaster, 296 Ga. 862, 770 S.E.2d 873 (2015).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 635, 645, 650, 659, 677, 730. 79 Am. Jur. 2d, Wills, §§ 21, 516, 571, 575.

C.J.S. — 95 C.J.S., Wills, §§ 412, 461 et seq., 593, 721.

ALR. — Proof of contents in establishment of lost will, 126 A.L.R. 1139.

Destruction or cancellation of one copy of will executed in duplicate, as revocation of other copy, 17 A.L.R.2d 805.

What constitutes fraud within statute relating to proof of will "fraudulently" destroyed during testator's lifetime, 23 A.L.R.2d 382.

What constitutes "estate" of nonresident decedent within statute providing for local ancillary administration where decedent died leaving an estate in jurisdiction, 34 A.L.R.2d 1270.

Proof of due execution of lost will, 41 A.L.R.2d 393.

Fact that instrument is designated or otherwise identified as a copy affecting its status as will, 81 A.L.R.2d 1112.

Admissibility of testator's declarations on issue of revocation of will, in his possession at time of his death, by mutilation, alteration, or cancellation, 28 A.L.R.3d 994.

Probate of copy of lost will as precluding later contest of will under doctrine of res judicata, 55 A.L.R.3d 755.

Testator's failure to make new will, following loss of original will by fire, theft, or similar casualty, as constituting revocation of original will, 61 A.L.R.3d 958.

Sufficiency of evidence that will was not accessible to testator for destruction, in proceeding to establish lost will, 86 A.L.R.3d 980.

Sufficiency of evidence of nonrevocation of lost will where codicil survives, 84 A.L.R.4th 531.

53-4-47. Effect of implied revocation.

An implied revocation extends only so far as an inconsistency exists between testamentary instruments. Any portion of a prior instrument that can stand consistently with the testamentary scheme in a subsequent instrument shall remain unrevoked.

History. — Code 1981, § 53-4-47, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward the concepts of former OCGA Sec. 53-2-75.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-406, are included in the annotations for this Code section.

Implied revocation. — When the testator makes a different disposition of certain personal property bequeathed by the later will, this constitutes a revocation of the item as to this property in the former will. Cummings v. Cummings, 89 Ga. App. 529, 80 S.E.2d 204 (1954) (decided under former Code 1933, § 113-406).

If the testator gave a ring to the testator's son by will, the testator could revoke this bequest either by conveying the ring and giving the ring to another prior to the testator's death, so that the ring did not remain a part of the testator's estate when the testator died, or the testator could revoke this bequest in the will or revoke the entire will. Cummings v. Cummings, 89 Ga. App. 529, 80 S.E.2d 204 (1954) (decided under former Code 1933, § 113-406).

Probate court properly denied admission to probate for a 1991 will due to an implied revocation by the 2001 will, pursuant to O.C.G.A. § 53-4-42(c), as the testator's act of replacing specific bequests in the first will with $100 bequest in the later will, and then changing the testator's wishes regarding a residuary clause, from all to the testator's then wife if she survived, to a division into three in the later will, impliedly revoked the first will by the later will. Mitchell v. Mitchell, 279 Ga. 282, 612 S.E.2d 274 (2005).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, § 489.

C.J.S. — 95 C.J.S., Wills, § 398 et seq.

ALR. — Necessity that later will refer to earlier will in order to effect a revocation under statutes providing that a will may be revoked by a subsequent will declaring the revocation, 28 A.L.R. 691.

Wills: cutting down estate created by absolute direction to testamentary trustee to pay over and deliver funds by subsequent provision, making different disposition, 46 A.L.R. 781.

Conflict of laws respecting revocation of will, 9 A.L.R.2d 1412.

Implied revocation of will by later will or codicil, 59 A.L.R.2d 11.

Probate where two or more testamentary documents, bearing the same date or undated, are proffered, 17 A.L.R.3d 603.

53-4-48. Effect of testator's marriage, or birth or adoption of child; provision in will for class of children.

(a) Except as otherwise provided in Code Section 53-4-49, the marriage of the testator, the birth of a child to the testator, including a posthumous child born within ten months of the testator's death, or the adoption of a child by the testator subsequent to the making of a will in which no provision is made in contemplation of such event shall result in a revocation of the will only to the extent provided in the remainder of this Code section.

(b) A provision in a will for a class of the testator's children shall be presumed to be made in contemplation of the birth or adoption of additional members of that class, absent an indication of a contrary

intent, and the mere identification in the will of children already born or adopted at the time of the execution of the will shall not defeat this presumption.

(c) If the will was made prior to an event specified in subsection (a) of this Code section, and does not contain a provision in contemplation of such an event, the subsequent spouse or child shall receive the share of the estate he or she would have received if the testator had died intestate. Such share shall be paid from the net residuum remaining after all debts and expenses of administration, including taxes, have been paid. If the residuum proves to be insufficient, then testamentary gifts shall abate in the manner provided in subsection (b) of Code Section 53-4-63. Any bequest in the will in favor of the subsequent spouse or child shall be given effect and shall count toward the intestate share. If the bequest equals or exceeds the intestate share, then the subsequent spouse or child shall receive the bequest in lieu of the intestate share provided by this subsection.

History. — Code 1981, § 53-4-48, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2002, p. 1316, § 2.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2002, "subsection (b)" was substituted for "paragraph (b)" in the third sentence in subsection (c).

Law reviews. — For article, "The Time Gap in Wills: Problems Under Georgia's Lapse Statutes," see 6 Ga. L. Rev. 268 (1972). For article discussing the pretermitted heir, see 10 Ga. L. Rev. 447 (1976). For article criticizing former Code 1933, § 113-408 as too drastic, and suggesting revisions, see 11 Ga. L. Rev. 297 (1977). For annual survey of law of wills, trusts, and administration of estates, see 38 Mercer L. Rev. 417 (1986). For annual survey of wills, trusts, guardianships, and fiduciary administration, see 58 Mercer L. Rev. 423 (2006). For annual survey of wills, trusts, guardianships, and fiduciary administration, see 68 Mercer L. Rev. 321 (2016).

For note, "Advantages and Disadvantages of Intestate Death for Married Persons with an Estate of $120,000 or Less," see 9 Ga. St. B.J. 102 (1972).

For comment on Thornton v. Anderson, 207 Ga. 714, 64 S.E.2d 186 (1951), see 3 Mercer L. Rev. 233 (1951); 14 Ga. B.J. 86 (1951).

COMMENT

This section carries forward the portions of former OCGA Sec. 53-2-76 that relate to the marriage of the testator and the birth of a child to the testator. This section indicates that the provisions apply in the event of the birth of a posthumous child within ten months of the testator's death. This section also clarifies that the adoption of a child by the testator has the same effect as the birth of a child. If the will contemplates the marriage or birth or adoption, the event will not result in a revocation of the will. Under the presumption that a testator probably would intend to treat after-born or after-adopted children the same as children already born or adopted, the section also states that a will that provides for a class of the testator's children is deemed to be made in contemplation of the birth or adoption of additional members of that class absent an indication of an intent to the contrary. Consequently, the subsequent birth or adoption of class members will not result in the revocation of the will. For example, if a testator leaves the entire estate "to my sons" and another son is born, it is presumed that the testator wanted the will to stay in effect and merely to include the new son as a member of the class. On the other hand, if a daughter is later born to the testator (an individual, in other

words, who is not a member of the class), the will would be revoked rather than stay in effect and leave the entire estate only to the testator's sons. Solely for the purposes of this Code section, the mere fact that the testator names already living children will not in and of itself defeat the notion that the gift is a gift to a class of the testator's children. See Code Sec. 53-4-58 for the result when a testator fails to provide for a child in the will because the testator believes the child to be dead.

JUDICIAL DECISIONS

Analysis

General Consideration
Revocation by Marriage
Revocation by Birth of Child

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-408, are included in the annotations for this Code section.

Language of statute is unambiguous. — It clearly expresses the intention of the legislature that in every case subsequent marriage or birth of a child will revoke a will, unless the will contains a provision which is made in contemplation of such an event. Williams v. Lane, 193 Ga. 306, 18 S.E.2d 481 (1942) (decided under former Code 1933, § 113-408).

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Under the law, the only questions to be decided are: (1) whether the marriage was subsequent to the will, and (2) whether the will makes any provision for that event. Johnson v. Cromer, 234 Ga. 73, 214 S.E.2d 644 (1975) (decided under former Code 1933, § 113-408).

Discretion to extend time for responses or objections to will. — Before a will was probated, O.C.G.A. §§ 53-11-5 and 53-11-10(a) provided a probate court with discretion to extend the time for the filing of responses or objections to the will in order to preserve the interests of justice; probate court properly extended the time for the decedent's widow to object or raise a claim under O.C.G.A. § 53-4-48 and to assert the statutory right to an intestate share after the initial acknowledgment and assent to the petition to probate the will which did not name the widow as a beneficiary. English v. Ricart, 280 Ga. 215, 626 S.E.2d 475 (2006).

Cited in Allen v. First Nat'l Bank, 169 F.2d 221 (5th Cir. 1948); Carter v. Graves, 206 Ga. 234, 56 S.E.2d 917 (1949); Campbell v. Allen, 208 Ga. 274, 66 S.E.2d 226 (1951); King v. Bennett, 215 Ga. 345, 110 S.E.2d 772 (1959); Houston v. Pollard, 217 Ga. 184, 121 S.E.2d 629 (1961); Lawson v. Hurt, 217 Ga. 827, 125 S.E.2d 480 (1962); Webb v. Smith, 220 Ga. 809, 141 S.E.2d 899 (1965); Lampkin v. Edwards, 222 Ga. 288, 149 S.E.2d 708 (1966); Brennan v. Rushing, 225 Ga. 85, 165 S.E.2d 840 (1969); Citizens & S. Nat'l Bank v. United States, 451 F.2d 221 (5th Cir. 1971); Jones v. Jones, 231 Ga. 145, 200 S.E.2d 725 (1973); Carr v. Kupfer, 250 Ga. 106, 296 S.E.2d 560 (1982); McPherson v. McPherson, 254 Ga. 122, 327 S.E.2d 204 (1985); Brown v. Cronic, 266 Ga. 779, 470 S.E.2d 682 (1996).

Revocation by Marriage

Will revoked by subsequent marriage is revoked in toto. Lavender v. Wilkins, 237 Ga. 510, 228 S.E.2d 888 (1976) (decided under former Code 1933, § 113-408).

Provision shall be made in contemplation of the event. — Will must show that the testator had in contemplation of the event, that is the testator's future marriage; and the will must contain a provision made in contemplation of such event, otherwise the will is revoked. Williams v. Lane, 193 Ga. 306, 18 S.E.2d 481 (1942) (decided under former Code 1933, § 113-408).

Provision in a testator's will that it was made "in contemplation of marriage," so that the will would not be revoked by operation of O.C.G.A. § 53-4-48(a) upon the testator's subsequent marriage did not have to identify the person the testator intended to marry. Evans v. Palmour, 274 Ga. 283, 553 S.E.2d 585 (2001).

Revocation automatic unless express provision made in contemplation of marriage. — It is not required that a provision in the will must be of a beneficial interest in the estate of the testator, but it is sufficient if the will refers to the event and provides for the same either by making a beneficial provision or expressing the intention or desire of the testator that such future husband have no beneficial interest in her estate. Williams v. Lane, 193 Ga. 306, 18 S.E.2d 481 (1942) (decided under former Code 1933, § 113-408).

Testator may refer in his will to a woman to whom he is subsequently married, but in the absence of express reference therein to his future marriage, the will does not show that the reference to the woman was made in contemplation of such an event. Williams v. Lane, 193 Ga. 306, 18 S.E.2d 481 (1942) (decided under former Code 1933, § 113-408).

Provision in the will of a testator giving a beneficial interest in her estate to the man whom she subsequently marries, but containing no mention or reference to the event of her future marriage, does not show that the provision was made in contemplation of her marriage. The subsequent marriage of the testator automatically revokes such a will. Williams v. Lane, 193 Ga. 306, 18 S.E.2d 481 (1942) (decided under former Code 1933, § 113-408).

Provision giving a beneficial interest in the estate to a named person whom the testator subsequently marries does not show or even intimate that such provision was made in contemplation of the marriage. Williams v. Lane, 193 Ga. 306, 18 S.E.2d 481 (1942) (decided under former Code 1933, § 113-408).

To avoid revocation of a will by a subsequent marriage, it must appear in clear and unmistakable terms that the testator contemplated the event of a future marriage and made some reference to that event. Johnson v. Cromer, 234 Ga. 73, 214 S.E.2d 644 (1975) (decided under former Code 1933, § 113-408).

Revocation is made to turn not upon any provision made for the wife but upon whether the testator, by the testator's will, has made a provision for such an event. If, by the testator's will the testator had done so, the will is not revoked; if the testator has not, it is revoked. McParland v. McParland, 233 Ga. 458, 211 S.E.2d 748 (1975) (decided under former Code 1933, § 113-408).

Illegal marriage insufficient to revoke will. — No agreement purporting to constitute a common-law marriage, nor cohabitation of the man and woman while holding themselves out to the public as husband and wife, nor birth of children to such parties, will constitute or prove a common-law marriage between them, when the man was legally married to another woman throughout the period of such cohabitation and relationship. Consequently, a will written by the purported wife during the cohabitation was revoked by her subsequent valid marriage to the purported husband after his divorce from his first wife. Williams v. Lane, 193 Ga. 306, 18 S.E.2d 481 (1942) (decided under former Code 1933, § 113-408).

Will is not voided by a marriage ceremony when, at that time, the caveator was incapable of contracting marriage and the ceremony was absolutely void. Graves v. Carter, 207 Ga. 308, 61 S.E.2d 282 (1950) (decided under former Code 1933, § 113-408).

When the evidence was in conflict as to whether there had been a previous marriage, the trial court was authorized to find that there had not and, therefore, that the ceremonial marriage between the

Revocation by Marriage (Cont'd)

testator and the caveator was valid so as to cause the revocation of the testator's will. Faulk v. Faulk, 222 Ga. 522, 150 S.E.2d 818 (1966) (decided under former Code 1933, § 113-408).

General provision disinheriting all "heirs" not expressly provided for is insufficient to show that the testator contemplated a future marriage. Johnson v. Cromer, 234 Ga. 73, 214 S.E.2d 644 (1975) (decided under former Code 1933, § 113-408).

Testamentary power of appointment cannot be exercised by a revoked will. Lavender v. Wilkins, 237 Ga. 510, 228 S.E.2d 888 (1976) (decided under former Code 1933, § 113-408).

Will exercising a power of appointment which was made in contemplation of marriage is not revoked by the subsequent marriage. Lavender v. Wilkins, 237 Ga. 510, 228 S.E.2d 888 (1976) (decided under former Code 1933, § 113-408).

Revocation by Birth of Child

Will revoked unless provision made for after-born child. — Fact that the testator may have lived some time after the birth of the child, and failed to make any change in the testator's will, can make no difference. The will is void immediately upon the birth of the child, and nothing the testator might do or fail to do could give the will life. The will is dead as completely as if the testator had destroyed the will by burning, or any other means known to the law. Saliba v. Saliba, 202 Ga. 279, 42 S.E.2d 748 (1947) (decided under former Code 1933, § 113-408).

Son shown to have been born subsequently to the execution of a will is not entitled to recover in ejectment against a purchaser for a valid consideration who relied on the judgment of the court of ordinary (now probate court) probating the will in solemn form, and who purchased prior to any proceeding to set aside such judgment. Mitchell v. Arnall, 203 Ga. 384, 47 S.E.2d 258 (1948) (decided under former Code 1933, § 113-408).

When a proceeding is filed to probate a will which unquestionably has been revoked by the subsequent birth of a child, and no provision has been made in contemplation of that event, and the fact appears on the face of the proceedings, consent by a guardian ad litem that the will be probated is clearly beyond the scope of the guardian's authority, and on a proper application for that purpose the judgment of probate should be set aside. Saliba v. Saliba, 202 Ga. 279, 42 S.E.2d 748 (1947) (decided under former Code 1933, § 113-408).

Revocation is made to turn, not upon any provision made for the child, but upon whether the testator, by the testator's will, has made a provision for such an event. If, by the testator's will the testator had done so, the will is not revoked; if the testator has not, it is revoked. McParland v. McParland, 233 Ga. 458, 211 S.E.2d 748 (1975) (decided under former Code 1933, § 113-408).

Probate court did not err in finding the testator's will was not made in contemplation of future children and was thus invalidated by the birth of children after the execution of the will because the reference in the will to "my dependents" in the context of directing the personal representative to check on the availability of survivor benefits was insufficient to show that the testator contemplated future-born children as it did not meet the essential basic requirement of showing that the event of future-born children was in the testator's mind at the time the will was executed. Hobbs v. Winfield, 302 Ga. 23, 805 S.E.2d 74 (2017).

Adoption equivalent to birth of child. — Antecedent will, which makes no provision in contemplation of an adoption, is revoked by implication or inference of law by the testator' legal adoption of a minor child. The act of adopting a child, under the provisions of the adoption statute of 1941 (Ga. L. 1941, p. 305) as amended by the Act of 1949 (Ga. L. 1949, p. 1157), is the equivalent in law of the birth of a child. Thornton v. Anderson, 207 Ga. 714, 64 S.E.2d 186 (1951), for comment, see 3 Mercer L. Rev. 233 (1951); 14 Ga. B.J. 86 (1951) (decided under former Code 1933, § 113-408).

Provision in a will giving an unborn child a beneficial interest in the estate obviously is made in contempla-

tion of the future birth of a child. Williams v. Lane, 193 Ga. 306, 18 S.E.2d 481 (1942) (decided under former Code 1933, § 113-408).

Virtual adoption did not result in revocation. — Although an adult child of a testator met most of the requirements for virtual adoption in that the adult child had been raised by the testator as the testator's own, the doctrine of virtual adoption did not apply because the testator had made a will disposing of the testator's estate. Virtual adoption could not result in a revocation of the will under O.C.G.A. § 53-4-48(a) because that statute applied only to legal adoptions, and virtual adoption was a legal fiction arising after the adoptive parent's death. Johnson v. Rogers, 297 Ga. 413, 774 S.E.2d 647 (2015).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 551, 556.

ALR. — Illegitimacy of child as affecting revocation of will by subsequent birth of child, 18 A.L.R. 91; 38 A.L.R. 1344.

Statute as to effect of subsequent birth of a child as applicable where will provides for child, in the absence of an express exception, 30 A.L.R. 1236.

Divorce as equivalent of death for the purposes of provision in will or trust in respect of survivorship as between husband and wife, 35 A.L.R. 141.

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Remarriage of woman after death of or divorce from former husband as revoking will executed during former marriage, 9 A.L.R.2d 510.

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Admissibility of extrinsic evidence to show testator's intention as to omission of provision for child, 88 A.L.R.2d 616.

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Sufficiency of provision for, or reference to, prospective spouse to avoid lapse or revocation of will by subsequent marriage, 38 A.L.R.4th 117.

Pretermitted heir statutes: what constitutes sufficient testamentary reference to, or evidence of contemplation of, heir to render statute inapplicable, 83 A.L.R.4th 779.

Legal status of posthumously conceived child of decedent, 17 A.L.R.6th 593.

53-4-49. Effect of testator's divorce, annulment, or remarriage to former spouse.

All provisions of a will made prior to a testator's final divorce or the annulment of the testator's marriage in which no provision is made in contemplation of such event shall take effect as if the former spouse had predeceased the testator, and the provisions of Code Section 53-4-64 shall not apply with respect to the descendants of the former spouse

who are not also descendants of the testator. If the testator remarries the former spouse and the testator has not revoked or amended the will that was made prior to the divorce or annulment, the remarriage shall not result in the revocation of the will and the provisions of the will that were revoked solely due to the application of this Code section shall be revived.

History. — Code 1981, § 53-4-49, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article, "The Time Gap in Wills: Problems Under Georgia's Lapse Statutes," see 6 Ga. L. Rev. 268 (1972). For article discussing the pretermitted heir, see 10 Ga. L. Rev. 447 (1976). For article criticizing former Code 1933, § 113-408 as too drastic, and suggesting revisions, see 11 Ga. L. Rev. 297 (1977). For annual survey of law of wills, trusts, and administration of estates, see 38 Mercer L. Rev. 417 (1986). For annual survey of wills, trusts, guardianships, and fiduciary administration, see 57 Mercer L. Rev. 403 (2005).

For note, "Advantages and Disadvantages of Intestate Death for Married Persons with an Estate of $120,000 or Less," see 9 Ga. St. B.J. 102 (1972).

For comment on Thornton v. Anderson, 207 Ga. 714, 64 S.E.2d 186 (1951), see 3 Mercer L. Rev. 233 (1951); 14 Ga. B.J. 86 (1951).

COMMENT

This section changes former OCGA Sec. 53-2-76 by providing that a divorce or annulment by the testator does not revoke the testator's will completely but rather results in the former spouse being treated as having predeceased the testator. In such a case, the provisions of the anti-lapse statute (Code Sec. 53-4-64) will not be applicable to descendants of the former spouse who are not also descendants of the testator. For example, if the testator is divorced but dies with an unrevoked will made during the marriage that named the testator's spouse as a beneficiary under the will, the spouse is treated as having predeceased the testator. If descendants of the spouse who are not also descendants of the testator survive the testator, these descendants will not take any portion of the testator's estate if their only claim is as beneficiaries who were substituted for the "predeceased" beneficiary by virtue of the application of Code Sec. 53-4-64. The provisions of this Code section apply to all provisions for the former spouse in the will, including provisions naming the former spouse as a fiduciary (executor, trustee of a testamentary trust, etc.). This section also provides that the remarriage of the testator to the same spouse will cause the pre-divorce will to become effective again if there has been no intervening change in that will.

JUDICIAL DECISIONS

Analysis

General Consideration
Revocation by Marriage
Revocation by Birth of Child

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-408, are included in the annotations for this Code section.

Language of statute is unambiguous. — It clearly expresses the intention of the legislature that in every case subsequent marriage or birth of a child will revoke a will, unless the will contains a provision which is made in contemplation of such an event. Williams v. Lane, 193

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Province of probate court versus proper trial court. — In a child's appeal of a trial court's declaratory judgment that the will of a parent was republished by a codicil and that a portion of a prior order of a probate court that the ex-spouse of the testator was to be treated as if having predeceased the testator was null and void was upheld on appeal as the issue regarding the construction of the will regarding the ex-spouse was a question of law for the trial court and was not within the jurisdiction of the probate court. Honeycutt v. Honeycutt, 284 Ga. 42, 663 S.E.2d 232 (2008).

Cited in Allen v. First Nat'l Bank, 169 F.2d 221 (5th Cir. 1948); Carter v. Graves, 206 Ga. 234, 56 S.E.2d 917 (1949); Campbell v. Allen, 208 Ga. 274, 66 S.E.2d 226 (1951); King v. Bennett, 215 Ga. 345, 110 S.E.2d 772 (1959); Houston v. Pollard, 217 Ga. 184, 121 S.E.2d 629 (1961); Lawson v. Hurt, 217 Ga. 827, 125 S.E.2d 480 (1962); Webb v. Smith, 220 Ga. 809, 141 S.E.2d 899 (1965); Lampkin v. Edwards, 222 Ga. 288, 149 S.E.2d 708 (1966); Brennan v. Rushing, 225 Ga. 85, 165 S.E.2d 840 (1969); Citizens & S. Nat'l Bank v. United States, 451 F.2d 221 (5th Cir. 1971); Jones v. Jones, 231 Ga. 145, 200 S.E.2d 725 (1973); Carr v. Kupfer, 250 Ga. 106, 296 S.E.2d 560 (1982); McPherson v. McPherson, 254 Ga. 122, 327 S.E.2d 204 (1985); Brown v. Cronic, 266 Ga. 779, 470 S.E.2d 682 (1996).

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Revocation is made to turn, not upon any provision made for the child, but upon whether the testator, by the testator's will, has made a provision for such an event. If, by the testator's will the testator had done so, the will is not revoked; if the testator has not, it is revoked. McParland v. McParland, 233 Ga. 458, 211 S.E.2d 748 (1975) (decided under former Code 1933, § 113-408).

Adoption equivalent to birth of child. — Antecedent will, which makes no provision in contemplation of an adoption, is revoked by implication or inference of law by the testator' legal adoption of a minor child. The act of adopting a child, under the provisions of the adoption statute of 1941 (Ga. L. 1941, p. 305) as amended by the Act of 1949 (Ga. L. 1949, p. 1157), is the equivalent in law of the birth of a child. Thornton v. Anderson, 207 Ga. 714, 64 S.E.2d 186 (1951), for comment, see 3 Mercer L. Rev. 233 (1951); 14 Ga. B.J. 86 (1951) (decided under former Code 1933, § 113-408).

Provision in a will giving an unborn child a beneficial interest in the estate obviously is made in contemplation of the future birth of a child. Williams v. Lane, 193 Ga. 306, 18 S.E.2d 481 (1942) (decided under former Code 1933, § 113-408).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 551, 556.

ALR. — Illegitimacy of child as affecting revocation of will by subsequent birth of child, 18 A.L.R. 91; 38 A.L.R. 1344.

Statute as to effect of subsequent birth of a child as applicable where will provides for child, in the absence of an express exception, 30 A.L.R. 1236.

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Sufficiency of provision for, or reference to, prospective spouse to avoid lapse or revocation of will by subsequent marriage, 38 A.L.R.4th 117.

Pretermitted heir statutes: what constitutes sufficient testamentary reference to, or evidence of contemplation of, heir to

render statute inapplicable, 83 A.L.R.4th 779.

53-4-50. Republication of revoked will.

A revoked will may be republished by a writing executed by the testator and subscribed and attested by witnesses with the same formality required for a will.

History. — Code 1981, § 53-4-50, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004).

COMMENT

This section revises former OCGA Sec. 53-2-77 by limiting the methods of republishing a will to a republication by a writing that satisfies the formalities for executing a will. This Code section also supplements Code Sec. 53-4-45 by providing an alternative means of reinstating a will that was expressly revoked by a written instrument that itself was later revoked.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-409, are included in the annotations for this Code section.

When alterations in a will occur, the law presumes, in the absence of evidence to the contrary, that the alterations were made after the execution of the will. Hicks v. Rushin, 228 Ga. 320, 185 S.E.2d 390 (1971) (decided under former Code 1933, § 113-409).

In construing codicil, parole evidence properly admitted to determine testator's intent. — Under O.C.G.A. § 53-4-50, a decedent could have revoked a later will by a codicil that referred to an earlier will. But as the codicil was attached to the later will, the appellees offered parol evidence stating that the codicil's reference to the later will was a scrivener's error, and the appellants offered no evidence in response, the appellees were entitled to summary judgment on their claim that the later will and codicil together constituted the decedent's last will and testament. Dyess v. Brewton, 284 Ga. 583, 669 S.E.2d 145 (2008).

Cited in Cubbedge v. Cubbedge, 287 Ga. App. 149, 650 S.E.2d 805 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 597, 606 et seq.

C.J.S. — 95 C.J.S., Wills, §§ 431 et seq., 437 et seq.

ALR. — Codicil as affecting application of statutory provision to will, or previous codicil not otherwise subject, or as obviating objections to lack of testamentary capacity, undue influence, or defective execution otherwise fatal to will, 87 A.L.R. 836.

Retrospective application of statute concerning execution of wills, 111 A.L.R. 910.

Admissibility of declarations by testator on issue of revocation of will, 172 A.L.R. 354.

Codicil as validating will or codicil which was invalid or inoperative at time of its purported execution, 21 A.L.R.2d 821.

Codicil as reviving revoked will or codicil, 33 A.L.R.2d 922.

Codicil as reviving or satisfied, bequest or devise, 58 A.L.R.2d 1072.

Revocation of will as affecting codicil and vice versa, 7 A.L.R.3d 1143.

ARTICLE 6

CONSTRUCTION OF WILL; TESTAMENTARY GIFTS

53-4-55. Construction of wills; intention of testator.

In the construction of all wills, the court shall seek diligently for the intention of the testator and shall give effect to such intention as far as it may be consistent with the rules of law. Provided the proof of intention is clear and convincing, the court may transpose sentences or clauses, change conjunctions, and supply or delete words in cases in which a sentence or clause as it stands is unintelligible or inoperative in context.

History. — Code 1981, § 53-4-55, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article discussing problems in construction of instrument conveying gift to a group or class, see 6 Ga. St. B.J. 169 (1969). For article, "The Time Gap in Wills: Shifting Assets and Shrinking Estates — Obsolescence and Testamentary Planning in Georgia," see 6 Ga. L. Rev. 649 (1972). For annual survey of wills, trusts, guardianships, and fiduciary administration, see 57 Mercer L. Rev. 403 (2005).

For note discussing construction and interpretation of wills, see 1 Ga. L. Rev. No. 1, p. 46 (1927).

COMMENT

This section carries over the concepts of former OCGA Sec. 53-2-91 but deletes the last sentence of that Code section (which required that a clause that was clear on its face be given effect "however well satisfied the court may be of a different testamentary intention") as it is in conflict with the spirit of this law. Former OCGA Sec. 53-2-90 (dealing with the construction of the word "lend") is repealed as unnecessary.

JUDICIAL DECISIONS

Analysis

General Consideration
Intent of Testator
1. In General
2. Definitions
3. Parol Evidence
4. Reduction of Estates
5. General Bequests Favored
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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 3900, former Code 1933, § 113-806, and former O.C.G.A. § 53-2-91 are included in the annotations for this Code section.

Rules of construction generally. — Rules applicable in the construction of a will are those established by the laws of Georgia and the decisions of the court, viz.: (a) every will is sui generis; (b) the first object is to find the intent of the testator; (c) such intent is to be derived from a consideration of the will as a whole and read in the light of the circumstances surrounding the will's execution; and (d) it

General Consideration (Cont'd)

is to be presumed that the testator intended to dispose of the testator's entire estate and not to die intestate as to any part of the testator's estate. Cumming v. Cumming, 219 Ga. 655, 135 S.E.2d 402 (1964) (decided under former Code 1933, § 113-806).

Every will is a thing to itself. It is emphatically not only sui juris but sui generis. Its terms are its own law, and the application of that law by construction of itself — of the statute which the testator personally enacted, to the contestants for its bounty, is the plain duty of the court. Stringfellow v. Harman, 207 Ga. 62, 60 S.E.2d 139 (1950) (decided under former Code 1933, § 113-806).

All wills differ; each is a law unto itself, and must be construed according to the will's own terms. Bratton v. Trust Co., 191 Ga. 49, 11 S.E.2d 204 (1940) (decided under former Code 1933, § 113-806).

Construction of will on ad hoc basis. — Precedents, or adjudged cases, are of but little authority, and of dangerous application, in deciding upon the intention of a testator; the construction depends so much on each case, upon the character of the testator, the terms the testator employs, and all the surrounding circumstances. Sproull v. Graves, 194 Ga. 66, 20 S.E.2d 613 (1942) (decided under former Code 1933, § 113-806); Whitney v. Citizens & S. Nat'l Bank, 214 Ga. 674, 107 S.E.2d 191 (1959) (decided under former Code 1933, § 113-806).

Presumption is that the testator intends by the testator's will to dispose of the testator's entire estate. Stephens v. Stephens, 218 Ga. 671, 130 S.E.2d 208 (1963) (decided under former Code 1933, § 113-806).

Construction which results in partial intestacy is not preferred. Trust Co. Bank v. Heyward, 240 Ga. 557, 242 S.E.2d 257 (1978) (decided under former Code 1933, § 113-806).

Cited in Coleman v. Harrison, 168 Ga. 859, 149 S.E. 141 (1929); Greene v. Foster, 178 Ga. 319, 173 S.E. 91 (1934); Refinance Corp. v. Wilson, 183 Ga. 336, 188 S.E. 707 (1936); Jefferson v. Bright, 189 Ga. 866, 8 S.E.2d 21 (1940); Perkins v. Citizens & S. Nat'l Bank, 190 Ga. 29, 8 S.E.2d 28 (1940); Mills v. Tyus, 195 Ga. 119, 23 S.E.2d 259 (1942); Comer v. Comer, 195 Ga. 79, 23 S.E.2d 420 (1942); Veach v. Veach, 205 Ga. 185, 53 S.E.2d 98 (1949); Stahl v. Russell, 206 Ga. 699, 58 S.E.2d 135 (1950); First Nat'l Bank v. Robinson, 209 Ga. 582, 74 S.E.2d 875 (1953); McClelland v. Johnson, 211 Ga. 348, 86 S.E.2d 97 (1955); Marsh v. Anderson, 214 Ga. 667, 107 S.E.2d 188 (1959); Dillard v. Dillard, 217 Ga. 176, 121 S.E.2d 766 (1961); Bedgood v. Thomas, 220 Ga. 262, 138 S.E.2d 313 (1964); McVay v. Anderson, 221 Ga. 381, 144 S.E.2d 741 (1965); Springer v. Cox, 221 Ga. 673, 146 S.E.2d 753 (1966); Pleasants v. First Nat'l Bank, 222 Ga. 316, 149 S.E.2d 696 (1966); Freedman v. Scheer, 223 Ga. 705, 157 S.E.2d 875 (1967); Williams v. Cowan, 226 Ga. 319, 174 S.E.2d 789 (1970); Ruth v. First Nat'l Bank, 230 Ga. 490, 197 S.E.2d 699 (1973); Boston v. Boston, 231 Ga. 801, 204 S.E.2d 102 (1974); Ammons v. Williams, 233 Ga. 534, 212 S.E.2d 769 (1975); Vickers v. Vickers, 234 Ga. 849, 218 S.E.2d 565 (1975); Stokes v. Trust Co., 507 F.2d 177 (5th Cir. 1975); Williams v. Williams, 236 Ga. 133, 223 S.E.2d 109 (1976); Grant v. Bell, 150 Ga. App. 141, 257 S.E.2d 12 (1979); Walker v. Bogle, 244 Ga. 439, 260 S.E.2d 338 (1979); Bailey v. Johnson, 245 Ga. 823, 268 S.E.2d 147 (1980); First Nat'l Bank v. United States, 634 F.2d 212 (5th Cir. 1981); Carswell v. Waters, 254 Ga. 431, 330 S.E.2d 590 (1985); First Nat'l Bank v. Jenkins, 256 Ga. 223, 345 S.E.2d 829 (1986); Powell v. Vann, 257 Ga. 353, 359 S.E.2d 673 (1987); Cole v. Robertson, 263 Ga. 149, 429 S.E.2d 678 (1993); Dickinson v. Fueller, 265 Ga. 861, 463 S.E.2d 127 (1995); Lemmons v. Lawson, 266 Ga. 571, 468 S.E.2d 749 (1996); Bennett v. Young, 270 Ga. 422, 510 S.E.2d 521 (1999); Folsom v. Rowell, 281 Ga. 494, 640 S.E.2d 5 (2007); Wilkes v. Fraser, 324 Ga. App. 642, 751 S.E.2d 455 (2013).

Intent of Testator

1. In General

Cardinal rule in construing any will is the ascertainment of the intention of the testator. Hungerford v. Trust Co.,

190 Ga. 387, 9 S.E.2d 630 (1940) (decided under former Code 1933, § 113-806).

Unambiguous language of the will setting forth the intention of the testator is the sole and controlling guide for determination of intention. Hungerford v. Trust Co., 190 Ga. 387, 9 S.E.2d 630 (1940) (decided under former Code 1933, § 113-806).

Search for the intention of testator should be made by two methods: (1) by looking to the will as a whole, and (2) by scrutinizing every phrase that the will contains. Arnold v. Richardson, 224 Ga. 181, 160 S.E.2d 809 (1968) (decided under former Code 1933, § 113-806).

Intention of testator is primary consideration. — In the construction of wills, the intention of the testator should be the first and great object of inquiry. And this is to be sought for by looking to the whole will, and not to detached parts of the will. Sproull v. Graves, 194 Ga. 66, 20 S.E.2d 613 (1942) (decided under former Code 1933, § 113-806); Whitney v. Citizens & S. Nat'l Bank, 214 Ga. 674, 107 S.E.2d 191 (1959) (decided under former Code 1933, § 113-806); Wolfe v. Citizens & S. Nat'l Bank, 221 Ga. 412, 144 S.E.2d 735 (1965) (decided under former Code 1933, § 113-806).

In finding testator's intent, the court is not limited to construing only the residuary clause in question, but may look to "the four corners" of the will to discover the testator's total testamentary disposition. Kirby v. Citizens & S. Nat'l Bank, 235 Ga. 205, 219 S.E.2d 112 (1975) (decided under former Code 1933, § 113-806).

Intention of the testator is not generally to be derived from mere consideration of fragmentary excerpts from the will, but from examination and consideration of every word which the testator included within the "four corners." Baker v. Citizens' & S. Nat'l Bank, 175 Ga. 161, 165 S.E. 21 (1932) (decided under former Civil Code 1910, § 3900).

Intentions of a testator are to be derived from a consideration of the testator's will as a whole, read in the light of the surrounding circumstances, and are not to be determined by arbitrary conjecture as to what the testator meant nor by consideration of detached portions of the will. Aiken v. Aiken, 209 Ga. 819, 76 S.E.2d 481 (1953) (decided under former Code 1933, § 113-806).

Intent of testator is to control. — It is axiomatic in the construction of wills that the intent of the testator as gathered from the entire instrument is to control. If two clauses of a will are so inconsistent that both cannot stand, the latter will prevail; but the whole will is to be taken together, and operation is to be given every part of it, if this can be done without violating its terms or the intention of the testator. And the intention of the testator is to be sought by looking to the whole will rather than to detached parts of the will. Watts v. Finley, 187 Ga. 629, 1 S.E.2d 723 (1939) (decided under former Code 1933, § 113-806).

Intention of the testator is to absolutely control. Not only may the rules of grammar be entirely disregarded in order to carry into effect the manifest intention of the testator, but even well-defined technical terms of the law will be given an unusual meaning, or will be held to be meaningless, when it is clear from the provisions in the will that the testator did not use them in their technical sense, or when, to carry out the testator's intention, it is necessary to entirely disregard such technical terms. Buchanan v. Nicholson, 192 Ga. 754, 16 S.E.2d 743 (1941) (decided under former Code 1933, § 113-806).

In construing a will the court is required to examine the will as a whole and to search diligently for the intention of the testator as the same may be revealed therein. This search for the intention of the testator should be made by two methods: (1) by looking to the will as a whole; and (2) by scrutinizing every phrase that the will contains. Patterson v. Patterson, 208 Ga. 17, 64 S.E.2d 585 (1951) (decided under former Code 1933, § 113-806).

In searching for the testator's intent, the court must look diligently to the entire will and circumstances surrounding the testator at the time of the will's execution. Wolfe v. Citizens & S. Nat'l Bank, 221 Ga. 412, 144 S.E.2d 735 (1965) (decided under former Code 1933, § 113-806).

In the construction of a will, as in the construction of other legal documents, the

Intent of Testator (Cont'd)
1. In General (Cont'd)

cardinal rule is to ascertain the intention of the maker. Hines v. Village of St. Joseph, Inc., 227 Ga. 431, 181 S.E.2d 54 (1971) (decided under former Code 1933, § 113-806).

Examination of four corners of will. — Court's primary guide in construing a will is the testator's intention as it may be gathered from the four corners of the document. Buchanan v. Nicholson, 192 Ga. 754, 16 S.E.2d 743 (1941) (decided under former Code 1933, § 113-806); Worley v. Smith, 236 Ga. 888, 225 S.E.2d 911 (1976) (decided under former Code 1933, § 113-806).

When the language of a will is clear and can be given legal effect as it stands, the courts will not, by construction, give the will a different effect. Crow v. Lewis, 223 Ga. 872, 159 S.E.2d 77 (1968) (decided under former Code 1933, § 113-806).

Intention of testator. — Cardinal principle in the interpretation of a will is to give effect to the testator's intention, when it can be ascertained from the will, and when such intention is not incompatible with established rules of law and equity. Bratton v. Trust Co., 191 Ga. 49, 11 S.E.2d 204 (1940) (decided under former Code 1933, § 113-806).

Intention of the testator is imperative on the courts, unless it is in conflict with some established rule of law. If it is, the law is more imperious than the intention, and the latter will yield to the former. The law, though, in order to defeat the intention, must be clearly and decidedly in conflict with it. Lane v. Citizens & S. Nat'l Bank, 195 Ga. 828, 25 S.E.2d 800 (1943) (decided under former Code 1933, § 113-806).

Every court must determine for itself what the intention of the testator is in the particular case before the court, and that intention should be carried into effect, provided the intention be not unlawful. Whitney v. Citizens & S. Nat'l Bank, 214 Ga. 674, 107 S.E.2d 191 (1959) (decided under former Code 1933, § 113-806).

When the language of a will is clear, and can be given legal effect as the will stands, the court will not, by construction, give the will a different effect. Seymour v. Presley, 239 Ga. 572, 238 S.E.2d 347 (1977) (decided under former Code 1933, § 113-806).

Courts are without authority to rewrite by construction an unambiguous will; for to do that would be to substitute the will of the court for that of the testator. Hungerford v. Trust Co., 190 Ga. 387, 9 S.E.2d 630 (1940) (decided under former Code 1933, § 113-806).

In order to construe item 14 of the will as the petitioners contend it should be, it would be necessary to make deletions and substitutions in the language of the testator, and this court is not authorized to do this, since the item as written has a logical meaning, consistent with the rules of law, which can be given effect. When the language of a will is clear and can be given legal effect as the will stands, the courts will not, by construction, give the will a different effect. Veal v. King, 216 Ga. 298, 116 S.E.2d 223 (1960) (decided under former Code 1933, § 113-806).

Duly executed written will, with unambiguous terms, cannot be reformed by adding a provision to the will. Lining v. Jackson, 203 Ga. 22, 45 S.E.2d 410 (1947) (decided under former Code 1933, § 113-806).

Court should construe to give effect to testator's intent. — If the intention of the testator is clear as it stands, it is the duty of the court to so construe it, regardless of any opinion the court may have as to a different testamentary intention. Davant v. Shaw, 206 Ga. 843, 59 S.E.2d 500 (1950) (decided under former Code 1933, § 113-806).

Terms of an unambiguous will may not be changed by extrinsic evidence; if a clause in a will as the will stands may have effect, it shall be so construed, however well satisfied the court may be of a different testamentary intention. Butler v. Prudden, 182 Ga. 189, 185 S.E. 102 (1936) (decided under former Code 1933, § 113-806).

An estate clearly fixed and devised in one item will not be diminished or enlarged by a subsequent item, unless the language and general context clearly and unmistakably discloses such to be the

testator's purpose and intent. Buchanan v. Nicholson, 192 Ga. 754, 16 S.E.2d 743 (1941) (decided under former Code 1933, § 113-806).

If two clauses of a will are so inconsistent that both cannot stand, the later will prevail, but the whole will is to be taken together, and operation is to be given to every part of the will, if this can be done without violating the will's terms or the intention of the testator. Barker v. Haunson, 174 Ga. 492, 163 S.E. 163 (1932) (decided under former Civil Code 1910, § 3900).

When, the devise apparently passes a fee-simple estate and does so merely because of the absence of an expressed intent as to what character of estate was actually intended to be devised, and in a subsequent provision the property is devised to others at the death of the first devisee, such provisions should be held to grant a life-estate with remainder over, else such subsequent provision must be held to have no meaning. Watts v. Finley, 187 Ga. 629, 1 S.E.2d 723 (1939) (decided under former Code 1933, § 113-806).

Clear, definite will prevails over uncertain codicil. — Provisions of a will are not revoked by a codicil, the language of which is capable of any other reasonable construction, or is less clear and certain than that used in the will. Barker v. Haunson, 174 Ga. 492, 163 S.E. 163 (1932) (decided under former Civil Code 1910, § 3900).

When a provision in a will is clear, certain, and definite in regard to a bequest, a codicil which is not certain and definite, its language being capable of some other reasonable construction, and which makes nonmandatory the terms of the original bequest only as to the specific form of fulfillment, and does not alter the mandatory character of the original bequest as to the will's general purpose, will not work a revocation. Buchanan v. Nicholson, 192 Ga. 754, 16 S.E.2d 743 (1941) (decided under former Code 1933, § 113-806).

Intent of in terrorem clause. — Given a widow's commission of undue influence in procuring a conveyance of beach property to herself and her son, it was not the decedent's intent in including an in terrorem clause to wholly immunize her from the entire amount of attorney's fees incurred by the estate in the undue influence litigation. Her share of the estate, like all the bequests, would be reduced in value after payment of the fees under O.C.G.A. § 53-7-6(4). Pate v. Wilson, 286 Ga. 133, 686 S.E.2d 88 (2009).

Will is to be construed by the law as the will existed at the death of the testator, and the testator's intention will yield to the law only when it clearly and decidedly conflicts therewith. Bailes v. Halsey, 179 Ga. 182, 175 S.E. 472 (1934) (decided under former Code 1933, § 113-806).

While the intention of a testator cannot be given effect if contrary to express enactments of the legislature or positive rules of property, in the construction of a will the cardinal rule is that the intention of the testator should be the first and great object of inquiry, and this is to be sought for by looking to the whole will, and not to detached parts of the will, and when so ascertained, shall be given effect as far as may be consistent with the rules of law. Love v. McManus, 208 Ga. 447, 67 S.E.2d 218 (1951) (decided under former Code 1933, § 113-806).

Will is to be construed under the law in effect at the testator's death. But this is only one of the rules of construction and is applicable only when no expression on the subject was made by the testator. Carnegie v. First Nat'l Bank, 218 Ga. 585, 129 S.E.2d 780 (1963) (decided under former Code 1933, § 113-806).

Rights of adopted child a question of testator's intent. — In construing the rights of an adopted child to take under a will, it is not a question of the right of the adopted child to inherit but simply a question of the testator's intent with respect to those who are to share in the estate. Thomas v. Trust Co. Bank, 247 Ga. 693, 279 S.E.2d 440 (1981) (decided under former Code 1933, § 113-806).

When a testator used the phrase "children of his body" evidencing an intent to include only natural children of her grandsons, and used the term "children, or descendants thereof" in describing the remaindermen in the testator's codicil, the testator's will was properly construed

Intent of Testator (Cont'd)
1. In General (Cont'd)

as excluding the adopted great-grandchildren. Epstein v. First Nat'l Bank, 260 Ga. 217, 391 S.E.2d 924 (1990) (decided under former O.C.G.A. § 53-2-91).

Grandchildren take nothing in a will when children take bequests in their own stead. — Motion for summary judgment of the testator's grandchildren in an action against their three uncles alleging that the grandchildren had an interest in the property that comprised the testator's estate was properly denied because the plain language of the will indicated that the testator did not intend that the bequests follow the law of intestacy, and the presumption in favor of a per stirpes distribution in the anti-lapse statute was overcome; the use of the phrase "per capita" in the will imposed a requirement that the individuals named, the testator's children, take the bequests in the children's own stead, and that the children had to survive the testator; and the grandchildren's mother, the testator's daughter, did not survive the testator. Piccione v. Arp, 302 Ga. 270, 806 S.E.2d 589 (2017).

Inconsistent subprovision. — In the construction of a will, it is a cardinal rule, imposed by former O.C.G.A. § 53-2-91, that the court shall strive diligently to ascertain the intent of the testator and give effect to it so far as consistent with the law. Therefore, inasmuch as subprovision of will did not plainly manifest an intent of the testator contrary to the legal presumption that distribution should be per stirpes, the trial court did not err in attempting to construe the apparently inconsistent language of the subprovision in the context of the entire will. In re Last Will of Lewis, 263 Ga. 349, 434 S.E.2d 472 (1993) (decided under former O.C.G.A. § 53-2-91).

Testator's intent on appointment of executor. — When a will named the testator's mother as executor, with the testator's daughter as executor "in the event that my mother should predecease me," and the mother was living but incompetent when the testator died, the will was properly construed as not naming a successor executor. Robbins v. Vanbrackle, 267 Ga. 871, 485 S.E.2d 468 (1997) (decided under former O.C.G.A. § 53-2-91).

2. Definitions

"Heirs" and "children" have same meaning. — Weight of authority is to the effect that generally the terms "heirs" and "children" in popular sense have the same significance. Everitt v. LaSpeyre, 195 Ga. 377, 24 S.E.2d 381 (1943) (decided under former Code 1933, § 113-806).

In order to prevent the phrase "or their bodily heirs" from becoming meaningless, it is logical to assume that the testator intended that, after the testator's residuary estate had vested in the testator's children who were in life at the testator's death, if any of these children should die before a complete determination and distribution of the residuary estate, their heirs would stand in the place of the deceased children. Veal v. King, 216 Ga. 298, 116 S.E.2d 223 (1960) (decided under former Code 1933, § 113-806).

Only logical construction of "my surviving children or their bodily heirs" is that the words "their bodily heirs" mean children of the testator's children who survive the testator's death. Veal v. King, 216 Ga. 298, 116 S.E.2d 223 (1960) (decided under former Code 1933, § 113-806).

"Bodily heirs" mean children. Veal v. King, 216 Ga. 198, 116 S.E.2d 223 (1960) (decided under former Code 1933, § 113-806).

Ordinary meaning of the words "my surviving children" is the children of the testator surviving the testator at the testator's death. Veal v. King, 216 Ga. 298, 116 S.E.2d 223 (1960) (decided under former Code 1933, § 113-806).

Testamentary provision to the effect that "whatever amount may be over when the donations are all made is to be equally divided among my sisters and brothers" constitutes a gift to a class consisting of testator's sisters and brothers living at the time of testator's death, to the exclusion of descendants of a sister and brother predeceasing testator. Johns v. Citizens & S. Nat'l Bank, 206 Ga. 313, 57 S.E.2d 182 (1950) (decided under former Code 1933, § 113-806).

Word "or" is frequently used to connect two others expressing the same idea. When so used, the word "or," in a grammatical sense, is equivalent to "being" and may be so construed in a will. Everitt v. LaSpeyre, 195 Ga. 377, 24 S.E.2d 381 (1943) (decided under former Code 1933, § 113-806).

"Need" defined. — Term "need" refers to the beneficiary's health, maintenance, and support consistent with the beneficiary's accustomed manner of living, but may include other areas if specific provision is made therefor in the will. Wright v. Trust Co. Bank, 260 Ga. 414, 396 S.E.2d 213 (1990) (decided under former O.C.G.A. § 53-2-91).

3. Parol Evidence

Use of parol evidence. — While parol evidence in some instances is authorized to explain an ambiguity in a will, oral testimony would be inadmissible for the purpose of inserting an entirely new clause in a will to dispose of an interest in property which the testator failed to devise. Lining v. Jackson, 203 Ga. 22, 45 S.E.2d 410 (1947) (decided under former Code 1933, § 113-806).

When there is no ambiguity in the instrument, parol evidence is inadmissible to add to, to modify, vary, or change the will. Hines v. Village of St. Joseph, Inc., 227 Ga. 431, 181 S.E.2d 54 (1971) (decided under former Code 1933, § 113-806).

Declarations of testator admissible on issue of undue influence. — Declarations of a testator freely and voluntarily made prior to the execution of the testator's will manifesting a long-continued purpose to dispose of the testator's property in a particular manner would be admissible on the issue as to whether undue influences had been exercised or not. Clements v. Clements, 247 Ga. 787, 279 S.E.2d 698 (1981) (decided under former Code 1933, § 113-806).

Charge on inadmissibility of parol evidence applies to will construction cases, not will validity cases. Clements v. Clements, 247 Ga. 787, 279 S.E.2d 698 (1981) (decided under former Code 1933, § 113-806).

4. Reduction of Estates

Estates devised absolutely in fee simple. — Courts will not by construction reduce an estate once devised absolutely in fee, by limitations contained in subsequent parts of the will, unless the intention to limit the devise is clearly and unmistakably manifest. Barker v. Haunson, 174 Ga. 492, 163 S.E. 163 (1932) (decided under former Civil Code 1910, § 3900).

When, in a will, property is devised in language sufficient to pass a fee-simple estate, the will should not be held to convey a lesser estate unless it is clear from a subsequent provision of the will that such was the intention of the testator. Watts v. Finley, 187 Ga. 629, 1 S.E.2d 723 (1939) (decided under former Code 1933, § 113-806).

When under the terms of the will, bequest in controversy was to vest unconditionally and in fee simple in a named brother of the testator upon his claiming such bequest within a stated period (otherwise to go to a designated legatee), and the brother claimed the bequest within the time limited, the title became vested unconditionally in the brother, and the bequest did not pass to the alternative legatee. Lassiter v. Bank of Dawson, 191 Ga. 208, 11 S.E.2d 910 (1940) (decided under former Code 1933, § 113-806).

Language conditioning bequests to sons-in-law, "provided they are living with their present wives at the time of my death," has but one meaning and is unambiguous and legatee's contention that the son was prevented from meeting the condition by his wife's death, and that it was therefore ineffective, was without merit. Hungerford v. Trust Co., 190 Ga. 387, 9 S.E.2d 630 (1940) (decided under former Code 1933, § 113-806).

When a will is susceptible of such interpretation, a provision creating a remainder shall be construed "so as to vest the estate indefeasibly at the earliest possible period of time." Buchanan v. Nicholson, 192 Ga. 754, 16 S.E.2d 743 (1941) (decided under former Code 1933, § 113-806).

When will devised all the property to the wife in fee simple, "to be used and disposed of in anywise as she may deem fit and proper for the exclusive benefit of

Intent of Testator (Cont'd)
4. Reduction of Estates (Cont'd)

herself and/or" their minor children and in the next paragraph disclosed that it was the testator's intention to leave the testator's estate in fee simple to the testator's spouse and their minor children with the testator's grown children receiving no share or claim upon the property, the property was devised to the wife absolutely and in fee simple. Aiken v. Aiken, 209 Ga. 819, 76 S.E.2d 481 (1953) (decided under former Code 1933, § 113-806).

Court will not by construction reduce an estate devised absolutely in fee simple because of limitations in subsequent parts of the will unless the intent to limit the devise is clearly and unmistakably manifested, all doubtful expressions being resolved in favor of the absolute estate. Aiken v. Aiken, 209 Ga. 819, 76 S.E.2d 481 (1953) (decided under former Code 1933, § 113-806).

Will bequeathing entire estate to testator's wife and further stating desire that upon wife's death, estate would pass to their son, gave wife fee simple rather than life estate. Chandler v. Chandler, 249 Ga. 575, 292 S.E.2d 685 (1982) (decided under former O.C.G.A. § 53-2-91).

Precatory words following gift of fee will not "cut down" interest devised. Chandler v. Chandler, 249 Ga. 575, 292 S.E.2d 685 (1982) (decided under former O.C.G.A. § 53-2-91).

5. General Bequests Favored

When testator intent unclear. — In cases of real doubt as to the nature of the bequest, whether general or special, if the intention of the testator in respect thereto cannot be clearly ascertained from the will, the law will declare it general and not special. Henderson v. First Nat'l Bank, 189 Ga. 175, 5 S.E.2d 636 (1939) (decided under former Code 1933, § 113-806).

In determining whether a particular bequest is general or special, resort must be had not alone to the particular item creating it, but to the will as a whole, in order to ascertain the intention of the testator which if it may be there discovered must control. Henderson v. First Nat'l Bank, 189 Ga. 175, 5 S.E.2d 636 (1939) (decided under former Code 1933, § 113-806).

Motive in making a bequest is a legitimate field for judicial inquiry only to the extent that the motive may illuminate the vital question of intent, when, due to the uncertain and ambiguous language of the will, the testator's intent is doubtful. Hungerford v. Trust Co., 190 Ga. 387, 9 S.E.2d 630 (1940) (decided under former Code 1933, § 113-806).

6. Presumption of Natural Descent

Rule is that the state assumes that one would rather have his or her property pass within the bloodline, unless a contrary intent is made clear. Trust Co. Bank v. First Nat'l Bank, 246 Ga. 222, 271 S.E.2d 141 (1980) (decided under former Code 1933, § 113-806).

In the construction of unclear wills the courts look to that interpretation which carries out the provisions of the statute of distribution, and in the absence of anything in the will to the contrary the presumption is that the testator intended that his or her property should go where the law carries it, namely the channel of natural descent. Trust Co. Bank v. First Nat'l Bank, 246 Ga. 222, 271 S.E.2d 141 (1980) (decided under former Code 1933, § 113-806).

Statute of distribution seeks to effectuate the presumed intent of an intestate, and when a will is unclear the courts follow the statute of distribution to effectuate the intent of the testator. Trust Co. Bank v. First Nat'l Bank, 246 Ga. 222, 271 S.E.2d 141 (1980) (decided under former Code 1933, § 113-806).

Language requiring distribution per capita versus per stirpes. — In the absence of anything in the will to the contrary, the presumption is that an ancestor intends that the ancestor's property should go where the law carries the property, which is supposed to be the channel of natural descent; and that the use of such terms as "in equal shares," or "share and share alike," or "equally divided," would not alone be sufficient to overcome this presumption and require a distribution per capita when the statute would require a distribution per stirpes. Harri-

son v. Odom, 241 Ga. 284, 244 S.E.2d 874 (1978) (decided under former Code 1933, § 113-806).

Grandchildren take nothing in a will under a bequest to children as a class, unless there be something to indicate and effectuate an intention that the grandchildren should take the interest of their parent who dies before the testator. Veal v. King, 216 Ga. 298, 116 S.E.2d 223 (1960) (decided under former Code 1933, § 113-806).

Testator's ignorance of all of personal property. — When the right of the testator to receive the moneys in question constituted personal property, and was included within the description "all my personal property," the mere fact that the testator was ignorant of the existence of such right is insufficient to show that the testator did not intend that all of the testator's personal property, whether known or unknown, should go to the testator's wife and daughter as stated in the testator's will. Evans v. Pennington, 177 Ga. 56, 169 S.E. 349 (1933) (decided under former Civil Code 1910, § 3900).

RESEARCH REFERENCES

Am. Jur. 2d. — 80 Am. Jur. 2d, Wills, §§ 1008 et seq., 1024, 1025.

C.J.S. — 96 C.J.S., Wills, §§ 819, 847, 849, 857, 858.

ALR. — Direction in will that legacies be paid out of the personal estate as affecting right to charge real estate therewith, 26 A.L.R. 648.

What is included in terms "notes," "securities," etc., in a bequest, 52 A.L.R. 1097.

Practical construction placed on will by parties interested, 67 A.L.R. 1272.

Term "heirs" in will as including legatees or devisees, 70 A.L.R. 581.

Content and effect of symbol or abbreviation "&" or "etc.", 77 A.L.R. 879.

Devise or bequest to country or political division without specification of particular purpose as a charitable devise or bequest, 82 A.L.R. 476.

Intention of testator as defeating operation of statute to prevent lapses, 92 A.L.R. 846; 63 A.L.R.2d 1172.

What is included in term "money" in will, 93 A.L.R. 514; 173 A.L.R. 656.

Phrase "from and after" death of life beneficiary as affecting character of remainder as vested or contingent, 103 A.L.R. 598.

Disinheritance provision of will as affecting construction of will as regards children or descendants of person disinherited, 112 A.L.R. 284.

Construction and application of provision of will expressly giving executor or trustee power to mortgage realty, 115 A.L.R. 1417.

Meaning of term "issue" when used as a word of purchase, 117 A.L.R. 691.

Doctrine of equitable conversion as affected by discretion as to time, manner or other circumstances of sale, where the duty to sell is mandatory, 124 A.L.R. 1448.

Word "now" or other word of time in will as relating to date of execution of will or date of death of testator, 125 A.L.R. 790.

Possibility of avoiding or limiting effect of clause in later will purporting to revoke all former wills, 125 A.L.R. 936.

Execution, by donee of power, of deed, mortgage, or will not referring to the power as exercise thereof, 127 A.L.R. 248.

Time as of which members of class described as testator's "heirs," "next of kin," "relations," etc., to whom a future gift is made are to be ascertained, 127 A.L.R. 602; 169 A.L.R. 207.

Provision in trust instrument making solvency of beneficiary, or discharge of his debts, a condition precedent to his receipt of trust property, 138 A.L.R. 1336.

Vested or contingent character of remainder as affected by fact that, if vested, certain person or persons will share in the property who were excluded by express terms of the will, 138 A.L.R. 1435.

Disposition of share of one of two or more life tenants or beneficiaries of income accruing between his death and the death of the last survivor of the beneficiaries under a will or other instrument which postpones the remainder until the latter event, without providing for such disposition, 140 A.L.R. 841; 71 A.L.R.2d 1332.

Incorporation of extrinsic writings in will by reference, 144 A.L.R. 714; 173 A.L.R. 568.

Equitable conversion by will as affected by total or partial failure of testator's purpose, 144 A.L.R. 1236.

Validity, construction, and effect of provision in will regarding amount payable for attorneys' services, 148 A.L.R. 362.

Education of beneficiary, or children of beneficiary, as within contemplation of provision of will or trust instrument permitting encroachment upon principal, 148 A.L.R. 1039.

Wills: significance and effect of statement of value or par value in specific legacy of bonds or stock, 151 A.L.R. 969.

When existence of institution named as beneficiary deemed to have ended, within contemplation of provision of will in that regard, 152 A.L.R. 1303.

Designation of legatee or devisee by abbreviation, 153 A.L.R. 486.

When bequest deemed to cover or include accounts receivable or other money obligations owned by testator, 154 A.L.R. 973.

Who included in term "family" in bequest or devise, 154 A.L.R. 1411.

Construction and application of phrase "understanding age" or similar obscure phrase, fixing the time when beneficiaries of trust or will shall receive principal or income, 157 A.L.R. 139.

Time as of which "heirs" or "next of kin" descriptive of beneficiaries of a devise or bequest are to be determined where ancestor predeceases the testator, 162 A.L.R. 716.

Prior estate as affected by remainder void for remoteness, 168 A.L.R. 321.

Respective rights and obligations of testamentary trustee and one whom will permits to occupy property, 172 A.L.R. 1283.

Effect of error in mentioning the number who are to take under a devise or legacy to persons described as a class, 173 A.L.R. 1012.

Construction and effect of general legacy conditional upon ademption of specific legacy or devise to legatee, 2 A.L.R.2d 819.

Phrase in will, "subject to payment of debts," and the like, as charging particular devise or bequest with debts, in exoneration of property otherwise subject thereto, 2 A.L.R.2d 1310.

What constitutes oil or gas "royalty," or "royalties," within language of conveyance, exception, reservation, devise, or assignment, 4 A.L.R.2d 492.

Enlarged interest acquired by testator after execution of will as passing by devise or bequest, 18 A.L.R.2d 519.

Nature of remainders created by will giving life estate to spouse of testator, with remainder to be divided equally between testator's heirs and spouse's heirs, 19 A.L.R.2d 371.

Who is "child," "issue," "descendant," "relation," "heir," etc., within antilapse statute describing the person taking through or from the legatee or devisee, 19 A.L.R.2d 1159.

Words of survivorship in will disposing of estate in remainder as referable to death of testator or to termination of intervening estate, 20 A.L.R.2d 830.

Nontrust life estate expressly given for support and maintenance, as limited thereto, 26 A.L.R.2d 1207.

Term "next of kin" used in will, as referring to those who would take in cases of intestacy under distribution statutes, or to nearest blood relatives of designated person or persons, 32 A.L.R.2d 296.

Validity and effect of provision in will regulating or controlling beneficiary's residence, 35 A.L.R.2d 387.

Purview of gift, charge, or like, for "college education," 36 A.L.R.2d 1323.

What passes under, and is included in, devise of "home" or "home place," 38 A.L.R.2d 840.

What passes under term "things" or "personal things" in will, 41 A.L.R.2d 946.

Provision of will that children, etc., of remainderman who dies before expiration of precedent estate or time fixed for distribution to remaindermen, shall take the share to which he would have been entitled, as affecting the character of remainder as vested or contingent, 47 A.L.R.2d 900.

What constitutes contest or attempt to defeat will within provision thereof forfeiting share of contesting beneficiary, 49 A.L.R.2d 198.

Testamentary gift to class or group of specified relationship as including those of half blood, 49 A.L.R.2d 1362.

Construction and effect of proviso of will that "in case of the death" of a devisee or legatee, or "if he die" (or equivalent expression), the property shall go to another, 51 A.L.R.2d 205.

Admissibility of subsequent declarations of settlor to aid interpretation of trust, 51 A.L.R.2d 820.

Spouse's right to take under other spouse's will as affected by antenuptial or postnuptial agreement or property settlement, 53 A.L.R.2d 475.

Applicability of antilapse statutes to class gifts, 56 A.L.R.2d 948.

Determination as to whether testator intended to dispose of property belonging to devisee or legatee so as to put latter to election, 60 A.L.R.2d 736.

Construction of devise to persons as joint tenants and expressly to the survivor of them or to them, "with the right of survivorship," 69 A.L.R.2d 1058.

Changing, deleting, or adding punctuation in construing will, 70 A.L.R.2d 215.

Person entitled to devise or bequest to "husband," "wife," or "widow," 75 A.L.R.2d 1413.

Wills: "stocks" as including bonds or other securities, 76 A.L.R.2d 243.

Construction and effect of will provision releasing or forgiving debt due testator, 76 A.L.R.2d 1020.

Husband or wife as heir within provision of will or trust, 79 A.L.R.2d 1438.

Effect of mistake of draftsman (other than testator) in drawing will, 90 A.L.R.2d 924.

Effect of will provision cutting off heir or next of kin, or restricting him to provision made, to exclude him from distribution of intestate property, 100 A.L.R.2d 325.

Bequest of stated amount to several legatees as entitling each to full amount or proportionate share thereof, 1 A.L.R.3d 479.

What passes under legacy or bequest of things found or contained in particular place or container, 5 A.L.R.3d 466.

Revocation of will as affecting codicil and vice versa, 7 A.L.R.3d 1143.

Validity, construction, and effect of bequest or devise to a person's estate, or to the person or his estate, 10 A.L.R.3d 483.

Disposition of all or residue of testator's property, without referring to power of appointment, as constituting sufficient manifestation of intention to exercise power, in absence of statute, 15 A.L.R.3d 346.

Admissibility of extrinsic evidence to clarify location of real property devised in a will, 16 A.L.R.3d 386.

Admissibility of extrinsic evidence to identify stocks, bonds, and other securities disposed of by will, 16 A.L.R.3d 432.

Wills: validity and construction of gift to A or B, or to A or B or survivor, 19 A.L.R.3d 1213.

Wills: admissibility of extrinsic evidence to determine whether fee or absolute interest, or only estate for life or years, was given, 21 A.L.R.3d 778.

Wills: bequest or devise referring to services to be rendered by donee to testator during latter's lifetime as absolute or conditioned gift, 22 A.L.R.3d 771.

Testamentary devise or bequest conditioned upon beneficiary's supporting or rendering services to named person as providing for condition subsequent or precedent, 25 A.L.R.3d 762.

What passes under term "securities" in will, 27 A.L.R.3d 1386.

What passes under terms "cash," "cash on hand," or "cash assets" in will, 27 A.L.R.3d 1406.

What passes under term "business" or "business enterprise" in will, 28 A.L.R.3d 1169.

Testamentary gift to children as including stepchild, 28 A.L.R.3d 1307.

What passes under, and is included in, devise of "building," "house," or "dwelling house," 29 A.L.R.3d 574.

What passes under terms "personal belongings," "belongings," "personal effects," or "effects" in will, 30 A.L.R.3d 797.

Disposition of property of inter vivos trust falling in after death of settlor, who left will making no express disposition of the trust property, 30 A.L.R.3d 1318.

Wills: term "heirs" as restricted to meaning "children," 37 A.L.R.3d 9.

Change in stock or corporate structure, or split or substitution of stock of corporation as affecting bequest of stock, 46 A.L.R.3d 7.

Wills: gift over to "survivors" of class or group of designated beneficiaries as restricted to surviving members of class or

group, or as passing to heirs or representatives of deceased beneficiary, 54 A.L.R.3d 280.

Validity and construction of bequest with limitation over to another in event that original beneficiary dies before distribution, payment, or receipt thereof, 59 A.L.R.3d 1043.

Construction of reference in will to statute where pertinent provisions of statute are subsequently changed by amendment or repeal, 63 A.L.R.3d 603.

Wills: separate gifts to same person in same or substantially same amounts made in separate wills or codicils, as cumulative or substitutionary, 65 A.L.R.3d 1325.

Construction and effect of will provisions expressly relating to the burden of estate or inheritance taxes, 69 A.L.R.3d 122.

Construction and effect of will provisions not expressly mentioning payment of death taxes but relied on as affecting the burden of estate or inheritance taxes, 70 A.L.R.3d 630.

Construction and effect of will provisions relied on as affecting payment of real or personal property taxes or income taxes, 70 A.L.R.3d 726.

Term "money" or "moneys" in will as including real property, 76 A.L.R.3d 1254.

Time in which option created by will to purchase real estate is to be exercised, 82 A.L.R.3d 790.

Wills: effect of gift to be disposed of "As Already Agreed" upon or the like, 85 A.L.R.3d 1181.

Base for determining amount of bequest of a specific percent or proportion of estate or property, 87 A.L.R.3d 605.

Validity and enforceability of provision of will or trust instrument for forfeiture or reduction of share of contesting beneficiary, 23 A.L.R.4th 369.

Word "child" or "children" in will as including grandchild or grandchildren, 30 A.L.R.4th 319.

Wills: what constitutes "bank," "checking," or "savings" account, within meaning of bequest, 31 A.L.R.4th 688.

Adoption as precluding testamentary gift under natural relative's will, 71 A.L.R.4th 374.

What constitutes contest or attempt to defeat will within provision thereof forfeiting share of contesting beneficiary, 3 A.L.R.5th 590.

What passes under term "personal property" in will, 31 A.L.R.5th 499.

Adopted child as within class named in deed or inter vivos trust instrument, 37 A.L.R.5th 237.

53-4-56. Construction of wills; parol evidence.

In construing a will, the court may hear parol evidence of the circumstances surrounding the testator at the time of execution to explain all ambiguities, whether latent or patent.

History. — Code 1981, § 53-4-56, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries over former OCGA Sec. 53-2-94. Former OCGA Secs. 53-2-92 (dealing with the construction of inconsistent provisions) and 53-2-93 (dealing with the construction of an unconditional gift of income) are repealed. The repeal of these rules of construction as statutory mandates does not prohibit a court's use of them as common law guidelines in the construction of wills.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 2457, former Code 1882, § 2457, former Civil

Code 1895, § 3325, former Civil Code 1910, § 3901, former Code 1933, § 113-807, and former O.C.G.A. § 53-2-94 are included in the annotations for this Code section.

Surrounding circumstances. — The most important of those surrounding circumstances mentioned in the statute are the recipients of one's bounty, their relations to that one and associations with that one, one's uniform affection for them, or any interruption of the current of that affection. Olmstead v. Dunn, 72 Ga. 850 (1884) (decided under former Code 1882, § 2457).

General rule is that parol testimony is inadmissible to explain a will, except by proving the circumstances which surround the testator; the testator's relation to persons and things about the testator; and this may at all times be done. Billingslea v. Moore, 14 Ga. 370 (1853) (decided under former law).

Declarations of testator admissible on issue of undue influence. — Declarations of a testator freely and voluntarily made prior to the execution of the testator's will manifesting a long-continued purpose to dispose of the testator's property in a particular manner would be admissible on the issue as to whether undue influences had been exercised or not. Clements v. Clements, 247 Ga. 787, 279 S.E.2d 698 (1981) (decided under former Code 1933, § 113-807).

Inconsistent statements by testator. — Parol evidence is not admissible to show that a testator meant one thing when the testator said another. Hall v. Beecher, 225 Ga. 354, 168 S.E.2d 581 (1969) (decided under former Code 1933, § 113-807).

Parol evidence prohibited if language of will unambiguous. — Parol testimony was not admissible to raise a latent ambiguity in a devise, and thus to defeat the legal effect of the plain, unambiguous terms used. Gillespie v. Schuman, 62 Ga. 252 (1879) (decided under former Code 1873, § 2457).

When the terms of a will are plain and unambiguous, parol testimony as to the sayings or statements of the testator that the testator intended to dispose of the testator's property in a certain way, and to certain persons, different from that expressed in the will, will be rejected. Hanvy v. Moore, 140 Ga. 691, 79 S.E. 772 (1913) (decided under former Civil Code 1910, § 3901).

While it is true that the cardinal rule for the construction of wills requires that the intention of the testator should be ascertained and enforced, and that in so doing parol evidence may be resorted to when the language of the will is doubtful or uncertain, there is no room for construction when the meaning of the words used in the will is so plain and obvious that it cannot be misunderstood and this is true although the words may express a meaning entirely at variance with the real intention of the testator. Hall v. Beecher, 225 Ga. 354, 168 S.E.2d 581 (1969) (decided under former Code 1933, § 113-807).

Parol evidence necessary when words capable of multiple, reasonable interpretations. — In a declaratory judgment action, the trial court erred in finding that language of a will was unambiguous because the will used the alternative and seemingly interchangeable words "live," "reside," and "remain" to describe the conditions of the widow's life estate, and those words were capable of multiple, reasonable interpretations, parol evidence was therefore necessary to resolve the ambiguity and ascertain the decedent's intent in devising the life estate. DeMott v. DeMott, 353 Ga. App. 190, 836 S.E.2d 612 (2019).

Oral testimony for purpose of inserting entirely new meaning. — While courts are authorized to hear parol testimony of the circumstances relating to the testator at the time of the execution of the will, yet when the language of the will is unambiguous and the testator's intention is stated in unmistakable language, parol evidence is inadmissible for the purpose of showing a different intention. Hungerford v. Trust Co., 190 Ga. 387, 9 S.E.2d 630 (1940) (decided under former Code 1933, § 113-807).

If the terms of a will when legally construed are plain and unambiguous, parol evidence cannot be received for the purpose of showing an intention contrary to that which the language when properly

construed necessitated, nor is parol evidence admissible to raise a latent ambiguity and then to explain the ambiguity, thus when no such ambiguity exists as a legal construction will not resolve, the construction is for the court, and not for the jury. Snellings v. Downer, 193 Ga. 340, 18 S.E.2d 531 (1942) (decided under former Code 1933, § 113-807); Hall v. Beecher, 225 Ga. 354, 168 S.E.2d 581 (1969) (decided under former Code 1933, § 113-807).

While parol evidence in some instances is authorized to explain an ambiguity in a will, oral testimony would be inadmissible for the purpose of inserting an entirely new clause in a will to dispose of an interest in property which the testator failed to devise. Lining v. Jackson, 203 Ga. 22, 45 S.E.2d 410 (1947) (decided under former Code 1933, § 113-807).

When the language of the will is unambiguous and the testator's intent is stated in clear and precise language, parol evidence is not admissible for the purpose of showing a different intent. Citizens & S. Nat'l Bank v. Kelly, 223 Ga. 294, 154 S.E.2d 584 (1967) (decided under former Code 1933, § 113-807).

When the terms of a will are plain and unambiguous, the terms must control, and parol evidence cannot be received to give the will a meaning different from that which is clearly and unequivocally expressed therein. Hall v. Beecher, 225 Ga. 354, 168 S.E.2d 581 (1969) (decided under former Code 1933, § 113-807).

Admissibility of parol evidence generally. — If from the will the intention is manifest, there is neither a necessity for, nor a power to admit parol testimony. Ambiguity is the basis upon which it is admitted if at all; if there is no ambiguity, if the intention is manifest, the precedent condition of admissibility is wanting; and it is not an ambiguity which is undefined, a loose supposition that there may be doubt, a conjectural hypothesis of a variant intent. Leroy M. Wiley, Parish & Co. v. Smith, 3 Ga. 551 (1847), overruled on other grounds, Folsom v. First Nat'l Bank of Atlanta, 246 Ga. 320, 271 S.E.2d 461 (1980) (decided under former law).

If the intention cannot be clearly ascertained, by reason of any patent ambiguity as to the thing bequeathed, or the person who shall take, the court will hear evidence to explain such ambiguity as to the thing or person. Williams v. McIntyre, 8 Ga. 34 (1850) (decided under former law).

Parol evidence could not change, add to, or contradict a written will, but where there were ambiguities, whether latent or patent, the ambiguities could be explained by the parol evidence. Burge v. Hamilton, 72 Ga. 568 (1884) (decided under former Code 1882, § 2457). See also Doyal v. Smith, 28 Ga. 262 (1859) (decided under former law).

While parol evidence is admissible to raise a latent ambiguity in a description and then explain it, in every case the intention of the maker of the instrument must be gathered from the instrument itself, read in the light of the parol evidence. Of course it is not permissible to create a devise or bequest by parol; but the parol evidence must show what the testator's real intention was from the language used. Olive v. Henderson, 121 Ga. 836, 49 S.E. 743, 104 Am. St. R. 185 (1905) (decided under former Civil Code 1895, § 3325).

Parol evidence necessary when words of will capable of multiple, reasonable interpretations. — Trial court erred in finding that Item Four of the will was unambiguous as while Item Four was not patently ambiguous on its face, it contained latent ambiguities concerning the property devised that appeared only when its words were put into operation and it was necessary for the trial court to consider parol evidence to resolve the latent ambiguity. Luke v. Luke, 356 Ga. App. 271, 846 S.E.2d 216 (2020).

Distinction between latent and patent ambiguities. — If a double meaning is apparent on the face of the instrument, then the ambiguity is a patent one. If the language is apparently not of double meaning, but is shown to be so only by the aid of collateral or extrinsic facts, the ambiguity is latent. Olive v. Henderson, 121 Ga. 836, 49 S.E. 743, 104 Am. St. R. 185 (1905) (decided under former Civil Code 1895, § 3325).

When the language of a will is doubtful or ambiguous, parol evidence

is admissible for the purpose of assisting the court in ascertaining its meaning. In such a case parol evidence may be admitted for the purpose of showing and explaining a latent ambiguity in a will. But, when the terms of a will are plain and unambiguous, they cannot be varied or explained by parol evidence showing an intention on the part of the testator at variance with that expressed in the instrument. Citizens' & S. Nat'l Bank v. Clark, 172 Ga. 625, 158 S.E. 297 (1931) (decided under former Civil Code 1910, § 3901).

Parol evidence to establish identity. — Writing purporting to convey land "to the heirs of" a named person, when that person is dead and the heirs are ascertainable, is not void upon the ground that "it does not show and does not describe the grantees"; for if there are persons ascertainable who are the heirs of the person named parol evidence would be admissible to establish their identity. Farrar Lumber Co. v. Brindle, 170 Ga. 37, 151 S.E. 923 (1930) (decided under former Civil Code 1910, § 3901).

Motive in making a bequest is a legitimate field for judicial inquiry only to the extent that motive may illuminate the vital question of intent, when, due to the uncertain and ambiguous language of the will, the testator's intent is doubtful. Hungerford v. Trust Co., 190 Ga. 387, 9 S.E.2d 630 (1940) (decided under former Code 1933, § 113-807).

Use of term "appropriate." — Parol evidence was admissible to determine testator's intent as the term "appropriate" in the will provision restricting the attorney's choice of government agency, charity, or foundation to which the testator's real property would go was ambiguous. Board of Regents v. Bates, 262 Ga. 307, 418 S.E.2d 8 (1992) (decided under former O.C.G.A. § 53-2-94).

It is not competent to prove the contents of a will by parol evidence. Thomasson v. Driskell, 13 Ga. 253 (1853) (decided under former law).

Parol evidence admitted. — Because the will contained a latent ambiguity as to which of two nephews was the intended beneficiary, evidence as to all the facts and circumstances respecting the decedent and the decedent's nephews, as well as parol evidence of the decedent's declarations, was admissible. Legare v. Legare, 268 Ga. 474, 490 S.E.2d 369 (1997) (decided under former O.C.G.A. § 53-2-94).

Charge on inadmissibility of parol evidence applies to will construction cases, not will validity cases. Clements v. Clements, 247 Ga. 787, 279 S.E.2d 698 (1981) (decided under former Code 1933, § 113-807).

Cited in Fraser v. Dillon, 78 Ga. 474, 3 S.E. 695 (1887); Morgan v. Huggins, 42 F. 869 (N.D. Ga. 1890); Georgia, C. & N. Ry. v. Archer, 87 Ga. 237, 13 S.E. 636 (1891); Lokey v. McMurrain, 154 Ga. 705, 115 S.E. 76 (1922); McMillan v. McCoy, 175 Ga. 699, 165 S.E. 604 (1932); Comer v. Citizens & S. Nat'l Bank, 182 Ga. 1, 185 S.E. 77 (1935); Murphy v. Johnston, 190 Ga. 23, 8 S.E.2d 23 (1940); Bratton v. Trust Co., 191 Ga. 49, 11 S.E.2d 204 (1940); Sproull v. Graves, 194 Ga. 66, 20 S.E.2d 613 (1942); MacGregor v. Roux, 198 Ga. 520, 32 S.E.2d 289 (1944); Hix v. Hix, 223 Ga. 50, 153 S.E.2d 440 (1967); Williams v. Whitehurst, 224 Ga. 246, 161 S.E.2d 507 (1968); Donehoo v. Donehoo, 229 Ga. 627, 193 S.E.2d 827 (1972); Scheridan v. Scheridan, 132 Ga. App. 210, 207 S.E.2d 691 (1974); McParland v. McParland, 233 Ga. 458, 211 S.E.2d 748 (1975); Cannon v. First Nat'l Bank, 237 Ga. 562, 229 S.E.2d 361 (1976); Grant v. Bell, 150 Ga. App. 141, 257 S.E.2d 12 (1979); DuBose v. Box, 246 Ga. 660, 273 S.E.2d 101 (1980); Chandler v. Chandler, 249 Ga. 575, 292 S.E.2d 685 (1982); Wright v. Trust Co. Bank, 260 Ga. 414, 396 S.E.2d 213 (1990).

RESEARCH REFERENCES

Am. Jur. 2d. — 80 Am. Jur. 2d, Wills, § 1114.

C.J.S. — 95 C.J.S., Wills, § 599. 96 C.J.S., Wills, §§ 834, 892, 893.

ALR. — Devise or bequest to beneficiary designated only as one who shall render specified service or occupy specified position or status, other than mere

relationship, 38 A.L.R. 775.

Construction and effect of provisions of will regarding abatement of legacies or devises in event of insufficiency of assets to pay all in full, 101 A.L.R. 704.

Incorporation of extrinsic writings in will by reference, 144 A.L.R. 714; 173 A.L.R. 568.

Designation of legatee or devisee by abbreviation, 153 A.L.R. 486.

Effect of error in mentioning the number who are to take under a devise or legacy to persons described as a class, 173 A.L.R. 1012.

Term "next of kin" used in will, as referring to those who would take in cases of intestacy under distribution statutes, or to nearest blood relatives of designated person or persons, 32 A.L.R.2d 296.

Admissibility of subsequent declarations of settlor to aid interpretation of trust, 51 A.L.R.2d 820.

Person entitled to devise or bequest to "husband," "wife," or "widow," 75 A.L.R.2d 1413.

Conclusiveness of testator's statement as to amount of debt or advancement to be charged against legacy or devise, 98 A.L.R.2d 273.

Admissibility of extrinsic evidence to clarify location of real property devised in a will, 16 A.L.R.3d 386.

Admissibility of extrinsic evidence to identify stocks, bonds, and other securities disposed of by will, 16 A.L.R.3d 432.

Admissibility of extrinsic evidence to determine whether fee or absolute interest, or only estate for life or years, was given, 21 A.L.R.3d 778.

Effect upon testamentary nature of document of expression therein of intention to make more formal will, further disposition of property, or the like, 46 A.L.R.3d 938.

Effect of gift to be disposed of "As Already Agreed" upon or the like, 85 A.L.R.3d 1181.

53-4-57. Partial illegality of will.

If a will is illegal in part, the part that is legal may be sustained; but if the whole will so constitutes one testamentary scheme that the legal portion alone cannot give effect to the testator's intention, the whole will shall fail.

History. — Code 1981, § 53-4-57, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004).

COMMENT

This section carries over former OCGA Sec. 53-2-4.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-108, are included in the annotations for this Code section.

Cited in Lawson v. Hurt, 217 Ga. 827, 125 S.E.2d 480 (1962).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 7, 8, 589, 592 et seq.

C.J.S. — 95 C.J.S., Wills, §§ 194, 195.

ALR. — Prosecution of action or claim

against estate by beneficiary as forfeiture of share in will by virtue of clause therein so providing, 30 A.L.R. 1014.

Validity and construction of statutes discountenancing donations, testamentary or otherwise, between persons living in concubinage or otherwise sustaining immoral relations, 62 A.L.R. 286.

Validity, construction, and effect of express provisions in will for severance of good from bad in event of partial invalidity, 80 A.L.R. 1210.

Validity of provision in deed or other instrument creating a cotenancy that neither tenant shall encumber or dispose of his interest without consent of the other, 124 A.L.R. 222.

Interlineations and changes appearing on face of will, 34 A.L.R.2d 619.

Effect of invalidity of provision conditioning testamentary gift upon divorce of beneficiary, on alternative provision conditioning gift upon spouse's death, 74 A.L.R.3d 1095.

53-4-58. Failure to provide for living child believed dead.

If at the time of execution of the will the testator fails to provide in the will for a living child of the testator solely because the testator believes the child to be dead, the child is entitled to receive a share in the estate as follows:

(1) If the testator had no other child living at the time the will was executed, an omitted child receives a share equal in value to that which the child would have received had the testator died intestate but only to the extent that any provision in the will to or for the benefit of the surviving parent of the omitted child is not thereby reduced; or

(2) If the will contains testamentary gifts to one or more other children of the testator, an omitted child is entitled to receive the share of the estate that the child would have received had the testator included all omitted children with the children to whom testamentary gifts were made under the will and had given an equal share to each child. To the extent feasible, the interest granted an omitted child must be of the same character, whether legal or equitable, present or future, as that left to the testator's other children under the will. In satisfying the share for the omitted child, the shares of the other children shall abate ratably, preserving to the maximum extent possible the testamentary plan adopted by the testator.

History. — Code 1981, § 53-4-58, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article discussing the pretermitted heir, see 10 Ga. L. Rev. 447 (1976). For article advocating repeal of this Code section, or amendment to eliminate relief for all mistakes but belief in the existence of an heir, see 11 Ga. L. Rev. 297 (1977).

For note, "Wills — Mistake of Fact as to the Existence or Conduct of an Heir," see 1 Ga. St. B.J. 543 (1965).

COMMENT

This section replaces former OCGA Sec. 53-2-8 and is modeled after Uniform Probate Code Sec. 2-302. See Code Sec. 53-4-48 for the result when a child is born or adopted by the testator after the will is executed.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-210, and former O.C.G.A. § 53-2-8, are included in the annotations for this Code section.

Application only to mistake arising from mere ignorance. — There is a difference between a "mistake" arising from mere ignorance and one which results from an error of judgment after investigation or from negligent or willful failure to make a proper investigation by means of which the truth could be readily and surely ascertained. It is to such a mistake as that first indicated that the statute applied; it could not have been intended to operate in instances of the latter character. Thornton v. Hulme, 218 Ga. 480, 128 S.E.2d 744 (1962) (decided under former Code 1933, § 113-210); Herrin v. Herrin, 224 Ga. 579, 163 S.E.2d 713 (1968) (decided under former Code 1933, § 113-210); Yancey v. Hall, 265 Ga. 466, 458 S.E.2d 121 (1995) (decided under former O.C.G.A. § 53-2-8); Joseph v. Grisham, 267 Ga. 677, 482 S.E.2d 251 (1997) (decided under former O.C.G.A. § 53-2-8).

Will can be set aside for mistake of fact arising from ignorance, but not from an error in judgment after an investigation or after willful failure to investigate. Hammett v. Reynolds, 243 Ga. 669, 256 S.E.2d 354 (1979) (decided under former Code 1933, § 113-210).

Error in judgment does not constitute mistake of fact. — Mere fact that a testator bequeathed to the testator's daughter a note in the testator's possession, executed by her to the testator, which had been paid, did not show such a mistake of fact as to the conduct of an heir at law as is contemplated by law, so as to justify a finding that the testator should be deemed to have died intestate as to such heir at law. Watkins v. Jones, 184 Ga. 831, 193 S.E. 889 (1937) (decided under former Code 1933, § 113-210).

When caveator insists that the trial court erred in directing a verdict for propounder because the evidence shows that the will was executed under a mistake of fact as to the conduct of caveator, the heir at law of testator, viz: that caveator was continuing to assert a right to one-half of the property whereas caveator was not continuing to assert such a right, caveator's evidence shows no more than an erroneous deduction or conclusion by testator that because caveator once asserted a right to one-half of the property, caveator was continuing to do so. This is not ignorance of the basic facts. It is at most an error of judgment resulting from a failure to make an investigation of the matter, which does not constitute a mistake of fact. Thornton v. Hulme, 218 Ga. 480, 128 S.E.2d 744 (1962) (decided under former Code 1933, § 113-210).

Caveat to a will filed by the testator's wife on the ground that the testator mistakenly believed the wife had signed an enforceable antenuptial agreement did not allege a mistake of fact, but a mistake of judgment; the testator knew as a fact that she signed the agreement; whether the testator believed it was enforceable was a matter of judgment. Kaplan v. Kaplan, 266 Ga. 612, 469 S.E.2d 198 (1996) (decided under former O.C.G.A. § 53-2-8).

Purported mistake of the testator relating to her belief that she owned certain property which was claimed to be owned by son was not a mistake of fact as to the existence or conduct of an heir. Shore v. Malloy, 267 Ga. 44, 472 S.E.2d 303 (1996) (decided under former O.C.G.A. § 53-2-8).

Mistake of fact as to conduct of heir as to such heir. — When court submitted to the jury the issue of whether the will was executed by the testator under a mistake of fact as to the conduct of the caveatrices, and properly instructed the jury that if the jury found the will to have been so executed it would be inoperative as to such heir or heirs, it was error to instruct the jury that, if the jury found the will to have been so executed, the jury should return a verdict finding against the will as a whole. Moreland v. Word, 209 Ga. 463, 74 S.E.2d 82 (1953) (decided under former Code 1933, § 113-210).

Law does not require that a father provide for the support of his chil-

dren after his death; public policy, of course, favors the support of minor children by the father's estate after death. Russell v. Fulton Nat'l Bank, 247 Ga. 556, 276 S.E.2d 641, overruled on other grounds, Dolvin v. Dolvin, 248 Ga. 439, 284 S.E.2d 254 (1981) (decided under former O.C.G.A. § 53-2-8).

Prejudiced attitude toward own children insufficient to raise issue of incompetence. — Law does not say, because a man is narrowminded, prejudiced, unforgiving, or even mean in his relations to some of his children, that he is incompetent to make a will, and the testimony of witnesses that he is incapable or incompetent because of such an attitude toward a child cannot make an issue for the jury to pass upon. Watkins v. Jones, 184 Ga. 831, 193 S.E. 889 (1937) (decided under former Code 1933, § 113-210).

Despite testator's erroneous belief that the testator's son had stolen money, caveator could still not recover, as the only mistake affecting a will is the testator's erroneous belief that a child is dead. Harper v. Harper, 274 Ga. 542, 554 S.E.2d 454 (2001).

Cited in Scott v. Wimberly, 188 Ga. 148, 3 S.E.2d 71 (1939); Davis v. Aultman, 199 Ga. 129, 33 S.E.2d 317 (1945); Lee v. Boyer, 217 Ga. 27, 120 S.E.2d 757 (1961); Clavin v. Clavin, 238 Ga. 421, 233 S.E.2d 151 (1977); Russell v. Fulton Nat'l Bank, 248 Ga. 421, 283 S.E.2d 879 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, § 399 et seq.

Am. Jur. Pleading and Practice Forms. — 8B Am. Jur. Pleading and Practice Forms, Descent and Distribution, § 1.

C.J.S. — 95 C.J.S., Wills, § 344.

ALR. — Mistake as to one's interest in land under law of descent as subject of relief, 39 A.L.R. 194.

Pretermitted heir statutes: what constitutes sufficient testamentary reference to, or evidence of contemplation of, heir to render statute inapplicable, 83 A.L.R.4th 779.

53-4-59. Specific, demonstrative, general, or residuary testamentary gifts.

Testamentary gifts may be specific, demonstrative, general, or residuary. A specific testamentary gift directs the delivery of property particularly designated. A demonstrative testamentary gift designates the fund or property from which the gift is to be satisfied but nevertheless is an unconditional gift of the amount or value specified. A general testamentary gift does not direct the delivery of any particular property. A residuary testamentary gift includes all the property of the estate that is not effectively disposed of by other provisions of the will.

History. — Code 1981, § 53-4-59, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article discussing problems in construction of instrument conveying gift to a group or class, see 6 Ga. St. B.J. 169 (1969). For article surveying wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 66 Mercer L. Rev. 231 (2014).

COMMENT

This section modifies former OCGA Sec. 53-2-95 by adding definitions of demonstrative and residuary testamentary gifts. The definition of demonstrative

testamentary gifts reflects that used by the courts (see, e.g., *Lavender v. Cooper,* 248 Ga. 685 (1982)).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 2426, former Code 1868, § 2422, former Code 1873, § 2458, former Code 1933, § 113-808, and former O.C.G.A. § 53-2-95 are included in the annotations for this Code section.

Legacy is testamentary gift of personalty. — Will provision which provides that the plaintiff in a case against the executors of the estate, "shall be paid a salary" so long as the plaintiff shall serve as manager of a named business does not purport to make a gift to the plaintiff, and plaintiff's contention that he has a "legacy" under this provision of the will is without merit. A legacy is a gift of personalty by will. Savannah Bank & Trust Co. v. Mason, 209 Ga. 364, 72 S.E.2d 720 (1952) (decided under former Code 1933, § 113-808).

Legacies may be either general, specific, or demonstrative. Owens v. Citizens' & S. Nat'l Bank, 177 Ga. 289, 170 S.E. 196 (1933) (decided under former Code 1933, § 113-808); DuBose v. Box, 246 Ga. 660, 273 S.E.2d 101 (1980) (decided under former Code 1933, § 113-808).

When a bequest made in the codicil gives $1,000.00 in money, it therefore can only be held a general legacy. Greene v. Foster, 178 Ga. 319, 173 S.E. 91 (1934) (decided under former Code 1933, § 113-808).

Presumption is stronger that a testator intends some benefit to a legatee than that the testator intends a benefit only upon the collateral condition that the testator shall remain, till death, owner of the property bequeathed. Young v. Young, 202 Ga. 694, 44 S.E.2d 659 (1947) (decided under former Code 1933, § 113-808).

Demonstrative Legacies

Demonstrative legacy defined. — Demonstrative legacy is one which designates the fund or property from which it is to be satisfied, but is nevertheless an unconditional gift to the legatee of the amount or value specified. DuBose v. Box, 246 Ga. 660, 273 S.E.2d 101 (1980) (decided under former Code 1933, § 113-808); Lavender v. Cooper, 248 Ga. 685, 285 S.E.2d 528 (1982) (decided under former O.C.G.A. § 53-2-95).

Demonstrative legacy distinguished. — Demonstrative legacy is one which designates the fund or property from which it is to be satisfied, but is nevertheless an unconditional gift to the legatee of the amount or value specified. That it names a particular fund or other property from which it is to be satisfied is considered to be demonstrative of a convenient mode of payment; if that mode fails, the legacy is to be satisfied out of the general assets of the estate. A demonstrative legacy differs from a general legacy in that it does not, in the first instance, abate upon insufficiency of assets to pay the debts of the estate and the expenses of distribution; it differs from a specific legacy in that there is recourse for its payment from the general assets of the estate in the event of ademption in part or in whole. Owens v. Citizens' & S. Nat'l Bank, 177 Ga. 289, 170 S.E. 196 (1933) (decided

under former Code 1933, § 113-808); Young v. Young, 202 Ga. 694, 44 S.E.2d 659 (1947) (decided under former Code 1933, § 113-808).

Demonstrative legacy differs from a general legacy in that it does not, in the first instance, abate upon insufficiency of assets to pay the debts of the estate and the expenses of administration; it differs from a specific legacy in that there is recourse for its payment from the general assets of the estate in the event of ademption in part or in whole. Thomas v. King, 182 Ga. 463, 185 S.E. 820 (1936) (decided under former Code 1933, § 113-808); Young v. Young, 202 Ga. 694, 44 S.E.2d 659 (1947) (decided under former Code 1933, § 113-808); DuBose v. Box, 246 Ga. 660, 273 S.E.2d 101 (1980) (decided under former Code 1933, § 113-808).

Demonstrative legacy is one which designates the fund or property from which it is to be satisfied but is nevertheless an unconditional gift to the legatee of the amount or value specified, and if the designated fund fails, the legacy is to be satisfied out of the general assets of the estate. Thomas v. King, 182 Ga. 463, 185 S.E. 820 (1936) (decided under former Code 1933, § 113-808); Woodall v. First Nat'l Bank, 223 Ga. 688, 157 S.E.2d 261 (1967) (decided under former Code 1933, § 113-808).

General Legacies

1. In General

General legacy defined only in this section. — Code only defines a general legacy in this statute. Bailes v. Halsey, 179 Ga. 182, 175 S.E. 472 (1934) (decided under former Code 1933, § 113-808).

General not specific legacy. — When the legacy "is to be raised from his estate," no particular property being designated to pay it, it is general and not specific. Morton v. Murrell, 68 Ga. 141 (1881) (decided under former Code 1873, § 2458).

Courts favor general legacies. — When a general money legacy is given, the testator is not to be presumed to have intended to make it dependent upon the existence of a fund merely because the testator has indicated that it is to be paid out of that fund. On the contrary, if the will gives a money legacy, and a particular fund is charged with the payment of it, the presumption is that this only indicates an intention to furnish an additional security for its payment; since, if the fund charged is sufficient, the legacy shall not abate, though the condition of the estate is such that other general legacies are compelled to abate. Tennille v. Phelps, 49 Ga. 532 (1873) (decided under former Code 1868, § 2422).

Courts are not inclined to construe a legacy to be specific under the statute when the question is in doubt. Morton v. Murrell, 68 Ga. 141 (1881) (decided under former Code 1873, § 2458).

General legacy defined. — General legacy is one which does not direct delivery of any particular property; it is not limited to any particular asset and may be satisfied out of any property of the same general character belonging to the estate of the testator. DuBose v. Box, 246 Ga. 660, 273 S.E.2d 101 (1980).

General legacy is a gift of something to be furnished out of the testator's general personal estate; it need not form part of the testator's property at the time of the testator's death. Young v. Young, 202 Ga. 694, 44 S.E.2d 659 (1947) (decided under former Code 1933, § 113-808).

Bequest of notes. — Bequest in the following words, "also notes to the amount of sixteen hundred dollars on K. and C. security, for the purpose of purchasing a plantation for the use of S. etc.," is not a specific legacy, and is not adeemed by the sale and transfer of the notes by the testator in the testator's lifetime. Smith v. Executors of Smith, 23 Ga. 21 (1857) (decided under former law).

Gift of money is general legacy. — Legacy of the "particular fund" which testator was to receive for the testator's "home place" was not a gift of money to be paid from a specified sum, but it was a gift of a "particular fund," not of part of it, or of a sum to be taken from it, or out of it, but a gift of the whole of "said sum," a particular fund, raised by the sale of a specific legacy. Whitlock v. Vaun, 38 Ga. 562 (1868) (decided under former Code 1863, § 2426).

General Legacies (Cont'd)
1. In General (Cont'd)

Money legacy left to the executor of a will, though expressed to be "in addition to the usual commissions obtained by law, and as a full compensation for any extra trouble he may have in executing the will," is a general legacy, and cannot, as a legacy, be exempted from abatement with other general legacies, in case of a deficiency of assets. Greene v. Foster, 178 Ga. 319, 173 S.E. 91 (1934) (decided under former Code 1933, § 113-808).

As a general rule, it is true that a gift of money, to be paid from a specified fund is, nevertheless, a general legacy, and a failure of the fund does not destroy the legacy, but it is unquestionably true that a testator may so charge a money legacy upon a particular fund as to make the legacy follow the fate of the fund. Tinsley v. Maddox, 176 Ga. 471, 168 S.E. 297 (1933) (decided under former Code 1933, § 113-808).

When a general money legacy is given, the testator is not to be presumed to have intended to make it dependent upon the existence of a fund merely because the testator has indicated that it is to be paid out of that fund. Thomas v. King, 182 Ga. 463, 185 S.E. 820 (1936) (decided under former Code 1933, § 113-808).

If the will gives a money legacy, and a particular fund is charged with the payment of it, the presumption is that this only indicates an intention to furnish an additional security for its payment; since, if the fund charged is sufficient, the legacy shall not abate, though the condition of the estate is such that other general legacies are compelled to abate. Thomas v. King, 182 Ga. 463, 185 S.E. 820 (1936) (decided under former Code 1933, § 113-808).

Life estate given by a testator to the testator's widow was a specific legacy. Rachels v. Wimbish, 31 Ga. 214 (1860) (decided under former law).

2. Residuary Legacies

Residuary legacy defined. — Residuary legacy "is a general legacy into which falls all the assets of the estate after the satisfaction of all other legacies and the payment of all debts of the estate and all costs of administration." Young v. Young, 202 Ga. 694, 44 S.E.2d 659 (1947) (decided under former Code 1933, § 113-808); Woodall v. First Nat'l Bank, 223 Ga. 688, 157 S.E.2d 261 (1967) (decided under former Code 1933, § 113-808).

Code does not provide for any subclassification of general legacies and any attempt to so do would be arbitrary and without authority either by statute or otherwise. Killingsworth v. First Nat'l Bank, 237 Ga. 544, 228 S.E.2d 901 (1976) (decided under former Code 1933, § 113-808).

Beneficiaries not entitled to distribution as residual testamentary gift. — Brother and sister were not entitled, under O.C.G.A. § 53-8-15(d), to an order requiring the executor to deed real property left to the brother, sister, and executor as a residual testamentary gift; a residual testamentary gift was a general testamentary gift that, under O.C.G.A. § 53-4-59, did not require the delivery of any particular property. Travis v. Travis, 279 Ga. 847, 621 S.E.2d 721 (2005).

Specific Legacies

Specific legacy defined. — Specific legacy is one which operates on property particularly designated; a gift of money to be paid from a specified fund is nevertheless a general legacy. Tinsley v. Maddox, 176 Ga. 471, 168 S.E. 297 (1933) (decided under former Code 1933, § 113-808).

Special legacy is one which operates on property specifically designated while a specific legatee, is one to whom is bequeathed a particular thing, as distinguished from all others of the same kind. Regents of Univ. Sys. v. Trust Co., 186 Ga. 498, 198 S.E. 345 (1938) (decided under former Code 1933, § 113-808).

When a will purported to bequeath to the trustees of the University of Georgia the "entire corpus" including accumulated interest, less monthly allowances from the income to four named persons during their lives respectively, and except $100.00 each to two of her husband's nephews, this was a specific legacy to the trustees of the University of Georgia. Regents of Univ. Sys. v. Trust Co., 186 Ga.

498, 198 S.E. 345 (1938) (decided under former Code 1933, § 113-808).

Specific bequest or devise has given as its particular characteristic that it gives or devises to the named legatee a particular article or item of property owned by the testator or in some instances to be acquired by him, which is identified and distinguished from all others of the same nature and which, as stated, may be segregated from the mass of the testator's other property or estate. Henderson v. First Nat'l Bank, 189 Ga. 175, 5 S.E.2d 636 (1939) (decided under former Code 1933, § 113-808).

Special legacy is one that can be separated from the body of the estate and pointed out so as to individualize it, and enable it to be delivered to the legatee as a thing sui juris. The testator fixes upon it, as it were, a label, by which it may be identified and marked for delivery to the owner, and the title to it, as a separable thing, vests at once, on the death of the testator, in the legatee. Young v. Young, 202 Ga. 694, 44 S.E.2d 659 (1947) (decided under former Code 1933, § 113-808); Woodall v. First Nat'l Bank, 223 Ga. 688, 157 S.E.2d 261 (1967) (decided under former Code 1933, § 113-808).

Failure by the testator to particularize the $1,000.00 bonds bequeathed to stated children, forbid their being classified as specific legacies, and, consequently they do not fail but are payable as general legacies, $1,000.00 to each legatee, out of the general assets of the estate, including the proceeds from the sale of the three bonds on hand after the payment of debts, if any, and the expenses of administration. Young v. Young, 202 Ga. 694, 44 S.E.2d 659 (1947) (decided under former Code 1933, § 113-808).

Fact that the will provides for the legal title to particular property to be held by a trustee for the benefit of the widow does not prevent the legacy from being a specific one. It is the particular designation of the property itself, not who holds the property's legal title, which makes the legacy specific. Woodall v. First Nat'l Bank, 223 Ga. 688, 157 S.E.2d 261 (1967) (decided under former Code 1933, § 113-808); Killingsworth v. First Nat'l Bank, 237 Ga. 544, 228 S.E.2d 901 (1976) (decided under former Code 1933, § 113-808).

Specific legacy is one that can be separated from the body of the estate and pointed out so as to individualize it, and enable it to be delivered to the legatee as a thing sui juris. Killingsworth v. First Nat'l Bank, 237 Ga. 544, 228 S.E.2d 901 (1976) (decided under former Code 1933, § 113-808).

Specific legacy means a devise which distinguishes the devised property from all other property of the same nature and thereby enables it to be separated from the body of the estate and delivered to the devisee as a thing sui juris. Peacock v. Owens, 244 Ga. 203, 259 S.E.2d 458 (1979) (decided under former Code 1933, § 113-808).

Specific legacy gives to the named legatee a particular article or item of property owned by the testator, which is identified and distinguished from all others of the same nature, and which may be segregated from the mass of the testator's other property or estate. DuBose v. Box, 246 Ga. 660, 273 S.E.2d 101 (1980) (decided under former Code 1933, § 113-808).

Specific devise of lands carries with it to the devisee the income, profit, or increase of the specific legacy from the date of the testator's death. Cheshire v. Keaton, 184 Ga. 29, 190 S.E. 579 (1937) (decided under former Code 1933, § 113-808).

There is no inhibition against giving a special legacy to several people, or in making a special legacy to all of the children of the testator. The only question is whether the legacy operates on specific property. Greene v. Foster, 178 Ga. 319, 173 S.E. 91 (1934) (decided under former Code 1933, § 113-808).

Specific legacy subject to ademption. — Legacy is not a specific legacy, which will be adeemed when it does not bequeath a bond so labeled and sequestered as to be distinguished from another bond of a similar kind it is a demonstrative legacy and does not fail if the subject matter be not in existence on the death of the testator. Young v. Young, 202 Ga. 694, 44 S.E.2d 659 (1947) (decided under former Code 1933, § 113-808).

If the particular property described in

Specific Legacies (Cont'd)

the specific legacy is disposed of by the testator during the testator's life or cannot be located at the testator's death, it is adeemed and the legatee has no claim on the estate for the value of the legacy. DuBose v. Box, 246 Ga. 660, 273 S.E.2d 101 (1980) (decided under former Code 1933, § 113-808).

Pleading and Practice

Courts are inclined to construe a legacy to be general and not specific to the end that an ademption may not result. Bailes v. Halsey, 179 Ga. 182, 175 S.E. 472 (1934) (decided under former Code 1933, § 113-808).

In cases of real doubt as to the nature of the bequest, whether general or special, if the intention of the testator in respect thereto cannot be clearly ascertained from the will, the law will declare it general and not special. Henderson v. First Nat'l Bank, 189 Ga. 175, 5 S.E.2d 636 (1939) (decided under former Code 1933, § 113-808).

In determining whether a particular bequest is general or special, resort must be had not alone to the particular item creating it, but to the will as a whole, in order to ascertain the intention of the testator which if it may be there discovered must control. Henderson v. First Nat'l Bank, 189 Ga. 175, 5 S.E.2d 636 (1939) (decided under former Code 1933, § 113-808).

When the question is in doubt the courts are not inclined to construe a legacy to be specific. Young v. Young, 202 Ga. 694, 44 S.E.2d 659 (1947) (decided under former Code 1933, § 113-808).

RESEARCH REFERENCES

Am. Jur. 2d. — 80 Am. Jur. 2d, Wills, § 1294 et seq.

C.J.S. — 97 C.J.S., Wills, § 1655 et seq.

ALR. — When legacy is regarded as demonstrative, 6 A.L.R. 1353; 64 A.L.R.2d 778.

What included in terms "notes," "securities," etc., in a bequest, 52 A.L.R. 1097.

Effect of designation of particular property in residuary clause of a will, 128 A.L.R. 822; 72 A.L.R.2d 1170.

Disregarding corporate entity, or charging a specific legacy of stock of close corporation, in order to pay general legacy for which assets of estate are otherwise insufficient, 144 A.L.R. 546.

Title of, or right to possession by, specific legatee prior to order or decree of distribution, 150 A.L.R. 91.

Validity and effect of devise of a "house," or "lot," etc. (there being two or more) or devise of specified acreage or other quantity out of a larger tract or from testator's estate, with or without a right of selection expressed, 157 A.L.R. 1129.

Satisfaction or ademption of general legacy by inter vivos gift, transfer, or payment to the legatee or another, 26 A.L.R.2d 9.

When legacy is regarded as demonstrative, 64 A.L.R.2d 778.

Change in stock or corporate structure, or split or substitution of stock of corporation, as affecting bequest of stock, 46 A.L.R.3d 7.

53-4-60. Income, profit, or increase of specific testamentary gifts.

The income, profit, or increase of specific testamentary gifts, as a general rule, goes with the gift though the time of enjoyment or vesting may be postponed.

History. — Code 1981, § 53-4-60, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article, "The Time Gap in Wills: Shifting Assets and Shrink-

ing Estates — Obsolescence and Testamentary Planning in Georgia," see 6 Ga. L. Rev. 649 (1972).

For note, "Determining Principal and Income Allocation in Georgia Trusts," see 8 Ga. St. B.J. 564 (1972).

COMMENT

This section carries forward former OCGA Section 53-2-96.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-809, are included in the annotations for this Code section.

Devisee entitled to income from date of testator's death. — Market value of the securities bequeathed to legatee should be as of the date of testator's death. Owens v. Citizens' & S. Nat'l Bank, 177 Ga. 289, 170 S.E. 196 (1933) (decided under former Code 1933, § 113-809).

Specific devise of lands carries with it to the devisee the income, profit, or increase of the specific legacy from the date of the testator's death. Cheshire v. Keaton, 184 Ga. 29, 190 S.E. 579 (1937) (decided under former Code 1933, § 113-809).

When the testator makes a gift of the income on the legacy, and neither the legacy nor the income therefrom is delivered to the beneficiary within the time limits specified in the will, in order to be made whole, the beneficiary is entitled to interest on the income during the period the beneficiary should have been, but was not, receiving such income. DuBose v. Box, 246 Ga. 660, 273 S.E.2d 101 (1980) (decided under former Code 1933, § 113-809).

Cited in Jackson v. Maddox, 136 Ga. 31, 70 S.E. 865, 1912B Ann. Cas. 1216 (1911); Moore v. Lindsey, 662 F.2d 354 (5th Cir. 1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 80 Am. Jur. 2d, Wills, §§ 1356, 1357.

C.J.S. — 97 C.J.S., Wills, § 1684 et seq.

ALR. — Time at which interest is payable under will or contract providing for payment of interest, 10 A.L.R. 997.

Who entitled to rent on death of landlord, 31 A.L.R. 4.

Income during administration as part of value of estate on which succession tax is to be computed, 32 A.L.R. 850.

What included in terms "notes," "securities," etc., in a bequest, 52 A.L.R. 1097.

Title of, or right to possession by, specific legatee prior to order or decree of distribution, 150 A.L.R. 91.

Disposition and rights in respect of surplus income from trust in excess of amount directed to be paid to, or required for support of, beneficiaries during trust period, 157 A.L.R. 668.

Term "proceeds" in will or other trust instrument as indicating intention as to whether assets are to constitute principal or income, 1 A.L.R.2d 194.

"Divide and pay over" rule, for purpose of determining vested or contingent character of estate, 16 A.L.R.2d 1383.

Bequest of bank deposits, stocks, bonds, notes, or other securities as carrying dividends or interest accruing between testator's death and payment of legacy, 15 A.L.R.3d 1038.

Testamentary devise or bequest conditioned upon beneficiary's supporting or rendering services to named person as providing for condition subsequent or precedent, 25 A.L.R.3d 762.

Change in stock or corporate structure, or split or substitution of stock of corporation, as affecting bequest of stock, 46 A.L.R.3d 7.

Extent of rights of surviving spouse who elects to take against will in profits of or increase in value of estate accruing after testator's death, 7 A.L.R.4th 989.

Proper disposition under will providing for allocation of express percentages or proportions amounting to more or less than whole of residuary estate, 35 A.L.R.4th 788.

53-4-61. Time at which general or demonstrative testamentary gift bears interest.

(a) A general or demonstrative testamentary gift usually bears interest at the legal rate after the expiration of 12 months from the death of the testator; provided, however, that when a general or demonstrative testamentary gift is to be paid at a later time or upon a later event, it bears no interest until such time or event.

(b) The general rule described in subsection (a) of this Code section yields to the equity and necessity of a particular case if the condition of the estate as to the payment of debts and testamentary gifts is doubtful or if the fund out of which the testamentary gift is to be paid is unavailable for all the charges made upon it or if any other equitable circumstance intervenes.

History. — Code 1981, § 53-4-61, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article, "The Time Gap in Wills: Shifting Assets and Shrinking Estates — Obsolescence and Testamentary Planning in Georgia," see 6 Ga. L. Rev. 649 (1972).

For note, "Determining Principal and Income Allocation in Georgia Trusts," see 8 Ga. St. B.J. 564 (1972).

COMMENT

This section carries over former OCGA Sec. 53-2-97 with modifications in the language, including the addition of language relating to demonstrative testamentary gifts. The legal rate of interest in the state of Georgia is set out in Code Sec. 7-4-2. Former OCGA Sec. 53-2-98 (defining "executory devise") is repealed as the concepts in this section are covered in recent amendments to OCGA Title 44.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-810, are included in the annotations for this Code section.

As a general rule, specific legacies of a productive nature bear interest from the death of the testator. Beal v. Crafton, 5 Ga. 301 (1848) (decided under former law).

Legacy of $4,000.00 to be paid in bonds is not a legacy that bears interest from the testator's death. Downing v. Bain, 24 Ga. 372 (1858) (decided under former law).

When the testator fixes by the testator's will the date on which a general legacy is to be paid, it bears interest from that date. DuBose v. Box, 246 Ga. 660, 273 S.E.2d 101 (1980) (decided under former Code 1933, § 113-810).

When the testator makes a gift of the income on the legacy, and neither the legacy nor the income therefrom is delivered to the beneficiary within the time limits specified in the will, in order to be made whole, the beneficiary is entitled to interest on the income during the period the beneficiary should have been, but was not, receiving such income. DuBose v. Box, 246 Ga. 660, 273 S.E.2d 101 (1980) (decided under former Code 1933, § 113-810).

When the testator is a parent of an

infant legatee, or is in loco parentis, the legacy bears interest from the death of the testator, whether the time of payment is postponed or not, unless there is another provision in the will for maintenance of the child. DuBose v. Box, 246 Ga. 660, 273 S.E.2d 101 (1980) (decided under former Code 1933, § 113-810).

Prejudgment interest properly awarded. — As an estate had sufficient funds to pay a bequest to an appellee, under O.C.G.A. § 53-4-61(b)(3), the probate court's decision that "other equitable circumstances" did not justify a decision not to award appellee prejudgment interest was left to the court's sound equitable discretion, and the appellate court found no manifest abuse of that discretion. In re Estate of Barr, 278 Ga. App. 837, 630 S.E.2d 135 (2006).

Applicability. — In determining the prejudgment interest to be added to a testamentary gift, the operative statute in a probate case is the more specific statute, O.C.G.A. § 53-4-61, rather than the more general one, O.C.G.A. § 7-4-15. In re Estate of Barr, 278 Ga. App. 837, 630 S.E.2d 135 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 80 Am. Jur. 2d, Wills, § 1358.

C.J.S. — 97 C.J.S., Wills, § 2002 et seq.

ALR. — Time at which interest is payable under will or contract providing for payment of interest, 10 A.L.R. 997.

Right to interest on legacy as affected by contest of will, 75 A.L.R. 179.

53-4-62. Testamentary gift to charity.

If a testamentary gift to a charity cannot be executed in the exact manner provided by the testator, the superior court may exercise equitable powers in such a way as will as nearly as possible effectuate the intention of the testator.

History. — Code 1981, § 53-4-62, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article discussing the validity of charitable gifts in Georgia, see 1 Ga. B.J. 16 (1939). For article, "The Rule Against Perpetuities as Applied to Georgia Wills and Trusts," see 16 Ga. L. Rev. 235 (1982). For article, "Private Trusts for the Provision of Private Goods," see 37 Emory L.J. 295 (1988).

For note on discriminatory charitable trusts in Georgia, with regard to application of the cy pres doctrine, in light of Evans v. Newton, 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966), see 6 Ga. St. B.J. 428 (1970).

For comment on Evans v. Abney, 396 U.S. 435, 90 S. Ct. 628, 24 L. Ed. 2d 634 (1970), see 22 Mercer L. Rev. 493 (1971). For comment on Creech v. Scottish Rite Hosp. for Crippled Children, 211 Ga. 195, 84 S.E.2d 563 (1954), see 17 Ga. B.J. 512 (1955). For comment on Trammell v. Elliott, 230 Ga. 841, 199 S.E.2d 194 (1973), see 10 Ga. St. B.J. 502 (1974).

COMMENT

This section modifies former OCGA Sec. 53-2-99 by replacing the former language with language that mirrors the cy pres doctrine set out in the Georgia Trust Code, Code Sec. 53-12-113.

JUDICIAL DECISIONS

Analysis

General Consideration
Application

JURISDICTION OF COURTS OF EQUITY

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 2436, former Code 1868, § 2432, former Code 1882, § 2468, former Civil Code 1910, § 3914, and former Code 1933, § 113-815, are included in the annotations for this Code section.

Doctrine of cy pres. — When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate the intention of the testator. This doctrine has no application whatever to a case where a charitable bequest fails entirely for the reason that is in opposition to a well-settled rule of law. Kelley v. Welborn, 110 Ga. 540, 35 S.E. 636 (1900), overruled on other grounds, Hood v. First Nat'l Bank, 219 Ga. 283, 133 S.E.2d 19 (1963) (decided under former Code 1933, § 113-815).

Purpose of cy pres doctrine. — Fundamental purpose of cy pres provisions is to allow the court to carry out the general charitable intent of the testator where this intent might otherwise be thwarted by the impossibility of the particular plan or scheme provided by the testator. Evans v. Abney, 396 U.S. 435, 90 S. Ct. 628, 24 L. Ed. 2d 634 (1970) (decided under former Code 1933, § 113-815).

Rules governing the establishment and administration of charitable trusts are different from those applicable to private trusts in giving effect to the intention of the donor and in establishing the charity. Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938) (decided under former Code 1933, § 113-815); Moss v. Youngblood, 187 Ga. 188, 200 S.E. 689 (1938) (decided under former Code 1933, § 113-815).

When a charitable intent can be discovered from a will, a court of equity will carry such intent into execution, and support the charitable purpose, and will not suffer an equitable interest to fail for want of a trustee to support the trust. Moss v. Youngblood, 187 Ga. 188, 200 S.E. 689 (1938) (decided under former Code 1933, § 113-815).

In the construction of charitable bequests, the court will be liberal so as to carry into effect the intention of the testator. Moss v. Youngblood, 187 Ga. 188, 200 S.E. 689 (1938) (decided under former Code 1933, § 113-815).

Bequests for charitable purposes are looked upon with great favor by the courts of this state, and every means will be resorted to which can legally be used to carry out a charitable intent manifested by a testator in the testator's will. Moss v. Youngblood, 187 Ga. 188, 200 S.E. 689 (1938) (decided under former Code 1933, § 113-815).

Courts look with favor upon trusts for public charitable purposes, and take special care to enforce them, to guard them from assault, and protect them from abuse. Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938) (decided under former Code 1933, § 113-815); Moss v. Youngblood, 187 Ga. 188, 200 S.E. 689 (1938) (decided under former Code 1933, § 113-815).

Gifts and bequests for religious purposes are more highly favored by laws than other species of trusts. Courts of equity are placed under peculiar obligations to see, even in cases of bequests or devises, that the use is sustained and carried into effect. Trustees of First Methodist Episcopal Church v. City of Atlanta, 76 Ga. 181 (1886) (decided under former Code 1882, § 2468).

If a gift is made for a public charitable purpose, it is immaterial that the trustee is uncertain or incapable of taking, or that the objects of the charity are uncertain and indefinite; it will, nevertheless, be sustained. Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938) (decided under former Code 1933, § 113-815); Moss v. Youngblood, 187 Ga. 188, 200 S.E. 689 (1938) (decided under former Code 1933, § 113-815).

Devises to charity are expressly authorized by the law, and are favored by the declared policy of the state. Reynolds v. Bristow, 37 Ga. 283 (1867) (decided

under former Code 1863, § 2436); Jones v. Habersham, 107 U.S. 174, 2 S. Ct. 336, 27 L. Ed. 401 (1883) (decided under former Code 1882, § 2468); Monahan v. O'Byrne, 147 Ga. 633, 95 S.E. 210 (1918) (decided under former Civil Code 1910, § 3914).

Cited in Reynolds v. Bristow, 37 Ga. 283 (1867); Webb v. Hicks, 117 Ga. 335, 43 S.E. 738 (1903); Murphy v. Johnston, 190 Ga. 23, 8 S.E.2d 23 (1940); Perkins v. Citizens & S. Nat'l Bank, 190 Ga. 29, 8 S.E.2d 28 (1940); Houston v. Mills Mem. Home, Inc., 202 Ga. 540, 43 S.E.2d 680 (1947); Strother v. Kennedy, 218 Ga. 180, 127 S.E.2d 19 (1962); Simpson v. Anderson, 220 Ga. 155, 137 S.E.2d 638 (1964); Alexander v. Georgia Baptist Found., Inc., 245 Ga. 545, 266 S.E.2d 165 (1980).

Application

Application generally. — As a general rule, the doctrine of cy pres is applied in cases: (1) when there is the presence of an otherwise valid charitable grant or trust; that is, one that has charity as its purpose and sufficiently offers benefits to an indefinite public; (2) when the specific intention of the settlor may not be legally or practically carried into effect; and (3) when there is exhibited a general charitable intent on the part of the settlor. Trammell v. Elliott, 230 Ga. 841, 199 S.E.2d 194 (1973), for comment, see 10 Ga. St. B.J. 502 (1974) (decided under former Code 1933, § 113-815).

It never has been considered as an objection to a charitable use, that it was general, and in some respects indefinite, unless there was an uncertainty as to the amount intended to be given, or the general object of the use was of so uncertain and indefinite a character, that it could not be executed. Moss v. Youngblood, 187 Ga. 188, 200 S.E. 689 (1938) (decided under former Code 1933, § 113-815).

Objects to be benefited to some extent indefinite. — Fact that those managing the hospital might not be able to receive and treat all of the applicants who constitute the class of beneficiaries of the benevolent scheme contained in the wills making the hospital the sole beneficiary would not be a reason for holding that the entire charitable scheme had failed, or for the application of the doctrine of cy pres. Reynolds v. Stanton, 174 Ga. 340, 162 S.E. 783 (1932) (decided under former Civil Code 1910, § 3914).

It is of the very essence of a charitable bequest that the objects to be benefited shall be to some extent indefinite. Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938) (decided under former Code 1933, § 113-815).

When it was apparent from the entire will and codicil that a bequest to the governing authorities of a named association, "same being an Orphan's Home located at Macon, Georgia," was intended as a charitable trust for the benefit of orphans as a class, and that the designated "governing authorities" were merely to perform the office of trustee, the bequest was sufficiently definite and specific to be capable of execution, and since a trust will not fail for the want of a trustee, the legacy would not lapse merely because there may have been no such orphan's home and "governing authorities" as were mentioned in the will; in such case a court of equity could, by approximation, effectuate the general charitable purpose of the testator in a manner most similar to that indicated by the testator. Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938) (decided under former Code 1933, § 113-815).

When the finding was authorized that hospital owned and maintained by the City of Augusta, commonly known as the "University Hospital of Augusta, Georgia," and thus designated in the will in question, was a charitable institution, owned by that city and maintained primarily for the gratuitous treatment of the sick and needy of the city and county, and that by that item the testator intended the estate therein bequeathed to be applied to the promotion of the charitable objects of such hospital, the charitable bequest, being valid, would be given effect. Moss v. Youngblood, 187 Ga. 188, 200 S.E. 689 (1938) (decided under former Code 1933, § 113-815).

When the manifest intention was to create a charitable trust for tubercular children, even though the charitable institution named never existed, the purpose and object for which the trust was created still exists and the legacy does not lapse,

Application (Cont'd)

and the cy pres doctrine applies. Creech v. Scottish Rite Hosp. for Crippled Children, 211 Ga. 195, 84 S.E.2d 563 (1954), for comment, see 17 Ga. B.J. 512 (1955) (decided under former Code 1933, § 113-815).

Legatee not designated by correct name. — Charitable bequest will not fail merely because the legatee is not designated by its correct name, if from the will itself and admissible extrinsic evidence it can be determined whom the testator intended to receive and apply such bequest. Moss v. Youngblood, 187 Ga. 188, 200 S.E. 689 (1938) (decided under former Code 1933, § 113-815).

Cy pres will not be applied when there is demonstrated an intention of the settlor contrary to the inference of general charitable intent that the property should be applied exclusively to the purpose which is or has become impracticable or illegal. Such demonstration of a specific intent of the settlor as would result in a failure of the devise must be clear, definite, and unambiguous. In such event the trust will fail, and a resulting trust will be implied for the benefit of the testator or the testator's heirs. Trammell v. Elliott, 230 Ga. 841, 199 S.E.2d 194 (1973), for comment, see 10 Ga. St. B.J. 502 (1974) (decided under former Code 1933, § 113-815).

Cy Pres doctrine is inapplicable. — When the accomplishment of the particular purpose and only that purpose was desired by the testator and the testator had no more general charitable intent and the testator would presumably have preferred to have the whole trust fail if the particular purpose is impossible of accomplishment, the cy pres doctrine is not applicable. Evans v. Abney, 396 U.S. 435, 90 S. Ct. 628, 24 L. Ed. 2d 634 (1970), for comment, see 22 Mercer L. Rev. 493 (1971) (decided under former Code 1933, § 113-815).

Jurisdiction of Courts of Equity

Jurisdiction of equity generally. — Courts of chancery (now equity) have jurisdiction to carry into effect charitable bequests, the object of which are definite and specific, and capable of being executed. Newson v. Starke, 46 Ga. 88 (1872) (decided under former Code 1868, § 2432). See also Beall v. Ex'rs of Fox, 4 Ga. 404 (1848).

Court of equity has an inherent jurisdiction in cases of charitable bequests and devises, and cases of charity in the courts of equity in England were held valid, and executed independently of, and previous to the statute of 43d Elizabeth. Moss v. Youngblood, 187 Ga. 188, 200 S.E. 689 (1938) (decided under former Code 1933, § 113-815).

When the framers of the Code declared the courts of chancery (now equity) to have jurisdiction to enforce charitable bequests, declared what were charities and recognized the doctrine of cy pres, the framers intended to say something more than that courts of equity could enforce trusts; there was no propriety in giving this special jurisdiction or in defining charitable purposes if a bequest, for charitable purposes, to be valid, must have the same certainty and definiteness as to its objects and mode of division, as bequests, not for charitable purposes. Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938) (decided under former Code 1933, § 113-815).

Special equity jurisdiction over charitable bequests grows out of the rule that, in cases of private right, courts will not enforce uncertainties, and that the parties at interest must be capable of definite ascertainment, but it is of the very nature of a charity that this is impossible, and from the most ancient times courts of chancery (now equity) in England have applied very different rules in determining the validity of charitable bequests from the rules applied to such as were not charitable. Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938) (decided under former Code 1933, § 113-815).

RESEARCH REFERENCES

Am. Jur. 2d. — 15 Am. Jur. 2d, Charities, § 148 et seq.

C.J.S. — 14 C.J.S., Charities, § 45 et seq.

ALR. — Gift to fraternal order as valid charitable gift, 5 A.L.R. 1175.

General charitable intent as essential to application of cy pres doctrine, 74 A.L.R. 671.

Law governing capacity of legatee or devisee to take, or of testator to give, to charitable or religious institutions, 91 A.L.R. 491.

Legacy or devise to religious or other society as affected by discontinuance of its active functions, or its merger or association with other organization, 91 A.L.R. 840.

Validity, interpretation, and application of provisions of will making devise or bequest to or in trust for religious or educational body dependent upon adherence to particular body of principles or dogmas, or ecclesiastical connection, 120 A.L.R. 971.

Doctrine of equitable conversion as affected by discretion as to time, manner or other circumstances of sale, where the duty to sell is mandatory, 124 A.L.R. 1448.

Cy pres doctrine as affected by sectarian or doctrinal differences or factors, 3 A.L.R.2d 78.

Allowance of attorneys' fees in litigation involving cy pres doctrine, 89 A.L.R.2d 691.

Applicability of doctrine of equitable approximation to cut down to a permissible time period the time of a testamentary gift that violates rule against perpetuities, 95 A.L.R.2d 807.

Validity and effect of provision or condition against alienation in gift for charitable trust or to charitable corporation, 100 A.L.R.2d 1208.

Validity and effect of gift for charitable purposes which excludes otherwise qualified beneficiaries because of their race or religion, 25 A.L.R.3d 736.

Merger or consolidation of corporation as terminating charitable trust of which corporation is beneficiary, 34 A.L.R.3d 749.

Charitable trusts: elimination or modification, by court, of restrictions on amount of donation or expenditure which trustee may make for purposes of trust, 50 A.L.R.3d 1116.

Application of cy pres doctrine to trust for promulgation of particular political or philosophical doctrines, 67 A.L.R.3d 417.

Division of charitable gift among several claimants where named donee is nonexistent, 67 A.L.R.3d 442.

Disposition of surplus trust income after payment of specific amount to charity, 96 A.L.R.3d 954.

53-4-63. Payment of debts of testator and expenses of estate administrator.

(a) Unless otherwise directed, the debts of the testator and expenses of administration of the estate shall be paid out of the residuum. Unless otherwise provided in the will, a residuary gift or any part thereof, including a residuary gift to a surviving spouse in lieu of year's support, shall be deemed a gift of the net residuum or part thereof remaining after all debts of the testator and expenses of administration of the estate, including taxes, have been paid.

(b) If the residuum proves to be insufficient for the payment of the debts of the testator and the expenses of administration of the estate, then general testamentary gifts shall abate pro rata to make up the deficiency. If general testamentary gifts are insufficient, then demonstrative testamentary gifts shall abate in the same manner. If both

general and demonstrative gifts are insufficient, then specific gifts shall abate in the same manner.

(c) After the estate assets in the hands of the personal representative are exhausted, a creditor may proceed against each beneficiary for that beneficiary's pro rata share of the debts to the extent a testamentary gift has been distributed to that beneficiary.

(d) Realty and personalty shall be equally liable for the payment of debts.

(e) Unless otherwise expressly directed in the will, nothing in this Code section shall be deemed to limit any rights to reimbursement for federal estate taxes, generation-skipping transfer taxes, or any other taxes that may be available to personal representatives under federal law.

History. — Code 1981, § 53-4-63, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-14/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (a), inserted "and expenses of administration of the estate" in the first sentence, and in the second sentence, inserted "of the testator" and "of the estate"; in the first sentence in subsection (b), substituted "debts of the testator" for "testator's debts" and inserted "of the estate"; and substituted "hands of the personal representative" for "executor's hands" in subsection (c).

Law reviews. — For article, "The Time Gap in Wills: Shifting Assets and Shrinking Estates — Obsolescence and Testamentary Planning in Georgia," see 6 Ga. L. Rev. 649 (1972). For article surveying legislative and judicial developments in Georgia's will, trusts, and estate laws, see 31 Mercer L. Rev. 281 (1979). For article, "Tax Apportionment Problems under the Georgia Probate Code," see 8 Ga. St. B.J. 16 (2003).

COMMENT

This section carries over former OCGA Sec. 53-2-101 with changes to reflect demonstrative testamentary gifts. The language of paragraph (c) is modified to clarify that, under certain circumstances, a creditor may proceed against a beneficiary when the executor has distributed testamentary gifts to the beneficiary. Similar concepts appear in Code Sec. 53-7-43. New subsection (e) clarifies that this statute is not intended to limit any of the rights to reimbursement that appear in federal tax law, such as Internal Revenue Code Sections 2205 through 2207B. Former OCGA Secs. 53-2-100 (relating to direction by testator that real property be converted to personalty) and 53-2-102 (relating to annuities or debts charged on land) are repealed.

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 3912, former Code 1933, § 113-821, and former O.C.G.A. § 53-2-101 are included in the annotations for this Code section.

Legislative purpose. — Purpose of the General Assembly in passing this statute was to treat the costs of the administration of the estate as much a debt of the decedent as any other obligation to which the decedent may be subject. Woodall v. First Nat'l Bank, 118 Ga. App. 440, 164 S.E.2d 361 (1968) (decided under former Code 1933, § 113-821).

Property subject to payment of debts of decedents. — While it is true that the commissions of the personal representative of a decedent do not, strictly speaking or primarily, constitute a debt due by the decedent, still the commissions due the personal representative of a decedent must be construed as part of the costs, and fall under the head of necessary expenses of administration. It is only another way of saying that of the property of the decedent, whether personalty or realty, is subject to the payment of the decedent's obligations. Colyer v. Huntley, 179 Ga. 332, 175 S.E. 901 (1934) (decided under former Civil Code 1910, § 3912).

Immunity of real estate from sale to pay the commissions of an executor has been abrogated, and commissions of an executor or administrator are expenses of administration to which any property of a decedent is subject. Colyer v. Huntley, 179 Ga. 332, 175 S.E. 901 (1934) (decided under former Code 1933, § 113-821).

Statute refers to "debts" owing by the deceased in his or her lifetime; it does not apply to such a demand where, long after the death of the testator, a bank fails and by operation of law there is a liability against the stock formerly owned by such testator and except as provided by law, there is no person authorized to contract a debt against an estate of a deceased person. State Banking Co. v. Hinton, 178 Ga. 68, 172 S.E. 42 (1933) (decided under former Code 1933, § 113-821).

Words "debt" or "debts" of an estate, used in a refunding bond given to an executor "are obviously the debts of the decedent, due by him in his life time, and not the claims of the executor for remuneration and expenses of the estate." State Banking Co. v. Hinton, 178 Ga. 68, 172 S.E. 42 (1933) (decided under former Code 1933, § 113-821).

Debt in its general sense is a specific sum of money which is due or owing from one person to another, and denotes not only the obligation of one person to pay, but the right of the other party to receive and enforce payment by judicial action. Woodall v. First Nat'l Bank, 118 Ga. App. 440, 164 S.E.2d 361 (1968) (decided under former Code 1933, § 113-821).

Taxes due a county or municipality come within the generally accepted meaning of personal debts, the collection of which is enforceable by appropriate judicial action. Woodall v. First Nat'l Bank, 118 Ga. App. 440, 164 S.E.2d 361 (1968) (decided under former Code 1933, § 113-821).

Will provision directing that "all just debts be paid without unnecessary delay," without more, is not an instruction to pay debts out of the gross estate rather than out of the residuum. American Cancer Soc'y v. Estate of Massell, 258 Ga. 717, 373 S.E.2d 741 (1988) (decided under former O.C.G.A. § 53-2-101).

Cited in Chamblee v. Atlanta Brewing & Ice Co., 131 Ga. 554, 62 S.E. 1032 (1908); May v. Braddock, 91 Ga. App. 853, 87 S.E.2d 365 (1955); Chamblee v. Guy, 218 Ga. 56, 126 S.E.2d 205 (1962); Alston v. United States, 349 F.2d 87 (5th Cir. 1965); Gibson v. McWhirter, 230 Ga. 545, 198 S.E.2d 205 (1973); Anderson v. Groover, 242 Ga. 50, 247 S.E.2d 851 (1978); Moore v. Lindsey, 662 F.2d 354 (5th Cir. 1981).

Priority

Priority generally. — As between the devisee of property on which there is a mortgage lien, and a devisee of other property, both being specific devises, the mortgage debt should be borne by the devisees of the mortgaged property. Raines v. Shipley, 197 Ga. 448, 29 S.E.2d 588 (1944)

Priority (Cont'd)

(decided under former Code 1933, § 113-821).

In regard to priority, debts and legacies stand on precisely the same footing and one can no more be diminished by the payment of commissions than the other. The expenses of administration, among which are the commissions of the representative, must first be paid whether enough be left to satisfy debts and legacies, or not. Alston v. United States, 228 F. Supp. 216 (N.D. Ga. 1964), aff'd, 349 F.2d 87 (5th Cir. 1965) (decided under former Code 1933, § 113-821).

Abatement of legacy given in lieu of year's support. — Legacy accepted by a widow under a will in lieu of other marital rights will not abate with other legacies to pay debts. Daniel v. Denham, 223 Ga. 544, 156 S.E.2d 906 (1967) (decided under former Code 1933, § 113-821).

Testamentary legacy to a wife, specifically given in lieu of year's support, is entitled to preference over other legacies and devises although the legacy exceeds the value of the year's support. When the remaining estate is adequate to pay all the obligations of the estate, such legacy of the wife will not abate to pay the debts and obligations of the testator. Killingsworth v. First Nat'l Bank, 237 Ga. 544, 228 S.E.2d 901 (1976) (decided under former Code 1933, § 113-821).

Bequest accepted by a widow in lieu of year's support (or, previously, dower) has a priority over other bequests insofar as abatement is concerned. DuBose v. Box, 246 Ga. 660, 273 S.E.2d 101 (1980) (decided under former Code 1933, § 113-821).

Bequest for the support and maintenance of a near relative is given priority over other bequests of the same class when no other provision is made for the near relative's support. DuBose v. Box, 246 Ga. 660, 273 S.E.2d 101 (1980) (decided under former Code 1933, § 113-821).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, § 685. 80 Am. Jur. 2d, Wills, §§ 1485 et seq., 1499, 1510, 1526.

C.J.S. — 34 C.J.S., Executors and Administrators, § 501. 97 C.J.S., Wills, §§ 1720, 1728, 1729.

ALR. — What amounts to an ademption or abatement of a legacy of a business or professional practice, 13 A.L.R. 173; 16 A.L.R.2d 1404.

Preferences among general legacies as regards abatement, 34 A.L.R. 1247.

Gift by will of mixed residue of real and personal property as subjecting residuary realty to payment of pecuniary legacies, 42 A.L.R. 654.

Specific devises and specific legacies as subject to ratable contribution for the payment of debts, 42 A.L.R. 1519.

Legacy or devise to creditor of testator as satisfaction in whole or part of debt, 86 A.L.R. 6; 47 A.L.R.2d 1140.

Construction and effect of provisions of will regarding abatement of legacies or devises in event of insufficiency of assets to pay all in full, 101 A.L.R. 704.

Direction in will for payment of debts of testator, or for payment of specified debt, as affecting debts or debt barred by limitation, 109 A.L.R. 1441.

Preference as regards life interest created by will as carrying similar preference in respect of remainder interest, 117 A.L.R. 1339.

Law of domicil or of place of ancillary administration as governing rights and priorities of creditors of decedent in respect of assets in ancillary jurisdiction, 124 A.L.R. 1281.

Priority received by creditors as regards ancillary assets of receivership or decedent's estate as justification for reducing their claims or dividends upon distribution in the primary or domiciliary jurisdiction so as to effect ultimate equality among creditors as regards total assets, 127 A.L.R. 504.

Property over which the testator had power of appointment which is exercised by residuary clause, as available for payment of pecuniary legacies after exhaustion of testator's own property, 129 A.L.R. 826.

Right of retainer in respect of indebtedness of heir, legatee, or distributee, 164 A.L.R. 717.

Priority of surviving spouse who accepts provision of will in lieu of dower or other marital rights over other legatees and devisees and creditors, 2 A.L.R.2d 607.

Phrase in will, "subject to payment of debts," and the like, as charging particular devise or bequest with debts, in exoneration of property otherwise subject thereto, 2 A.L.R.2d 1310.

Right to intrench upon corpus, when income is insufficient, to pay stated sum which trust instrument directs to be paid periodically to beneficiary out of income, 67 A.L.R.2d 1393.

Right of devisee of real estate specifically devised but subject to mortgage to contribution or other relief from specific devisee of other property, 72 A.L.R.2d 383.

Liability for debts and expenses as between personalty generally bequeathed and realty passing by the residuary clause or left undisposed of, 74 A.L.R.2d 553.

Right of heir or devisee to have realty exonerated from lien thereon at expense of personal estate, 4 A.L.R.3d 1023.

Devise or bequest pursuant to testator's contractual obligation as subject to estate, succession, or inheritance tax, 59 A.L.R.3d 969.

Construction and effect of will provisions expressly relating to the burden of estate or inheritance taxes, 69 A.L.R.3d 122.

Construction and effect of will provisions not expressly mentioning payment of death taxes but relied on as affecting the burden of estate or inheritance taxes, 70 A.L.R.3d 630.

Liability for wrongful autopsy, 18 A.L.R.4th 858.

Proper disposition under will providing for allocation of express percentages or proportions amounting to more or less than whole of residuary estate, 35 A.L.R.4th 788.

53-4-64. Death of beneficiary before will executed or before death of testator.

(a) If a beneficiary is dead when the will is executed or otherwise dies before the testator, but has any descendants living at the death of the testator, the testamentary gift, if absolute and without remainder or limitation, shall not lapse but shall vest in the descendants of the beneficiary in the same proportions as if inherited directly from the deceased beneficiary under the intestacy laws of this state.

(b) The provisions of subsection (a) of this Code section shall also apply to a testamentary gift to a class unless there appears a clear intent to the contrary.

(c) If a beneficiary is treated as having predeceased the testator due to a divorce or annulment, as provided in Code Section 53-4-49, or due to the beneficiary being responsible for the death of the testator, as provided in Code Section 53-1-5, the provisions of subsection (a) of this Code section shall apply only to vest the testamentary gift in descendants of the beneficiary who are also descendants of the testator.

History. — Code 1981, § 53-4-64, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article, "The Time Gap in Wills: Problems Under Georgia's Lapse Statutes," see 6 Ga. L. Rev. 268 (1972). For article, "The Time Gap in Wills: Shifting Assets and Shrinking Estates — Obsolescence and Testamentary Planning in Georgia," see 6 Ga. L. Rev. 649 (1972). For article, "Descendible Future

Interests in Georgia: The Effect of the Preference for Early Vesting," see 7 Ga. L. Rev. 443 (1973). For article surveying developments in Georgia wills, trusts, and administration of estates law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 307 (1981). For article, "Lapse Statutes: Recurring Construction Problems," see 37 Emory L.J. 323 (1988). For survey article on wills, trusts, guardianships, and fiduciary administration for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003).

For note, "Vesting Title in a Murderer: Where is the Equity in the Georgia Supreme Court's Interpretation of the Slayer Statute in Levenson?," see 45 Ga. L. Rev. 877 (2011).

COMMENT

Paragraph (a) of this section carries over former OCGA Sec. 53-2-103, the Georgia anti-lapse statute, with slight modifications in the language. Paragraph (b) provides that, absent a clear intent to the contrary, the anti-lapse statute overrides the class gift rule so that the descendants of a predeceased class member may take that class member's share, pursuant to the provisions of this statute. Paragraph (c) provides that the descendants of a beneficiary who is treated as having predeceased the testator due to the statutes relating to divorce (Code Sec. 53-4-49) or to the killing of the testator by the beneficiary (OCGA Sec. 53-1-5) may not take that beneficiary's share under this statute unless they are also descendants of the testator. For example, if a testator's will leaves a testamentary gift to the testator's spouse but the testator and spouse are then divorced, Code Sec. 53-4-49 provides that the testator's spouse will be treated as having predeceased the testator. The children of the testator's spouse may take in place of this "predeceased" beneficiary but, pursuant to subsection (c) of this section, only if they are also children of the testator.

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 2430, former Code 1882, § 2462, former Civil Code 1895, § 1330, former Civil Code 1910, § 3906, former Code 1933, § 113-812, and former O.C.G.A. § 53-2-103 are included in the annotations for this Code section.

No restriction on testator. — Former Civil Code 1910, §§ 3906 and 3907, dealing with lapsed legacies and the results of lapses, apply in cases involving an absolute legacy, without more, and a lapse; but the statutes in no way restrict the power of a testator to provide what shall become of the testator's estate in case of the death of a legatee named in it. Foster v. Hardee, 135 Ga. 591, 69 S.E. 1110 (1911) (decided under former Civil Code 1910, § 3906).

It is familiar law that a legacy lapses by the death of the legatee or devisee in the life time of the testator, unless there be words of substitution or other provisions in the will, or by statute against a lapse. Collier v. Citizens & S. Nat'l Bank, 206 Ga. 857, 59 S.E.2d 385 (1950) (decided under former Code 1933, § 113-812).

At common law and under the law of this state before the Act of 1836 (former Code 1933, § 113-812), if the legatee died before the death of the testator the legacy lapsed, whether the legatee left issue or not. Now, if there be issue, the issue takes as substituting legatee. Sanders v. First Nat'l Bank, 189 Ga. 450, 6

S.E.2d 294 (1939) (decided under former Code 1933, § 113-812).

Effect of designating beneficiaries by name in will. — Testator's designation of beneficiaries by name generally indicates the testator intended the beneficiaries to take as individuals, but other language in the will may show a controlling intention that the individuals take as a class. Whitlock v. Lawson, 260 Ga. 520, 397 S.E.2d 433 (1990) (decided under former O.C.G.A. § 53-2-103).

Death of legatee without descendants creates lapse of legacy. — Normally when a sole legatee under a will predeceases the testator and leaves no lineal descendants, a lapse of the legacy occurs, and the testator's estate passes to his or her heirs at law. However, a testator may prevent such a lapse by providing for the disposition of his or her estate in the event of the death of the legatee. Fiumefreddo v. Scudder, 252 Ga. 279, 313 S.E.2d 683 (1984) (decided under former O.C.G.A. § 53-2-103).

Section prevents lapse of legacies. — Statute provides what shall be done when a legatee who has already been determined predeceases the testator, and is intended to prevent the lapse of legacies. Johns v. Citizens & S. Nat'l Bank, 206 Ga. 313, 57 S.E.2d 182 (1950) (decided under former Code 1933, § 113-812).

Ultimate effect of the statute is that the devise vests in the issue in the same proportions as if inherited directly from their deceased ancestor. Seymour v. Presley, 239 Ga. 572, 238 S.E.2d 347 (1977) (decided under former Code 1933, § 113-812).

Those who are entitled to the devise will take as substituted beneficiaries, and not as heirs of the deceased legatee. Seymour v. Presley, 239 Ga. 572, 238 S.E.2d 347 (1977) (decided under former Code 1933, § 113-812).

Cited in Pace v. Klink, 51 Ga. 220 (1874); Cheney v. Selman, 71 Ga. 384 (1883); Pearson v. Cochran, 152 Ga. 276, 109 S.E. 498 (1921); Mills v. Tyus, 195 Ga. 119, 23 S.E.2d 259 (1942); Saliba v. Saliba, 202 Ga. 791, 44 S.E.2d 744 (1947); McGhee v. Banks, 115 Ga. App. 155, 154 S.E.2d 37 (1967); Brown v. Newkirk, 239 Ga. 579, 238 S.E.2d 352 (1977); Honeycutt v. Honeycutt, 284 Ga. 42, 663 S.E.2d 232 (2008).

Application of Section

When the legacies and devices are not absolute and are limited. — When the legatee dies before a contingent legacy is vested, there is nothing to transmit to the heirs. Allen v. Whitaker, 34 Ga. 6 (1864) (decided under former Code 1863, § 2430).

Testator devised to J. $2,500.00, "provided he is in my employment at the time of my death." J. voluntarily severed business relations with the testator, and died before the death of the testator. In a suit by the testator's wife and children to recover the legacy, it was held that the legacy lapsed, and the plaintiffs are not entitled to recover. Johnson v. Folsom, 145 Ga. 479, 89 S.E. 521 (1916) (decided under former Civil Code 1910, § 3906).

Statute does not apply when the legacy is made expressly contingent on the legatee surviving the testator and then the legatee predeceases the testator. Powell v. Watkins, 221 Ga. 851, 148 S.E.2d 303 (1966) (decided under former Code 1933, § 113-812).

If they had been absolute and not limited, lapse would have been prevented by this statute, even though the beneficiaries are a class, where all the class predeceased the testator, as contrasted with the situation where one of a class survives, preventing lapse and the intervention of this statute; when one of a class survives, the rule of survivorship is applicable. Graham v. Patton, 231 Ga. 391, 202 S.E.2d 58 (1973) (decided under former Code 1933, § 113-812).

Issue of deceased need not also be descendant of testator. — Statute does not require that the issue of a deceased legatee or devisee also be a descendant of the testator before a legacy or devise will vest under the statute. Robinson v. Ray, 254 Ga. 237, 327 S.E.2d 721 (1985) (decided under former O.C.G.A. § 53-2-103).

Statute does not apply to class gifts. Johnson v. Wishard, 227 Ga. 355, 180 S.E.2d 738 (1971) (decided under former Code 1933, § 113-812).

Application to class gifts. — When there is a devise to a class, those dying in

Application of Section (Cont'd)

the lifetime of the testator do not take, and there being no question of lapsed legacy, the statute is inapplicable. Davie v. Wynn, 80 Ga. 673, 6 S.E. 183 (1888) (decided under former Code 1882, § 2462); Tolbert v. Burns, 82 Ga. 213, 8 S.E. 79 (1888) (decided under former Code 1882, § 2462).

Statute has no application to the case where the legacy is to a class, and one or more of the class is in esse at the testator's death. It is only when all the members of the class predecease the testator that a lapse will be prevented. Davis v. Sanders, 123 Ga. 177, 51 S.E. 298 (1905) (decided under former Civil Code 1895, § 3330).

A bequest to B and B's children is a bequest to a class. The class consists of B and such of B's children as survive the testator. B had a child who died before the testator, leaving issue, such issue would not share with B in the legacy under the law. Davis v. Sanders, 123 Ga. 177, 51 S.E. 298 (1905) (decided under former Civil Code 1895, § 3330).

Devise by a mother to her children, share and share alike, including her son, is a devise to a class, and the whole property thereunder goes to those members of the class only who survive the testator. Hurst v. McKissack, 209 Ga. 440, 73 S.E.2d 91 (1952) (decided under former Code 1933, § 113-812).

Gifts held to be to individuals, rather than to class. — When a testator named a testator's daughter and granddaughter in the testator's will, and stated the testator's intention to reward them individually for services they had rendered to the testator, the probate court erred by ruling that the testator intended a class, rather than individual, gift. Whitlock v. Lawson, 260 Ga. 520, 397 S.E.2d 433 (1990) (decided under former O.C.G.A. § 53-2-103).

Statute cannot be applied when an unfulfilled condition attached to vesting. Graham v. Patton, 231 Ga. 391, 202 S.E.2d 58 (1973) (decided under former Code 1933, § 113-812).

Devise to children. — When a testator by the testator's will gave to one of the testator's daughters one-fourth of the testator's estate, and the daughter died before the death of the testator, leaving two children who survived her and the testator, the interest in the estate of the testator so given to this daughter, the same being absolute and without remainder or limitation, vested in such issue of the daughter as if inherited directly from their deceased grandfather. When a daughter of such deceased daughter of the testator died intestate, leaving no spouse or issue, but leaving her father and a sister as her sole heirs at law, such father and sister become entitled to any estate to which the deceased daughter was entitled either in right of her mother under the will of her grandfather or in her own right. Terry v. Chandler, 172 Ga. 715, 158 S.E. 572 (1931) (decided under former Civil Code 1910, § 3906).

When the grantee in the deed was also appointed by will, but died before the will became effective, leaving a child as the sole heir at law, who was in life at the death of the testator, the child was substituted as appointee by operation of law, and took the property in remainder, to the exclusion of the person to whom the named appointee had attempted to convey the property. Newton v. Bullard, 181 Ga. 448, 182 S.E. 614 (1935) (decided under former Code 1933, § 113-812).

Unless there be something to indicate a contrary intent on the part of the testator, a devise or bequest to a named person, followed by a provision that if the person shall die childless the property shall pass to some other person, conveys to the person a fee, subject to be divested upon the person dying childless, or, as it is sometimes called, a base or qualified fee. Scranton-Lackawanna Trust Co. v. Bruen, 206 Ga. 872, 59 S.E.2d 397 (1950) (decided under former Code 1933, § 113-812).

Devise of the residue of testator's estate to one person, and if the testator should die without children to another, conveys to the first devisee an estate in fee defeasible on the testator dying childless, and when, as here, the second devisee survived the testator, but predeceased the first devisee, upon the death of the first without child or children, the property passed to the heirs of the second devisee. Scranton-Lackawanna

Trust Co. v. Bruen, 206 Ga. 872, 59 S.E.2d 397 (1950) (decided under former Code 1933, § 113-812).

Absence of residuary clause. — When the original will did not contain a residuary clause, and two daughters had died a short time prior to the execution of the codicil which provided that property given to one deceased daughter would descend to testator's other heirs, it was the manifest intention of the testator to, in effect, supply a residuary clause to the will. Davant v. Shaw, 206 Ga. 843, 59 S.E.2d 500 (1950) (decided under former Code 1933, § 113-812).

Legacy to a testator's daughter having lapsed by her death before the death of the testator, the interest in the estate given to this daughter, the same being absolute and without remainder or limitation, and this daughter having left issue living at the death of the testator, vested in such issue as if inherited directly from the deceased grandfather. Powell v. Watkins, 221 Ga. 851, 148 S.E.2d 303 (1966) (decided under former Code 1933, § 113-812).

Statute inapplicable. — Anti lapse statute under O.C.G.A. § 53-4-64(a) did not apply when the intent of the testator in drafting the will with regards to the testator's residual estate clearly expressed the intent that the bequests were contingent upon the beneficiaries surviving the testator; the bequests were conditional and lapsed when the unfulfilled condition attached to vesting. Bridges v. Taylor, 276 Ga. 530, 579 S.E.2d 740 (2003).

Motion for summary judgment of the testator's grandchildren in an action against their three uncles alleging that the grandchildren had an interest in the property that comprised the testator's estate was properly denied because the plain language of the will indicated that the testator did not intend that the bequests follow the law of intestacy, and the presumption in favor of a per stirpes distribution in the anti-lapse statute was overcome; the use of the phrase "per capita" in the will imposed a requirement that the individuals named, the testator's children, take the bequests in the children's own stead, and that the children had to survive the testator; and the grandchildren's mother, the testator's daughter, did not survive the testator. Piccione v. Arp, 302 Ga. 270, 806 S.E.2d 589 (2017).

RESEARCH REFERENCES

Am. Jur. 2d. — 80 Am. Jur. 2d, Wills, § 1424.

C.J.S. — 97 C.J.S., Wills, § 1803.

ALR. — Applicability of statute to prevent lapses, in case of person dead at time will was made, 3 A.L.R. 1682.

Effect of restrictive words or reference to specific property in residuary clause to limit scope of clause as regards lapsed or ineffectual legacies and devises, 10 A.L.R. 1522.

Decree directing distribution of estate to person who is dead, 25 A.L.R. 1563.

Rule that devise over in case of first taker's death refers to death in testator's lifetime as affected by fact that the first devisee was unborn when will was made, 26 A.L.R. 609.

Devise or bequest to one "or his heirs" or to one "and his heirs" as affected by death of person named before death of testator, 78 A.L.R. 992; 128 A.L.R. 94.

Lapse of legacy charged on devise on death of beneficiary before time fixed for payment, 82 A.L.R. 680.

Intention of testator as defeating operation of statute to prevent lapses, 92 A.L.R. 846; 63 A.L.R.2d 1172.

Provision of will that children, etc., of remainderman who dies before expiration of precedent estate or time fixed for distribution to remaindermen, shall take the share to which he would have been entitled, as affecting character of remainder as vested or contingent, 109 A.L.R. 5; 47 A.L.R.2d 900.

Who are within descriptive terms "relation," "descendant," "child," "brother," "sister," etc., describing the legatee or devisee, in statute providing against lapse upon death of legatee or devisee before testator, 115 A.L.R. 444; 63 A.L.R.2d 1195.

Statute to prevent lapse in event of death of devisee or legatee before testator as applicable to interest of beneficiary

under trust who dies before testator, 118 A.L.R. 559.

Death of life tenant before death of testator as causing lapse or "acceleration" of remainder, 133 A.L.R. 1367.

Devolution of lapsed portion of residuary clause, 139 A.L.R. 868; 36 A.L.R.2d 1117.

Time as of which "heirs" or "next of kin" descriptive of beneficiaries of a devise or bequest are to be determined where ancestor predeceases the testator, 162 A.L.R. 716.

Postponement of time of closing a class to which a future interest is given, as implying survivorship, 166 A.L.R. 823.

Gift over to surviving members of a group of share of deceased member as creating absolute interest in last survivor, 166 A.L.R. 1277.

Classification for purposes of inheritance or succession or estate tax of one who takes by virtue of lapsed legacy statute, 168 A.L.R. 271.

Benefit of direction in deed or will for payments by grantee or devisee to third person as surviving latter's death, and passing as part of his estate, 6 A.L.R.2d 363.

Devise or bequest to designated individual "or his estate," "or his children," "or his representative," or the like (other than "or his heirs"), as subject to lapse in event of individual's death before that of testator, 11 A.L.R.2d 1387.

Who is "child," "issue," "descendant," "relation," "heir," etc., within antilapse statute describing the person taking through or from the legatee or devisee, 19 A.L.R.2d 1159.

Right or option given by will to purchase estate property as personal, or as surviving optionee's death and exercisable by his successors in interest, 28 A.L.R.2d 1167.

Construction and effect of proviso of will that "in case of the death" of a devisee or legatee, or "if he die" (or equivalent expression), the property shall go to another, 51 A.L.R.2d 205.

Applicability of antilapse statutes to class gifts, 56 A.L.R.2d 948.

Antilapse statute as applicable to interest of beneficiary under inter vivos trust who predeceases life-tenant settlor, 47 A.L.R.3d 358.

Wills: gift over to "survivors" of class or group of designated beneficiaries as restricted to surviving members of class or group, or as passing to heirs or representatives of deceased beneficiary, 54 A.L.R.3d 280.

Validity, construction, and application of statutory requirement that will beneficiary survive testator for specified time, 88 A.L.R.3d 1339.

Testamentary option to purchase estate property as surviving optionee's death, 18 A.L.R.4th 578.

53-4-65. Disposition of lapsed or void testamentary gift of residuum.

(a) A lapsed or void testamentary gift of realty or personalty shall become part of the residuum.

(b) A lapsed or void gift of the residuum shall be deemed a part of the share of the other residuary beneficiaries in proportion to their original shares of the residuum. If there are no other residuary beneficiaries, a lapsed or void gift of the residuum shall pass by intestacy.

History. — Code 1981, § 53-4-65, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section replaces former OCGA Sec. 53-2-104. This section provides that lapsed gifts of real and personal property are treated the same in that they fall to the residue of the estate. This section also provides that a lapsed share of a

residuary beneficiary will pass by intestacy unless there are other residuary beneficiaries surviving, in which case the predeceased beneficiary's share shall go to the other residuary beneficiaries in proportion to each beneficiary's share of the residuum.

Law reviews. — For article surveying developments in Georgia wills, trusts, and administration of estates law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 307 (1981).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-2-104 are included in the annotations for this Code section.

Lapsed gift passed by intestacy rules. — Because a parent's will was plain and unambiguous and did not contain a residue clause, the lapsed gift of the residue passed to the parent's three daughters by intestacy according to O.C.G.A. § 53-4-65(b); although the parent expressed disappointment with two daughters and left them specific bequests of $10 each, the parent did not express an intent to disinherit the daughters. Banner v. Vandeford, 293 Ga. 654, 748 S.E.2d 927 (2013).

Cited in Robinson v. Ray, 254 Ga. 237, 327 S.E.2d 721 (1985); Tumlin v. Butler, 264 Ga. 488, 448 S.E.2d 198 (1994).

53-4-66. Ademption or destruction of specific testamentary gift.

Except as provided in Code Section 53-4-67, a specific testamentary gift is adeemed or destroyed, wholly or in part, when the testator for any reason does not own the subject of such gift at death.

History. — Code 1981, § 53-4-66, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article, "The Time Gap in Wills: Shifting Assets and Shrinking Estates — Obsolescence and Testamentary Planning in Georgia," see 6 Ga. L. Rev. 649 (1972).

COMMENT

This section carries over provisions of former OCGA Sec. 53-2-105, clarifying that a specific testamentary gift is adeemed by extinction when, for any reason, the testator does not own the property that is the subject of the gift at death. For new provisions relating to ademption by satisfaction and to advancements of demonstrative, general, and residuary gifts, see Code Sec. 53-1-10.

JUDICIAL DECISIONS

Analysis

General Consideration
Ademption Rule
Exceptions

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 3908, former Code 1933, § 113-817, and former O.C.G.A. § 53-2-105 are included in the annotations for this Code section.

General Consideration (Cont'd)

Ademption is confined to specific legacies. Kramer v. Kramer, 201 F. 248 (5th Cir. 1912), cert. denied, 231 U.S. 753, 34 S. Ct. 322, 58 L. Ed. 467 (1913) (decided under former Civil Code 1910, § 3908); Woodall v. First Nat'l Bank, 223 Ga. 688, 157 S.E.2d 261 (1967) (decided under former Code 1933, § 113-817).

Legacy is not a specific legacy, which will be adeemed when it does not bequeath a bond so labeled and sequestered as to be distinguished from another bond of a similar kind; it is a demonstrative legacy and does not fail if the subject matter is not in existence on the death of the testator. Young v. Young, 202 Ga. 694, 44 S.E.2d 659 (1947) (decided under former Code 1933, § 113-817).

When a will may reasonably be construed as showing an intention of the testator to bequeath to the six legatees something of the value of $1,000.00 each, and only three bonds remain, the will stating the $1,000.00 payments to be made from bonds, a fair and just execution of the will, as found by the trial court, would be to sell the three bonds and place the proceeds in the general assets and from that fund pay the six legatees $1,000.00 each. Young v. Young, 202 Ga. 694, 44 S.E.2d 659 (1947) (decided under former Code 1933, § 113-817).

Failure by the testator to particularize the $1,000.00 bonds bequeathed to stated children, forbid their being classified as specific legacies, and, consequently they do not fail but are payable as general legacies, $1,000.00 to each legatee, out of the general assets of the estate, including the proceeds from the sale of the three bonds on hand after the payment of debts, if any, and the expenses of administration. Young v. Young, 202 Ga. 694, 44 S.E.2d 659 (1947) (decided under former Code 1933, § 113-817).

Cited in Beall v. Blake, 16 Ga. 119 (1854); Weems v. Andrews, 22 Ga. 43 (1857); Clayton v. Akin, 38 Ga. 320, 95 Am. Dec. 393 (1868); Worrill v. Gill, 46 Ga. 482 (1872); Reed v. Reed, 68 Ga. 589 (1882); Hart v. Johnson, 81 Ga. 734, 8 S.E. 73 (1888); Elliott v. Johnson, 178 Ga. 384, 173 S.E. 399 (1934); Roberts v. Wilson, 200 Ga. 201, 36 S.E.2d 758 (1946); Thompson v. Mathews, 226 Ga. 347, 174 S.E.2d 916 (1970); Chandler v. Owen, 233 Ga. 25, 209 S.E.2d 618 (1974); Howard v. Estate of Howard, 249 Ga. App. 287, 548 S.E.2d 48 (2001); Harbin v. Harbin, 261 Ga. App. 244, 582 S.E.2d 131 (2003).

Ademption Rule

Meaning of ademption. — Ademption of a specific legacy is the extinction or withdrawal of it, in consequence of some act of the testator equivalent to its revocation, or clearly indicative of an intention to revoke. Kramer v. Kramer, 201 F. 248 (5th Cir. 1912), cert. denied, 231 U.S. 753, 34 S. Ct. 322, 58 L. Ed. 467 (1913) (decided under former Civil Code 1910, § 3908).

Ademption is effected by the extinction of the thing or fund bequeathed, or by disposition of it subsequent to the will from which an intention that the legacy should fail is presumed. Kramer v. Kramer, 201 F. 248 (5th Cir. 1912), cert. denied, 231 U.S. 753, 34 S. Ct. 322, 58 L. Ed. 467 (1913) (decided under former Civil Code 1910, § 3908).

Term "ademption" is sometimes used as synonymous with satisfaction, but such use is inaccurate, as ademption operates independently of intention in case the specific thing given is, at the testator's death, no longer owned by the testator. Kramer v. Kramer, 201 F. 248 (5th Cir. 1912), cert. denied, 231 U.S. 753, 34 S. Ct. 322, 58 L. Ed. 467 (1913) (decided under former Civil Code 1910, § 3908).

Ademption generally. — When a testator conveys to another specific property devised or bequeathed, and does not afterward become possessed of the property, and the will contains no provision for such contingency, the devise or legacy is adeemed, and such legal result cannot be obviated by extrinsic evidence tending to show that the testator did not intend it. Thompson v. Long, 202 Ga. 718, 44 S.E.2d 651 (1947) (decided under former Code 1933, § 113-817).

Standard for defining a "conveyance" is whether there has occurred a change in the testator's ownership sufficiently radical to manifest, as a matter of law, the testator's intention to revoke the specific devise. The term "conveyance" includes a single transaction by which a

testator sells the testator's fee simple title to real estate in return for a security title to the real estate sold. Peacock v. Owens, 244 Ga. 203, 259 S.E.2d 458 (1979) (decided under former Code 1933, § 113-817).

Ademption arises upon the conveyance of the specific property covered by the legacy, and rests upon a rule of law independent of any supposed actual intent of the testator; and in the absence of any facts which would bring the case within the exceptions set forth in statute, and in the absence of any provision in the will in contemplation of such a contingency, a trial court properly held that a devise had been wholly adeemed by reason of the conveyance of the realty involved, and since the testator died intestate as to this devise, that the proceeds thereof passed into the residuum of the estate. Thompson v. Long, 202 Ga. 718, 44 S.E.2d 651 (1947) (decided under former Code 1933, § 113-817).

Devise adeemed. — When a testator conveys to another specific property devised or bequeathed, and does not afterwards become possessed of the property, and the will contains no provision for such contingency, the devise or legacy is adeemed, and such legal result cannot be obviated by extrinsic evidence tending to show that the testator did not intend it. Moncrief v. Shuman, 169 Ga. 217, 150 S.E. 98 (1929) (decided under former Civil Code 1910, § 3908).

When a testator conveys to a third party specific property devised and the will contains no provision for such a contingency, there can be no inquiry into a testator's intention in adeeming specifically bequeathed property. Woodall v. First Nat'l Bank, 223 Ga. 688, 157 S.E.2d 261 (1967) (decided under former Code 1933, § 113-817).

Although a testator failed to form a limited partnership prior to the testator's death, such that a devise of member certificates was without effect and was adeemed, the business property that was devised to beneficiaries was not limited to that entity. Simmons v. England, 323 Ga. App. 251, 746 S.E.2d 862 (2013).

Devise held to be adeemed. — When wife devised one-half interest in real estate to husband by specific devise, but did not devise the proceeds of its sale to husband, the specific devise was adeemed by alienation when testator sold the fee simple title in return for a down payment, note, and security title. Powell v. Thorsen, 253 Ga. 572, 322 S.E.2d 261 (1984) (decided under former O.C.G.A. § 53-2-105).

Ademption and substitution. — Because the purchase of a second property closed over a year before the sale of the bequeathed property closed and the testator executed a valid codicil after the sale that did not mention either property, the bequeathed property was adeemed pursuant to O.C.G.A. § 53-4-66; consequently, there was no basis for substitution under O.C.G.A. § 53-4-67(a). Fletcher v. Ellenburg, 279 Ga. 52, 609 S.E.2d 337 (2005).

Exceptions

Exceptions to ademption rule. — There are four exceptions to the rule that ademption occurs when a testator conveys to another the specific property bequeathed, those exceptions are: (1) where the testator afterwards becomes possessed of the same property; (2) where the attempt to convey fails; (3) where the testator exchanges the property for other of like character; and (4) where the testator merely changes the investment of a fund bequeathed. Lang v. Vaughn, 137 Ga. 671, 74 S.E. 270, 40 L.R.A. (n.s.) 542, 1913B Ann. Cas. 52 (1912) (decided under former Code 1933, § 113-817); Woodall v. First Nat'l Bank, 223 Ga. 688, 157 S.E.2d 261 (1967) (decided under former Code 1933, § 113-817).

A specific devise is adeemed when, after the execution of the will, the testator "conveys" to another the specific property devised unless one of the following four exceptions applies: reacquisition by the testator; failure of the conveyance; receipt of like property in exchange for the devised property, and mere change in the investment of a fund. Peacock v. Owens, 244 Ga. 203, 259 S.E.2d 458 (1979) (decided under former Code 1933, § 113-817).

RESEARCH REFERENCES

Am. Jur. 2d. — 80 Am. Jur. 2d, Wills, §§ 1458, 1460, 1482.

Am. Jur. Proof of Facts. — Self-Dealing by Trustee, 38 POF3d 279.

Fiduciary's Breach of Investment Duties, 1 POF2d 467.

C.J.S. — 97 C.J.S., Wills, § 1742 et seq.

ALR. — What amounts to an ademption or abatement of a legacy of a business or professional practice, 13 A.L.R. 173; 16 A.L.R.2d 1404.

Ademption of bequest of chattel by change in form, 40 A.L.R. 558.

What is included in terms "notes," "securities," etc., in a bequest, 52 A.L.R. 1097.

Ademption or failure of substituted gift made by codicil or later will as preventing revocation, or effecting revival, of original gift to the same legatee or devisee, 59 A.L.R. 1106.

Change from absolute ownership of real property to mortgage interest by way of security, or vice versa, as ademption or revocation of legacy or devise, 65 A.L.R. 632.

Option given by testator before or after execution of will as ademption of specific legacy or devise, 79 A.L.R. 268; 155 A.L.R. 571.

Interest or estate remaining in testator after conveyance or transfer of less than his entire interest or estate in property as passing under previously executed will covering property in question, 117 A.L.R. 1380.

Duty and liability of executor (or administrator with will annexed) in respect of personal property specifically bequeathed, and not needed for payment of debts, 127 A.L.R. 1071.

Burden of debts and cost of administration as between residuary legatees, and heirs or next of kin who take lapsed, adeemed, or invalid legacies, 144 A.L.R. 476.

Doctrine of election as applicable where testator after the execution of the will transferred to one beneficiary the subject of a specific devise or bequest to another, 147 A.L.R. 735.

Devise of undivided interest as affected by partition of tract subsequent to execution of will, 162 A.L.R. 146.

Construction and effect of general legacy conditional upon ademption of specific legacy or devise to legatee, 2 A.L.R.2d 819.

Right of general legatee of stocks, bonds, or other securities, where testator owns at time of death none such as are described in will or less than bequeathed, 22 A.L.R.2d 457.

Satisfaction or ademption of general legacy by inter vivos gift, transfer, or payment to the legatee or another, 26 A.L.R.2d 9.

Right of beneficiary as against estate of insured who borrowed on the policy, 31 A.L.R.2d 979.

Disposition of proceeds of insurance on property specifically bequeathed or devised, 35 A.L.R.2d 1056.

Ademption or revocation of specific devise or bequest by guardian, committee, or conservator of mentally or physically incompetent testator, 51 A.L.R.2d 770.

Codicil as reviving adeemed or satisfied bequest or devise, 58 A.L.R.2d 1072.

What amounts to ademption to specific legacy of corporate stock or other corporate securities, 61 A.L.R.2d 449.

Conclusiveness of testator's statement as to amount of debt or advancement to be charged against legacy or devise, 98 A.L.R.2d 273.

Ademption of bequest of proceeds of property, 45 A.L.R.3d 10.

Change in stock or corporate structure, or split or substitution of stock of corporation, as affecting bequest of stock, 46 A.L.R.3d 7.

Ademption of legacy of business or interest therein, 65 A.L.R.3d 541.

Disposition of insurance proceeds of personal property specifically bequeathed or devised, 82 A.L.R.3d 1261.

Liability for wrongful autopsy, 18 A.L.R.4th 858.

Ademption of bequest of debt or balance on debt, 25 A.L.R.4th 88.

Proper disposition under will providing for allocation of express percentages or proportions amounting to more or less than whole of residuary estate, 35 A.L.R.4th 788.

Ademption or revocation of specific devise or bequest by guardian, committee,

conservator, or trustee of mentally or physically incompetent testator, 84 A.L.R.4th 462.

53-4-67. Exchange, loss, theft, destruction, or condemnation of testamentary gift.

(a) If the testator exchanges property which is the subject of a specific testamentary gift for other property of like character, or merely changes the investment of a fund so given, the testator's intention shall be deemed to be to substitute the one for the other, and the testamentary gift shall not fail.

(b) If, within six months prior to the testator's death, property which is the subject of a specific testamentary gift is lost, stolen, or destroyed, and if such loss, theft, or destruction is covered, wholly or in part, by insurance, the specific beneficiary has the right to any proceeds of such insurance that are unpaid at the testator's death or, if any such proceeds have been paid prior to the testator's death, to a pecuniary gift equal to the amount of the proceeds so paid. The foregoing provisions shall also apply if the property is damaged but not destroyed, except that the amount of the insurance proceeds or the pecuniary gift to be paid to the specific beneficiary shall be reduced by the cost of any repairs made to the damaged property by the testator or the testator's personal representative.

(c) If, within six months prior to the testator's death, property which is the subject of a specific testamentary gift is taken by condemnation, the beneficiary has the right to any award for such condemnation unpaid at the testator's death or, if any such award has been paid prior to the testator's death, to a pecuniary gift equal to the amount of the award so paid.

History. — Code 1981, § 53-4-67, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article, "The Time Gap in Wills: Shifting Assets and Shrinking Estates — Obsolescence and Testamentary Planning in Georgia," see 6 Ga. L. Rev. 649 (1972).

COMMENT

Subsection (a) of this section carries over former OCGA Sec. 53-2-106. Subsections (b) and (c) of this section add provisions outlining special circumstances in which a beneficiary may receive substitute testamentary gifts upon the loss, theft, destruction, or condemnation of property that is the subject of a specific testamentary gift.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 3909, and former Code 1933, § 113-818,

are included in the annotations for this Code section.

Statement that "the law deems the intention to be," in the former statute, shows that if the testator makes no provision in the testator's will on the subject, expressive of the testator's intent in case of a sale or the like, the law declares what it deems is the testator's legal intent; or, in other words, provides what shall be the result in such case. This excludes the idea that in every case what the law deems to be the intent has no force, and that the courts will go afield hunting for an intent expressed in parol or to be gathered from conduct or acts of the testator after the making of the will. Lang v. Vaughn, 137 Ga. 671, 74 S.E. 270, 40 L.R.A. (n.s.) 542, 1913B Ann. Cas. 52 (1912) (decided under former Civil Code 1910, § 3909).

Substitution generally. — When specifically bequeathed capital stock is sold for money and the testator independently reinvests in stocks and certificates there is no "exchange" of property bequeathed for other of like character, as contemplated by the statute, so far as to except it from operation of the principle of ademption. Woodall v. First Nat'l Bank, 223 Ga. 688, 157 S.E.2d 261 (1967) (decided under former Code 1933, § 113-818).

Bequest of capital stock for the use and benefit of testator's wife that is subsequently sold by the testator prior to testator's death is not a fund bequested within the meaning of this statute. Woodall v. First Nat'l Bank, 223 Ga. 688, 157 S.E.2d 261 (1967) (decided under former Code 1933, § 113-818).

When lands exchanged were all farm land, the fact that the three tracts did not have the same acreage, and possibly not the same market value, does not prevent the tracts from being of like character. Thompson v. Mathews, 226 Ga. 347, 174 S.E.2d 916 (1970) (decided under former Code 1933, § 113-818).

Ademption and substitution. — Because the purchase of a second property closed over a year before the sale of the bequeathed property closed and the testator executed a valid codicil after the sale that did not mention either property, the bequeathed property was deemed pursuant to O.C.G.A. § 53-4-66; consequently, there was no basis for substitution under O.C.G.A. § 53-4-67(a). Fletcher v. Ellenburg, 279 Ga. 52, 609 S.E.2d 337 (2005).

Cited in Reed v. Reed, 68 Ga. 589 (1882); Roberts v. Wilson, 200 Ga. 201, 36 S.E.2d 758 (1946); Chandler v. Owen, 233 Ga. 25, 209 S.E.2d 618 (1974).

RESEARCH REFERENCES

Am. Jur. 2d. — 80 Am. Jur. 2d, Wills, §§ 1167, 1475.

C.J.S. — 96 C.J.S., Wills, § 1171 et seq.

ALR. — Substitutional legacy or devise as affected by original legatee's or devisee's renunciation, 157 A.L.R. 1104.

Change in stock or corporate structure, or split or substitution of stock of corporation, as affecting bequest of stock, 46 A.L.R.3d 7.

53-4-68. Conditions that are impossible, illegal, or against public policy; conditions in terrorem.

(a) Conditions in a will that are impossible, illegal, or against public policy shall be void.

(b) A condition in terrorem shall be void unless there is a direction in the will as to the disposition of the property if the condition in terrorem is violated, in which event the direction in the will shall be carried out, except as otherwise provided in subsection (c) of this Code section.

(c) A condition in terrorem shall not be enforceable against an interested person for:

(1) Bringing an action for interpretation or enforcement of a will;

(2) Bringing an action for an accounting, for removal, or for other relief against a personal representative; or

(3) Entering into a settlement agreement.

History. — Code 1981, § 53-4-68, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-15/HB 865.

The 2020 amendment, effective January 1, 2021, added ", except as otherwise provided in subsection (c) of this Code section" at the end of subsection (b); and added subsection (c).

Law reviews. — For article surveying developments in Georgia wills, trusts, and administration of estates law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 307 (1981). For survey article on wills, trusts, guardianships, and fiduciary administration for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003).

COMMENT

This section carries over former OCGA Sec. 53-2-107 and broadens the second paragraph of that section by allowing a condition in terrorem to take effect not merely in the event there is a limitation over to some other named person (as provided in the former statute) but rather in any case in which the will contains directions as to how the property is to be distributed if the condition in terrorem is violated.

JUDICIAL DECISIONS

Condition valid. — Condition in an in terrorem clause that provided for forfeiture of a legacy if a beneficiary contested the will was not void under O.C.G.A. § 53-4-68(b) as a disposition of the property was provided for if the condition was violated; because an action seeking removal of the executor did not challenge the validity of the will, appellant beneficiary would not violate the in terrorem clause. Sinclair v. Sinclair, 284 Ga. 500, 670 S.E.2d 59 (2008).

Applicability. — Decedent's bequest to decedent's widow was not subject to any condition but was an outright gift, and therefore O.C.G.A. § 53-4-68(a), which voided conditions that were against public policy, did not apply to divest the bequest to the widow, although the widow was found to have committed undue influence in the decedent's pre-decease conveyance of property to herself and her son. Pate v. Wilson, 286 Ga. 133, 686 S.E.2d 88 (2009).

RESEARCH REFERENCES

ALR. — Effect of testamentary gift to child conditioned upon specified arrangements for parental control, 11 A.L.R.4th 940.

53-4-69. Election by beneficiary with claim adverse to will.

A beneficiary taking under a will shall allow all the provisions of the will to be executed as far as the beneficiary can. A beneficiary who has a claim adverse to the will shall be required to elect whether to claim under the will or against it. However, the mere fact that the beneficiary is also a creditor shall not necessitate an election.

History. — Code 1981, § 53-4-69, enacted by Ga. L. 1996, p. 504, § 10.

Cross references. — Equitable principles governing elections between benefits, § 23-1-24.

COMMENT

This section carries over former OCGA Sec. 53-2-111.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 3910, are included in the annotations for this Code section.

Doctrine of election does not apply to residuary legatees. McGinnis v. McGinnis, 1 Ga. 496 (1846) (decided under former law).

Election without knowledge of deed. — Election to take under will in ignorance of deed of testator is not such as to estop legatee from claiming adversely to the will. Shewmake v. Robinson, 148 Ga. 287, 96 S.E. 564 (1918) (decided under former Civil Code 1910, § 3910).

When devise and deed to same person. — When a testator makes a will and subsequently conveys the land therein devised by deed, if the devise and the deed be to the same person, and other benefits are given to that person by the will, one is not put to an election to claim under the will or the deed, one may claim under both. Johnson v. Hayes, 139 Ga. 218, 77 S.E. 73 (1913) (decided under former Civil Code 1910, § 3910).

Time of election. — There is no time prescribed within which either party shall claim the right of putting the other to election. Each case must depend upon its own circumstances. McGinnis v. McGinnis, 1 Ga. 496 (1846) (decided under former law).

Cited in McFadden v. Dale, 155 Ga. 256, 116 S.E. 596 (1923).

RESEARCH REFERENCES

ALR. — Extent of rights of surviving spouse who elects to take against will in profits of or increase in value of estate accruing after testator's death, 7 A.L.R.4th 989.

What constitutes transfer outside the will precluding surviving spouse from electing statutory share under Uniform Probate Code § 2-301, 11 A.L.R.4th 1213.

Validity and enforceability of provision of will or trust instrument for forfeiture or reduction of share of contesting beneficiary, 23 A.L.R.4th 369.

53-4-70. Election by beneficiary owning testamentary gift of property.

(a) When a testator has attempted to make a testamentary gift of property that is not the testator's own and has also given a benefit to a person to whom the property belongs, the person shall elect to take either under the will or against the will.

(b) An election pursuant to subsection (a) of this Code section shall not be required if:

(1) The will itself, from other causes, is not effective in passing title to the property in question;

(2) The testator has an interest in the property in question upon which the will may operate;

(3) The testamentary gift shows that the testator intended to give the property only in the event that the testator's own title was good; or

(4) The benefit given to the person called upon to elect is not from the testator's own property but is by virtue of a power of appointment in the testator.

History. — Code 1981, § 53-4-70, enacted by Ga. L. 1996, p. 504, § 10.

Cross references. — Equitable principles governing elections between benefits, § 23-1-24. Applicability of section to deeds, § 44-5-37.

COMMENT

This section carries over former OCGA Sec. 53-2-112.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 4610, and former Code 1933, § 37-502, are included in the annotations for this Code section.

Statute does not apply to residuary legatees as such. McGinnis v. McGinnis, 1 Ga. 496 (1846) (decided under former law).

Meaning and intent. — Meaning and intent of this statute is that it is designed for the purpose of making sure that a legatee shall not be permitted to hold onto a legatee's own legacy under a will and at the same time deprive another legatee of property given the legatee under the will. Holliday v. Pope, 205 Ga. 301, 53 S.E.2d 350 (1949) (decided under former Code 1933, § 37-502).

Statute is not intended and should not be construed to mean that a legatee must speculate by electing to take what the legatee believes to be a good claim to property, and at that period of pure chance relinquish the legatee's unquestioned title to the property under the will. On the other hand, the intent of this statute is to prevent such legatee from taking both the property going to the legatee under the will and property which the legatee claims. Holliday v. Pope, 205 Ga. 301, 53 S.E.2d 350 (1949) (decided under former Code 1933, § 37-502).

Election defined. — An "election" in equity is a choice which a person is compelled to make between the acceptance of a benefit under an instrument and the retention of one's own property which is attempted to be disposed of by that instrument. Rieves v. Smith, 184 Ga. 657, 192 S.E. 372 (1937) (decided under former Code 1933, § 37-502).

Election requires prior adjudication of ownership of devised property. — Plaintiff would not be compelled to elect between a legacy and a "mere claim" to property until after there has been an adjudication of the question whether or not plaintiff is in fact the owner of an interest in the property disposed of by the will, and then only in the event this issue is determined in plaintiff's favor; since, if plaintiff were first compelled to elect, and plaintiff should for any reason fail in the trial to establish plaintiff's claim, there would be no defeated or disappointed legatees to compensate, but, on the contrary, the other legatees would get the very property plaintiff claimed. Rieves v. Smith, 184 Ga. 657, 192 S.E. 372 (1937) (decided under former Code 1933, § 37-502).

A case of election only arises when a person is entitled to one of two benefits to each of which plaintiff has the legal title, and an election can exist only when

there is a choice between two or more inconsistent remedies actually existing at the time of election. Rieves v. Smith, 184 Ga. 657, 192 S.E. 372 (1937) (decided under former Code 1933, § 37-502).

To raise a case of election a person must be entitled to one of two benefits, to each of which one has legal title, but to enforce both would be unconscientious and inequitable to others having claims upon the same property or fund. One must have legal title to both benefits, and have right to enforce either at one's election. Holliday v. Pope, 205 Ga. 301, 53 S.E.2d 350 (1949) (decided under former Code 1933, § 37-502).

Choice of beneficiary. — When a testator, after devising property owned by the testator to one beneficiary, assumes to devise to another property belonging to the first devisee, the devisee of the property owned by the testator, if one accepts the devise with knowledge of the facts, is precluded from asserting a claim to one's own property devised to the other beneficiary. The beneficiary must elect between keeping one's own and taking what is given by the will. Rieves v. Smith, 184 Ga. 657, 192 S.E. 372 (1937) (decided under former Code 1933, § 37-502).

Choice is compulsory between two inconsistent rights or claims when there is a clear intention of the testator that the beneficiary shall not enjoy both. Rieves v. Smith, 184 Ga. 657, 192 S.E. 372 (1937) (decided under former Code 1933, § 37-502).

Requirement that will describe specific property. — Doctrine of election as applied to wills, against one claiming inconsistent benefits, arises when the testator "has attempted to give property not his own, and has given a benefit to a person to whom that property belongs," in which case "the devisee or legatee shall elect either to take under or against the will." It is applicable when the instrument confers upon one a benefit while attempting to dispose of one's own property, in which event such person must elect whether to accept the benefit under the instrument or retain one's property. However, this doctrine does not apply when testamentary disposition describes no specific property so as to identify the property with that of the claimant, but describes the property only generally, as "all my real and personal property and all property of every kind and character owned by me at my death," since the testator would be presumed to have intended to bequeath only what the testator actually owned and could lawfully dispose of. First Nat'l Bank & Trust Co. v. Roberts, 187 Ga. 472, 1 S.E.2d 12 (1939) (decided under former Code 1933, § 37-502).

Doctrine of election may prohibit specific performance of contract. — Specific performance of an alleged contract to will certain property in return for services rendered testator would not be decreed if to do so would allow the petitioner to acquire both that property and the property already given to one under the will. Holliday v. Pope, 205 Ga. 301, 53 S.E.2d 350 (1949) (decided under former Code 1933, § 37-502).

Condition contemplated by statute, when an election is mandatory, will exist in a suit for specific performance of a contract to will certain property to petitioner who was given other less desirable property in the will, only when by a judgment of the court the petitioner acquires legal title to the property which one seeks; and by the very act of praying for and obtaining such a decree of title the petitioner will have thereby made an election to renounce the petitioner's legacy under the will, and the requirements of statute will thus be satisfied. Holliday v. Pope, 205 Ga. 301, 53 S.E.2d 350 (1949) (decided under former Code 1933, § 37-502).

Cited in Lamar v. McLaren, 107 Ga. 591, 34 S.E. 116 (1899); Caraker v. Brown, 152 Ga. 677, 111 S.E. 51 (1922); McFadden v. Dale, 155 Ga. 256, 116 S.E. 596 (1923); State Banking Co. v. Hinton, 178 Ga. 68, 172 S.E. 42 (1933).

RESEARCH REFERENCES

ALR. — Revocation of election to take under or contrary to will, 81 A.L.R. 740; 71 A.L.R.2d 942.

Right to accept one devise or bequest under will and renounce another, 91 A.L.R. 607.

When one to whom policy of insurance on life of testator is payable is put to his election as between his right under the policy and his right to take under provision for his benefit in will, 110 A.L.R. 1317.

Doctrine of election or estoppel as applicable as against beneficiary of will where provision for other beneficiary is invalid, not for reasons personal to former, but because of statute or public policy, 112 A.L.R. 377.

Validity of election to take under or against will as affected by the fact that it was filed before probate of will or grant of letters, 120 A.L.R. 1270.

Doctrine of election as applicable where testator after the execution of the will transferred to one beneficiary the subject of a specific devise or bequest to another, 147 A.L.R. 735.

Necessity of election between will and contract by testator to leave property at death, 152 A.L.R. 898.

Does surviving spouse who elects against will take by way of distributive share or by way of inheritance from deceased spouse, 160 A.L.R. 429.

Election to take against will as extinguishing power of appointment, 38 A.L.R.2d 977.

Election by spouse to take under or against will as exercisable by agent or personal representative, 83 A.L.R.2d 1077.

Factors considered in making election for incompetent to take under or against will, 3 A.L.R.3d 6.

Time within which election must be made for incompetent to take under or against will, 3 A.L.R.3d 119.

53-4-71. Compensation to defeated beneficiary electing against will.

If, pursuant to Code Sections 53-4-69 and 53-4-70, an election is made against the will, the defeated beneficiary shall be entitled to compensation out of the property bequeathed to the person who made the election, up to the value of the defeated testamentary gift.

History. — Code 1981, § 53-4-71, enacted by Ga. L. 1996, p. 504, § 10.

Cross references. — Equitable principles governing elections between benefits, § 23-1-24. Applicability of section to deeds, § 44-5-37.

COMMENT

This section carries over former OCGA Sec. 53-2-114. Former OCGA Sec. 53-2-113 (dealing with election for an incompetent beneficiary) is repealed.

53-4-72. Passing of after-acquired property.

All property owned by the testator at death that was acquired subsequent to the making of a will shall pass under the will if the provisions of the will are sufficiently broad to embrace the property.

History. — Code 1981, § 53-4-72, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries over former OCGA Sec. 53-2-117. Former OCGA Sec. 53-2-116 (relating to compensatory devises to executors) is repealed.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 2429, former Code 1868, § 2425, former Code 1882, § 2461, and former O.C.G.A. § 53-2-117 are included in the annotations for this Code section.

Cited in Jones v. Shewmake, 35 Ga. 151 (1866); Gibbon v. Gibbon, 40 Ga. 562 (1869); Morgan v. Huggins, 42 F. 869 (N.D. Ga. 1890); Barber v. Warren, 271 Ga. 75, 515 S.E.2d 153 (1999).

53-4-73. Disposition of heart pacemakers.

(a) Any individual who is 18 years of age or older and of sound mind may provide for the sale by contract or by will of a heart pacemaker implanted within the individual, such disposition to be made at death. If the sale is by will, it shall be effective without probate.

(b) When individuals in prior classes are not available at the time of death of an individual having a heart pacemaker and in the absence of a disposition contract or will, actual notice of contrary indications by the decedent, and actual opposition by a member of the same or a prior class, any of the following individuals, in order of priority stated, may sell the heart pacemaker:

(1) The spouse;

(2) An adult son or daughter;

(3) Either parent;

(4) An adult brother or sister;

(5) A guardian of the person of the decedent at the time of the decedent's death other than a guardian ad litem appointed for such purpose; or

(6) Any other person authorized or under obligation to dispose of the body.

(c) If a buyer has actual notice of contrary indications by the decedent or actual notice that a sale by a member of a class is opposed by a member of the same or a prior class, no valid sale may be made. The persons authorized by subsection (b) of this Code section may make the sale only after the time of death of the individual having the heart pacemaker.

(d) Unless otherwise provided in a will or contract, all proceeds from sales under this Code section shall be added to the estate of the decedent.

(e) Sales of pacemakers under this Code section shall be subject to:

(1) Medical acceptability of the heart pacemaker for reuse; and

(2) The laws of this state relating to autopsies.

(f) This Code section shall not apply to the sale or gift of a nuclear-powered pacemaker.

History. — Code 1981, § 53-4-73, enacted by Ga. L. 1996, p. 504, § 10.

Cross references. — Persons authorized to receive donations of heart pacemakers, § 31-1-6. Anatomical gifts, § 44-5-140 et seq. Post-mortem examinations, § 45-16-20 et seq.

COMMENT

This section carries over former OCGA Sec. 53-1-4.

53-4-74. Pecuniary marital deduction testamentary gift or transfer.

(a) As used in this Code section, the term "marital deduction testamentary gift or transfer" means a testamentary gift or transfer of assets, including cash, which qualifies for the federal estate tax marital deduction.

(b) Where a will or trust agreement authorizes or requires an executor, administrator, or trustee to satisfy a pecuniary marital deduction testamentary gift or transfer wholly or partly by a distribution of assets in kind at values which are finally determined for federal estate tax purposes or at values which are determined by reference to such federal estate tax valuation, the executor, administrator, or trustee, in satisfaction of the pecuniary marital deduction bequest or transfer, shall distribute assets, including cash, which shall have an aggregate fair market value fairly representative of the distributee's proportionate share of the appreciation or depreciation, from the date or dates of federal estate tax valuation to the date or dates of distribution in satisfaction of the pecuniary marital deduction bequest or transfer.

History. — Code 1981, § 53-4-74, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For note, "Advantages and Disadvantages of Intestate Death for Married Persons with an Estate of $120,000 or Less," see 9 Ga. St. B.J. 102 (1972).

COMMENT

This section carries over former OCGA Sec. 53-4-17 but deletes the language relating to the effective dates of the Act as unnecessary.

RESEARCH REFERENCES

ALR. — Estate tax as element in computation of widow's share in estate, 10 A.L.R. 518.

Deduction of state estate or succession tax before computing federal tax, 16 A.L.R. 674.

Deduction of federal gift tax in computing state inheritance tax, 56 A.L.R.3d 1322.

Construction and application of "pay-all-taxes" provision in will, as including liability of nontestamentary property for inheritance and estate taxes, 56 A.L.R.5th 133.

53-4-75. Construction of wills and trust instruments referring to federal estate and generation-skipping transfer tax laws.

Repealed by Ga. L. 2020, p. 377, § 1-16/HB 865, effective January 1, 2021.

History. — Code 1981, § 53-4-75, enacted by Ga. L. 2010, p. 552, § 1/SB 461.

Editor's notes. — This Code section was based on Code 1981, § 53-4-75, enacted by Ga. L. 2010, p. 552, § 1/SB 461.

CHAPTER 5

PROBATE

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53-5-3. Time limitation.
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53-5-5. Duty to file will.
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53-5-17. Procedure.
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Witnesses; Settlement Agreement; Expenses

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53-5-24. Unavailability of subscribing witnesses.
53-5-25. Settlement agreement.
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Article 5

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53-5-34. Effect of admission to ancillary probate.
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Article 6

Jurisdiction

53-5-50. Original jurisdiction; petition and pleading requirements.
53-5-51. Contents of petition; service of notice; issuance of relief.
53-5-52. Time limitation; filing of petition constitutes claim against estate.
53-5-53. Applicability of article.

Article 7

Uniform Transfer on Death Security Registration

53-5-60. Short title.

Sec.
53-5-61. Definitions.
53-5-62. Ownership of a security.
53-5-63. Authorization of beneficiary form.
53-5-64. Registration of a beneficiary form.
53-5-65. Words used in beneficiary form.
53-5-66. Designation of transfer in beneficiary form.
53-5-67. Ownership of registered security after death.
53-5-68. Duties of registering entity; implementation of registration; applicability of Code Section 53-5-67; protective effect.
53-5-69. Effect of beneficiary form.
53-5-70. Terms and conditions of beneficiary form; illustrations.
53-5-71. Applicability of article.

Editor's notes. — This chapter was effective January 1, 1998, to the extent that no vested rights of title, year's support, succession, or inheritance are impaired, as provided by the version of Code Section 53-1-1 enacted by Ga. L. 1996, p. 504, § 10, as amended by Ga. L. 1997, p. 1352, § 1.

Ga. L. 1996, p. 504, § 10, effective January 1, 1998, repealed the Code sections formerly codified at this chapter, and enacted the current chapter. The former chapter consisted of §§ 53-5-1 through 53-5-21, and was based on Laws 1838, Cobb's 1851 Digest, p. 296; Laws 1850, Cobb's 1851 Digest, p. 297; Ga. L. 1853-54, p. 34, § 1; Ga. L. 1855-56, p. 148, §§ 1-4; Ga. L. 1862-63, p. 30, §§ 1-3; Code 1863, §§ 2531-2533, 2535, 2536; Ga. L. 1865-66, p. 31, § 1; 1866, p. 66, § 1; Code 1868, §§ 2530-2533, 2535-2537; Code 1873, §§ 2571-2574, 2576-2578; Code 1882, §§ 2571-2574, 2576-2578; Ga. L. 1884-85, p. 49, § 1; Ga. L. 1890-91, p. 227, § 1; Civil Code 1895, §§ 3465-3473; Ga. L. 1899, p. 47, § 1; Ga. L. 1903, p. 76, § 1; Civil Code 1910, §§ 4041-4051; Ga. L. 1918, p. 122, § 1; Code 1933, §§ 113-1001.1, 113-1002, 113-1002.1, 113-1003 through 113-1005.3, 113-1006, 113-1006.1, 113-1007 through 113-1012; Ga. L. 1937, p. 861, §§ 1-5; Ga. L. 1939, p. 236, § 1; Ga. L. 1943, p. 621, § 1; Ga. L. 1947, p. 866, § 1; Ga. L. 1953, Jan.-Feb. Sess., p. 453, § 1; Ga. L. 1955, p. 731, § 1; Ga. L. 1958, p. 378, § 1; Ga. L. 1958, p. 657, § 11; Ga. L. 1959, p. 136, § 5; Ga. L. 1960, p. 227, § 1; Ga. L. 1968, p. 997, § 1; Ga. L. 1976, p. 1059, §§ 1, 2; Ga. L. 1977, p. 545, §§ 1-3; Ga. L. 1979, p. 1325, § 2; Code 1981, § 53-5-1.1; Ga. L. 1983, p. 3, § 42; Ga. L. 1986, p. 982, § 20; Ga. L. 1986, p. 1272, §§ 1-8; Ga. L. 1987, p. 375, § 1; Ga. L. 1991, p. 948, §§ 1, 2; Ga. L. 1992, p. 6, § 53; Ga. L. 1993, p. 1054, § 1.

Law reviews. — For article, "Probate and Administration of Small Estates in Georgia: Some Proposals for Reform," see 6 Ga. L. Rev. 74 (1971). For article, "The Probate and Establishment of Domestic and Foreign Wills: An Analysis of Statutory Requirements," see 13 Ga. L. Rev. 133 (1978).

RESEARCH REFERENCES

ALR. — Establishment of will lost before testator's death, 34 A.L.R. 1304.

Situs of corporate stock for purposes of probate jurisdiction and administration, 72 A.L.R. 179.

Prima facie case for proponent in will contest as shifting burden of proof, 76 A.L.R. 373.

Admissibility and credibility of testimony of subscribing witness tending to impeach execution of will or testamentary capacity of testator, 79 A.L.R. 394.

Admissibility of declarations of testator on issue of undue influence, 79 A.L.R. 1447; 148 A.L.R. 1225.

Right to probate of will as affected by prior appointment of administrator, 95 A.L.R. 1107; 2 A.L.R.4th 1315.

Arbitration of issues or questions pertaining to probate matters, 104 A.L.R. 359.

Character of instrument as will, or its admissibility to probate as such, as affected by its failure to make any disposition of property or by fact that there is no beneficiary entitled to take thereunder, 147 A.L.R. 636.

Contingent interest as sufficient to entitle one to oppose or contest will or codicil, 162 A.L.R. 843.

Estoppel to contest will or attack its validity, 28 A.L.R.2d 116.

Right of executor or administrator to contest will or codicil of his decedent, 31 A.L.R.2d 756.

Necessity that executor or administrator be represented by counsel in presenting matters in probate court, 19 A.L.R.3d 1104.

Right to probate subsequently discovered will as affected by completed prior proceedings in interests administration, 2 A.L.R.4th 1315.

Modern status: inheritability or descendability of right to contest will, 11 A.L.R.4th 907.

Attorney's delay in handling decedent's estate as ground for disciplinary action, 21 A.L.R.4th 75.

Authority of probate court to depart from statutory schedule fixing amount of executor's commissions and attorneys' fees, 40 A.L.R.4th 1189.

Fraud as extending statutory limitations period for contesting will or its probate, 48 A.L.R.4th 1094.

Sufficiency of evidence to support grant of summary judgment in will probate or contest proceedings, 53 A.L.R.4th 561.

Estoppel to contest will or attack its validity by acceptance of benefits thereunder, 78 A.L.R.4th 90.

ARTICLE 1

GENERAL PROVISIONS

Law reviews. — For article, "Probate Matters," see 20 Ga. B.J. 183 (1957). For article, "Probate and Administration of Small Estates in Georgia: Some Proposals for Reform," see 6 Ga. L. Rev. 74 (1971). For article, "The Probate and Establishment of Domestic and Foreign Wills: An Analysis of Statutory Requirements," see 13 Ga. L. Rev. 133 (1978).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. T. 53, C. 3 are included in the annotations for this Code section.

Probate is title-accommodating rather than interest-creating. Jenkins v. United States, 428 F.2d 538 (5th Cir.), cert. denied, 400 U.S. 829, 91 S. Ct. 59, 27 L. Ed. 2d 59 (1970) (decided under former O.C.G.A. T.3, C. 3).

Process of probating a will in Georgia is essentially a formal validation of the property interests which came into existence upon the death of the testator. Jenkins v. United States, 428 F.2d 538 (5th Cir.), cert. denied, 400 U.S. 829, 91 S. Ct. 59, 27 L. Ed. 2d 59 (1970) (decided under former O.C.G.A. T. 53, C. 3).

RESEARCH REFERENCES

ALR. — Establishment of will lost before testator's death, 34 A.L.R. 1304.

Situs of corporate stock for purposes of probate jurisdiction and administration, 72 A.L.R. 179.

Prima facie case for proponent in will contest as shifting burden of proof, 76 A.L.R. 373.

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impeach execution of will or testamentary capacity of testator, 79 A.L.R. 394.

Admissibility of declarations of testator on issue of undue influence, 79 A.L.R. 1447; 148 A.L.R. 1225.

Right to probate of will as affected by prior appointment of administrator, 95 A.L.R. 1107; 2 A.L.R.4th 1315.

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Modern status: inheritability or descendability of right to contest will, 11 A.L.R.4th 907.

Authority of probate court to depart from statutory schedule fixing amount of executor's commissions and attorneys' fees, 40 A.L.R.4th 1189.

Estoppel to contest will or attack its validity by acceptance of benefits thereunder, 78 A.L.R.4th 90.

53-5-1. Jurisdiction and domicile.

(a) The probate court shall have exclusive jurisdiction over the probate of wills.

(b) The county of domicile of the testator at death shall give jurisdiction to the probate court of that county.

(c) The domicile of a testator who was in the care of a nursing home or other similar facility at the time of death shall be presumed to be the county in which the testator was domiciled immediately before entering the nursing home or other facility; provided, however, this presumption may be rebutted. If it is determined by the probate court that the testator considered or, in the absence of an impairment of mental faculties, the testator would have considered the county in which the facility is located to be the testator's domicile, then for purposes of this Code section that county shall be considered the testator's county of domicile.

History. — Code 1981, § 53-5-1, enacted by Ga. L. 1996, p. 504, § 10.

Cross references. — Probate courts generally, T. 15, C. 9. Jurisdiction of judge of probate court to grant administration on estates, § 15-9-31.

COMMENT

This section carries forward former OCGA Secs. 53-3-1 and 53-1-5 but changes the term "residence" to "domicile" throughout.

JUDICIAL DECISIONS

Analysis

General Consideration
Exclusive Jurisdiction
Immunity of Judgment from Collateral Attack
Appeal to Superior Court

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 2421, former Code 1933, § 113-603, and former O.C.G.A. § 53-3-1 are included in the annotations for this Code section.

Locus of execution irrelevant. — Death of a testator while a state resident confers jurisdiction upon the local probate court even though the will was executed outside the state while the testator was a nonresident. Zeh v. Griffin, 257 Ga. 364, 359 S.E.2d 899 (1987) (decided under former O.C.G.A. § 53-3-1).

Jurisdiction of superior court following "transfer". — Superior court lacked jurisdiction under Georgia law to hear a probate action that was "transferred" to superior court by a probate court, and the superior court's order dismissing a caveat to a decedent's will was null and void. Carpenter v. Carpenter, 276 Ga. 746, 583 S.E.2d 852 (2003).

Cited in Bryan v. Walton, 14 Ga. 185 (1853); Perkins v. Perkins, 21 Ga. 13 (1857); Lucas v. Parsons, 24 Ga. 640, 71 Am. Dec. 147 (1858); Slade v. Street, 27 Ga. 1 (1859); Arnold v. Arnold, 62 Ga. 627 (1879); Israel v. Wolf, 100 Ga. 339, 28 S.E. 109 (1897); Godwin v. Godwin, 129 Ga. 67, 58 S.E. 652 (1907); Turner v. Holbrook, 145 Ga. 603, 89 S.E. 700 (1916); Peavey v. Crawford, 182 Ga. 782, 187 S.E. 13 (1936); Jones v. Dean, 188 Ga. 319, 3 S.E.2d 894 (1939); Robinson v. Georgia Sav. Bank & Trust Co., 106 F.2d 944 (5th Cir. 1939); Fitzgerald v. Morgan, 193 Ga. 802, 20 S.E.2d 73 (1942); Heath v. Jones, 168 F.2d 460 (5th Cir. 1948); Jackson v. Sapp, 210 Ga. 134, 78 S.E.2d 23 (1953); Woo v. Markwalter, 210 Ga. 156, 78 S.E.2d 473 (1953); Willis v. Willis, 213 Ga. 45, 96 S.E.2d 591 (1957); Dockery v. Findley, 216 Ga. 807, 120 S.E.2d 608 (1961); Brady v. Stephenson, 227 Ga. 461, 181 S.E.2d 387 (1971); Caldwell v. Miles, 228 Ga. 177, 184 S.E.2d 470 (1971).

Exclusive Jurisdiction

Probate court has original and exclusive jurisdiction. — Probate court has exclusive jurisdiction of the probate of wills, and a will cannot be proved and admitted in evidence in a contest under it in the superior court. Elliott v. Johnson, 178 Ga. 384, 173 S.E. 399 (1934) (decided under former Code 1933, § 113-603).

Court of equity is without jurisdiction to determine the validity of wills and to cancel them. Elliott v. Johnson, 178 Ga. 384, 173 S.E. 399 (1934) (decided under former Code 1933, § 113-603).

Court of ordinary (now probate court) has original and exclusive jurisdiction, in the first instance, of the probate of wills; and a court of equity in the exercise of its equity powers has no jurisdiction to enjoin the custodian of an alleged will from offering the will for probate, or for any reason to decree cancellation of an alleged will on which no action has been taken by the court of ordinary (now probate court). The rule that equity seeks to do complete justice will not bring into equitable jurisdiction matters of which another court has exclusive jurisdiction. Furr v. Jordan, 196 Ga. 862, 27 S.E.2d 861 (1943) (decided under former Code 1933, § 113-603).

Probate must occur within county of residence of decedent. — It being within the power of the judge of the probate court of any county to compel the filing in the judge's office of any paper purporting to be the last will and testament of a deceased person who at the time of death resided in such county, and the probate court having original and exclusive jurisdiction in the first instance of the probate of all wills, the superior court, in the exercise of the court's equity powers, has no jurisdiction to enjoin the custodian

Exclusive Jurisdiction (Cont'd)

of an alleged will from offering the will for probate, nor to decree, for any reason, the cancellation of an alleged will upon which no action has ever been taken by the probate court. Elliott v. Johnson, 178 Ga. 384, 173 S.E. 399 (1934) (decided under former Code 1933, § 113-603).

When will was offered for probate in the court of ordinary (now probate court) of a certain county, as the court having jurisdiction, solely upon the ground that the decedent was domiciled in that county at the time of the decedent's death, and there was no contention that the evidence did not establish without dispute all averments contained in the application for probate, it was not cause for reversal for any reason assigned, that the court in directing the verdict in favor of probate included direction for a special finding that the decedent was a resident of and was domiciled in Fulton County at the time of the decedent's death as a general verdict for the propounders would necessarily have implied the jurisdictional fact that the decedent was so domiciled; and it did not appear that the caveator was harmed by the direction of such special finding, or by its existence as a part of the verdict. Hungerford v. Spalding, 183 Ga. 547, 189 S.E. 2 (1936) (decided under former Code 1933, § 113-603).

Probate courts have general jurisdiction of the granting or revocation of letters of administration, and therefore judgment granting letters as to a particular estate cannot be impeached collaterally on the ground that the decedent resided in a different county; such a judgment must be attacked in the court where it was rendered, especially where the judgment itself recites the fact that the deceased was late of that county. Davis v. Tyson, 60 Ga. App. 714, 4 S.E.2d 704 (1939) (decided under former Code 1933, § 113-603).

Probate proper in county of domicile. — Probate court did not err in finding that the testators were domiciled in Newton County at the time of the testators' deaths as the testators resided in a nursing home in that county and had no plans to return to the testators' Fulton County home or to the appellant's residence in Rockdale County and, thus, the probate court properly exercised jurisdiction over the petition to probate the testators' wills. Hardee v. Whitlock, 345 Ga. App. 536, 813 S.E.2d 616 (2018).

Probate cannot be predicated on ownership of real estate alone. — Mere ownership of real estate in a certain county would not confer jurisdiction upon the court of ordinary (now probate court) of such county to probate an alleged will, unless the decedent died a nonresident of this state, since the probate of a will must be made in the county of the residence of the alleged testator if a resident of this state; and, if not a resident of this state, the will may be probated in any county where real estate belonging to the testator is situated. Hungerford v. Spalding, 183 Ga. 547, 189 S.E. 2 (1936) (decided under former Code 1933, § 113-603).

Issue to be decided on an application for probate is devisavit vel non, and does not include any issue as to the validity of the testator's title. Wetter v. Habersham, 60 Ga. 193 (1878) (decided under former Code 1873, § 2421); Cone v. Johnston, 202 Ga. 420, 43 S.E.2d 545 (1947) (decided under former Code 1933, § 113-603).

Issue of devisavit vel non does not include any issue as to the title or the ownership of property, and a court of ordinary (now probate court) and a superior court on appeal from a court of ordinary (now probate court) has no jurisdiction to try and determine the question of the validity or invalidity of a contract by legatees disposing of property contrary to the terms of a will offered for probate. Cone v. Johnston, 202 Ga. 420, 43 S.E.2d 545 (1947) (decided under former Code 1933, § 113-603).

Exclusive jurisdiction on issues of undue influence and contract to make will. — When the decedent's grandniece filed a caveat to the probate of the will in solemn form on grounds of undue influence and contract to make a will and then filed an identical complaint in the superior court, the probate court, under O.C.G.A. § 53-5-1(a), had exclusive jurisdiction of the probate of the 1997 will, and the superior court was required to transfer that portion of the action to the

probate court. SunTrust Bank v. Peterson, 263 Ga. App. 378, 587 S.E.2d 849 (2003).

Immunity of Judgment from Collateral Attack

Judgment of probate court immune from collateral attack. — Court of ordinary (now probate court) is a court of general jurisdiction, and, unless want of jurisdiction appears on the face of the record, its judgment cannot be collaterally attacked. Davis v. Tyson, 60 Ga. App. 714, 4 S.E.2d 704 (1939) (decided under former Code 1933, § 113-603).

Any attack or proceeding to set aside must be brought in the court of ordinary (now probate court) where the will was probated in common form; or this may be done in a court of equity where the judgment of the court of ordinary (now probate court) probating the will was procured through fraud. Davis v. Tyson, 60 Ga. App. 714, 4 S.E.2d 704 (1939) (decided under former Code 1933, § 113-603).

Appeal to Superior Court

Appeal to superior court from judgment of probate court. — When an appeal is taken to the superior court from a judgment of a court of ordinary (now probate court) admitting or refusing the probate of a paper as a will, that court becomes quoad hoc a probate court, and in trying the appeal the superior court cannot go beyond the jurisdiction of the court of ordinary (now probate court) as respects rights, and can deal with no question of merits, except such as could have been raised in the primary court. Cone v. Johnston, 202 Ga. 420, 43 S.E.2d 545 (1947) (decided under former Code 1933, § 113-603).

Appeal to superior court from preliminary ruling of probate court. — An appeal to the superior court from a preliminary ruling and before the court of ordinary (now probate court) rendered judgment in the main case would improperly usurp the jurisdiction of the court of ordinary (now probate court) in violation of the Constitution and statutory law by depriving that court of jurisdiction to decide the main question, which is, has the document offered been proved? Hartley v. Holwell, 202 Ga. 724, 44 S.E.2d 896 (1947) (decided under former Code 1933, § 113-603).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 748, 751.

C.J.S. — 95 C.J.S., Wills, § 525.

ALR. — Jurisdiction in proceeding for probate of will to adjudicate as to other will not offered for probate, 119 A.L.R. 1099.

53-5-2. Right to offer will for probate; "interested person" defined.

(a) As used in this Code section, the term "interested person" shall include, but shall not necessarily be limited to, any heir of the decedent; legatee, devisee, or beneficiary under the will; creditor of the decedent; purchaser from an heir of the decedent; administrator or temporary administrator appointed for the estate of the decedent prior to the discovery of the will; trustee or beneficiary of a testamentary trust established by the will or of a trust to which the will makes a devise or bequest; and individual making a claim under, or having standing to caveat to the probate of, an earlier will. An agent, conservator, guardian, guardian ad litem, or other fiduciary or appropriate representative of such an interested person may act on such interested person's behalf.

(b) The right to offer a will for probate shall belong to the executor, if one is named. If for any reason the executor fails to offer the will for probate with reasonable promptness, or if no executor is named, any interested person may offer the will for probate.

History. — Code 1981, § 53-5-2, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2018, p. 356, § 3-1/SB 436; Ga. L. 2020, p. 377, § 1-17/HB 865.

The 2020 amendment, effective January 1, 2021, inserted subsection (a); redesignated the existing provisions as subsection (b); and, in subsection (b), deleted the last sentence, which read: "As used in this Code section, the term 'interested person' shall include, but shall not be limited to, any legatee, devisee, creditor of the decedent, purchaser from an heir of the decedent, an administrator appointed for the decedent prior to the discovery of the will, and any individual making a claim under an earlier will".

Law reviews. — For annual survey on wills, trusts, guardianships, and fiduciary administration, see 67 Mercer L. Rev. 273 (2015).

COMMENT

This section carries forward the concept of former OCGA Sec. 53-3-2. The section is modified to allow interested persons to offer the will for probate if the executor fails to act promptly.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-614, are included in the annotations for this Code section.

Renunciation is an act whereby a person, named in a will as executor, declines to take on personally the burden of that office. The act is, therefore, predicated on an existing office. It presupposes the existence of the will. If no will has been made, there is no executorship to renounce. Nor until it is shown that there is a will, can it appear that there is a renunciable executorship. Wheeler v. Wheeler, 82 Ga. App. 831, 62 S.E.2d 579 (1950) (decided under former Code 1933, § 113-614).

Interested persons only have right to file caveat. — Georgia Supreme Court has found that only those who have some interest in the will or estate which will be affected or concluded by probate have a right to file a caveat. Georgia cases have recognized those interested persons with standing to caveat a will to include heirs, a purchaser from an heir, a judgment creditor of an heir, an administrator appointed for the testator before the discovery of the will, and persons claiming under an earlier will. Ray v. Stevens, 295 Ga. 895, 764 S.E.2d 809 (2014).

Must be an interested person. — Trial court erred by denying two children's motion to dismiss the petition to probate filed by the decedent's brother because the brother lacked standing to offer the will to probate under O.C.G.A. § 53-5-2 since the brother was not an interested person as the brother was not a judgment creditor of an heir of the decedent, a purchaser from an heir, a person claiming under an earlier will, or an administrator appointed for the decedent before discovery of the will. Ray v. Stevens, 295 Ga. 895, 764 S.E.2d 809 (2014).

General creditor not an interested person. — Being a general creditor of an estate would not give a person standing to offer a will for probate; thus, a general creditor is not an interested person for purposes of O.C.G.A. § 53-5-2. Ray v. Stevens, 295 Ga. 895, 764 S.E.2d 809 (2014).

Separation of a legally married couple does not deprive the widow of her right to a year's support out of the husband's estate. Knowles v. Knowles, 125 Ga. App. 642, 188 S.E.2d 800 (1972) (decided under former Civil Code 1933,

§ 113-1002); Hunnicutt v. Hunnicutt, 180 Ga. App. 798, 350 S.E.2d 770 (1986) (decided under former O.C.G.A. § 53-5-2); Brown v. Estate of Brown, 246 Ga. App. 332, 539 S.E.2d 824 (2000) (decided under former O.C.G.A. § 53-5-2).

Terminable nature of widow's right to year's support. — Widow is entitled to no year's support unless she applies for it prior to her death and prior to her remarriage, and thus, it is apparent on its face that her right is a terminable one. United States v. Edmondson, 331 F.2d 676 (5th Cir. 1964) (decided under former Code 1933, § 53-5-2).

Impact of death of widow. — When a widow dies pending proceedings to have a year's support set aside to her out of her husband's estate, a return of the appraisers setting aside a year's support is void. May v. Braddock, 92 Ga. App. 302, 88 S.E.2d 539 (1955).

Right to a year's support can be waived if application is not made while the spouse is alive and widowed. However, there is no basis to conclude that the year's support, if applied for, lapses if the award is not finalized before the death of the claimant. Wigley v. Hambrick, 193 Ga. App. 903, 389 S.E.2d 763 (1989), cert. denied, 193 Ga. App. 911, 389 S.E.2d 763 (1990) (decided under former O.C.G.A. § 53-5-2).

Cited in Fletcher v. Gillespie, 201 Ga. 377, 40 S.E.2d 45 (1946); Heath v. Jones, 168 F.2d 460 (5th Cir. 1948); Oakley v. Anderson, 235 Ga. 607, 221 S.E.2d 31 (1975); In re Estate of Ehlers, 289 Ga. App. 14, 656 S.E.2d 169 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, § 776.

C.J.S. — 95 C.J.S., Wills, § 468.

ALR. — Necessity of allegations that contestant of will is an interested party, 117 A.L.R. 1455.

Statutes dealing with existing intestate administration, upon discovery of will, 65 A.L.R.2d 1201.

53-5-3. Time limitation.

(a) As used in this Code section, the term "will" includes a codicil.

(b) A will shall not be offered for probate following the expiration of five years from the earlier of:

(1) The latest date on which a petition is filed for the appointment of a personal representative of the decedent's estate, an order that no administration is necessary on the decedent's estate, or the probate of a different will; or

(2) The date of entry of a final order granting any petition of the sort described in paragraph (1) of this subsection that remains in continuing force and effect.

(c) The offering of a will for probate following the entry of an order of the sort described in paragraph (2) of subsection (b) of this Code section shall constitute a claim against a decedent's estate that arose before the death of the decedent for purposes of Code Section 9-3-36.

History. — Code 1981, § 53-5-3, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 8; Ga. L. 2008, p. 715, § 9/SB 508; Ga. L. 2020, p. 377, § 1-18/HB 865.

The 2020 amendment, effective January 1, 2021, added subsection (a); redesignated and rewrote the previously existing provisions as subsection (b), which read: "A will shall not be offered for probate following the expiration of five years from the latest date on which a petition is filed for:

"(1) The appointment of a personal representative of the decedent's estate; or

"(2) An order that no administration is necessary on the decedent's estate;

"provided, however, that the will of a testator who died prior to January 1, 1998, may be offered for probate at least until December 31, 2002."; and added subsection (c).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2008, in paragraph (1), "or" was added at the end; and, in paragraph (2), "or" was deleted preceding "An order".

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997). For survey article on wills, trusts, guardianships, and fiduciary administration, see 60 Mercer L. Rev. 417 (2008).

COMMENT

This section provides that a will cannot be probated unless it is offered for probate within five years of the latest date on which a petition for some action on the testator's estate (appointment of a personal representative, petition for year's support or petition for an order that no administration is necessary) has been filed. Former Title 53 contained no time limit on offering wills for probate. See Code Secs. 53-5-50 et seq. regarding the setting aside of an order admitting a will to probate.

53-5-4. Recovery of property from bona fide purchaser for value.

An executor acting under or any person claiming under a will offered for probate within the period described in Code Section 53-5-3 shall be permitted to recover from a bona fide purchaser for value:

(1) Property acquired from the heirs of the testator or anyone claiming through them, unless an order that no administration is necessary was entered prior to the purchase and the purchase occurred prior to the probate of the will;

(2) Property set aside in a year's support proceeding and acquired from the spouse or children of the testator or anyone claiming through them, unless the order granting year's support was entered prior to the purchase and the purchase occurred prior to the probate of the will; and

(3) Property acquired from the administrator of the testator's estate or the heirs of the testator or anyone claiming through them, unless the administrator was qualified prior to the purchase and the purchase occurred prior to the probate of the will.

History. — Code 1981, § 53-5-4, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section protects innocent purchasers who acquire property within the statutory five-year period for probating a will. If the purchasers acquired the property from the heirs of the testator, they are not protected from actions by the executor or beneficiaries under a will probated after the purchase unless an order declaring that no administration is necessary was granted prior to the purchase in accordance with Article 4 of Chapter 2 of this Title. Persons who purchased from the testator's spouse or children are protected only if an order granting Year's Support to the spouse or children was entered in accordance with Chapter 3 of this Title. Persons who purchased from an administrator or the heirs are protected if the administrator was duly appointed prior to the purchase in accordance with Article 3 of Chapter 6 of this Title.

53-5-5. Duty to file will.

A person having possession of a will shall file it with reasonable promptness with the probate court of the county having jurisdiction. The probate court may attach for contempt and may fine and imprison a person withholding a will until the will is delivered.

History. — Code 1981, § 53-5-5, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-3-3 and adds that a custodian of a will must file the will with reasonable promptness. See the Comment to Code Sec. 53-4-31, which indicates that the original of a joint will need not be filed upon the probate of the will of the second person to die.

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Laws 1838, Cobb's 1851 Digest, p. 296, Laws 1850, Cobb's 1851 Digest, p. 297, Laws 1872, Cobbs 1851 Digest, p. 307, former Code 1863, § 2531, former Code 1868, § 2530, former Code 1873, § 2751, former Code 1882, § 2571, former Civil Code 1895, § 3465, former Civil Code 1910, §§ 3862 and 4041, former Code 1933, §§ 113-610 and 113-1002, and former O.C.G.A. §§ 53-3-3, 53-5-1, and 53-5-2 are included in the annotations for this Code section.

Executor must offer will and probate court must determine validity. — It is not only the duty of an individual nominated as executor under a will on the will's face to offer the will for probate, but it is the duty of the court of ordinary (now probate court), with all the parties at interest before the court, to adjudicate whether the will be in fact valid or invalid.

General Consideration (Cont'd)

Mitchell v. Arnall, 203 Ga. 384, 47 S.E.2d 258 (1948) (decided under former Code 1933, § 113-610).

Failure to compel filing of will constitutes constructive fraud against purchaser. — One's failure to move in the matter of compelling another to file the alleged will after one's refusal, and to apply to have the will probated for so long a time, is such gross negligence as would amount to constructive fraud against a purchaser from the other without notice of the will and acting on faith of one's apparent title as heir at law, and would estop one and one's assigns from setting up title under the subsequently probated will as against such purchaser from the husband claiming as heir at law. Hadden v. Stevens, 181 Ga. 165, 181 S.E. 767 (1935) (decided under former Code 1933, § 113-610).

Authority of probate court to order custodian to file instrument. — Ordinary (now probate judge), either upon own motion or upon information filed in the office, may require, under pain of contempt, the custodian of the instrument to file the instrument in the office of the ordinary (now probate judge); and once filed in the office of ordinary (now probate judge), an application for probate could be made by any person interested under the will. Hadden v. Stevens, 181 Ga. 165, 181 S.E. 767 (1935) (decided under former Code 1933, § 113-610).

Time within which will must be probated. — Except as to proof in solemn form after probate in common form, there is no statute of limitation upon the time within which a will may be probated, and if a will is finally offered, the will's proof and record cannot be denied upon the ground of delay by the propounder, nor because of acts on the propounder's part from which an estoppel might arise in other cases. Walden v. Mahnks, 178 Ga. 825, 174 S.E. 538 (1934) (decided under former Code 1933, § 113-610).

When it did not appear from the record that the possessor of the will and caveator was in any way responsible for the ordinary's (now probate judge) failure to send up the will and codicils with the other papers on file in the ordinary's court, the trial court did not err in overruling the motion of the proponent to dismiss the appeal of the caveator. McSherry v. Israel, 222 Ga. 520, 150 S.E.2d 646 (1966) (decided under former Code 1933, § 113-610).

Failure to promptly file a subsequent will as required does not bar a caveator from submitting that will in the probate proceeding in superior court on appeal from the admission of an earlier will to probate in the probate court. Lee v. Wainwright, 256 Ga. 478, 350 S.E.2d 238 (1986) (decided under former O.C.G.A. § 53-3-3).

Cited in Harrell v. Hamilton, 6 Ga. 37 (1849); Davison v. Sibley, 140 Ga. 707, 79 S.E. 855 (1913); Young v. Freeman, 153 Ga. 827, 113 S.E. 204 (1922); Irwin v. Peek, 171 Ga. 375, 155 S.E. 515 (1930); Carmichael v. Mobley, 50 Ga. App. 574, 178 S.E. 418 (1934); Lewis v. Patterson, 191 Ga. 348, 12 S.E.2d 593 (1940); Heath v. Jones, 168 F.2d 460 (5th Cir. 1948); Vinson v. Citizens & S. Nat'l Bank, 223 Ga. 54, 153 S.E.2d 436 (1967); Oakley v. Anderson, 235 Ga. 607, 221 S.E.2d 31 (1975); Daniel v. Lipscomb, 225 Ga. App. 135, 483 S.E.2d 325 (1997).

Pleading and Practice

1. Distribution Generally

This statute is a branch of the statute of distributions, and prescribes how the estate of a deceased person to this extent is to be disposed of; creditors are left out and adult children are left out, until this much of the estate is withdrawn from it, and then creditors and adult children are admitted for participation in the balance. Smith v. Sanders, 208 Ga. 405, 67 S.E.2d 229 (1951) (decided under former Code 1933, § 113-1002).

Provision for a year's support is a branch of the statute of distribution, and the persons entitled to it are just as much and as absolutely entitled as they are in case of intestacy to a distributive share of the residue after the year's support is deducted and all debts are paid. Creditors are left out, and adult children are left out, until this much of the estate is withdrawn from it, when they are admit-

ted for participation in the balance; they have no right to anything except by the statute of distributions. Rimes v. Graham, 199 Ga. 406, 34 S.E.2d 443 (1945) (decided under former Code 1933, § 113-1002).

Statute of distributions does not determine entitlement to year's support. — Statute prescribes those who are to benefit thereunder, and the ordinary rules of inheritance designate the heirs of a decedent. Neither is dependent upon the other, and the statute of distributions does not determine who are entitled to a year's support. Woodes v. Morris, 247 Ga. 771, 279 S.E.2d 704 (1981) (decided under former Code 1933, § 113-1002).

"Ordinary law of distribution" and law governing year's support are entirely distinct and independent. Woodes v. Morris, 247 Ga. 771, 279 S.E.2d 704 (1981) (decided under former Code 1933, § 113-1002).

Question of whom deceased is bound by law to support is not answered by determination of one's heirs at law. Woodes v. Morris, 247 Ga. 771, 279 S.E.2d 704 (1981) (decided under former Code 1933, § 113-1002).

Adopted child entitled to year's support. — In Georgia, the rules of inheritance, as fixed by statute, use the words "child" or "children" without mentioning therein an adopted child or children. Nevertheless, by virtue of the adoption statutes an adopted child or children take under the statute of descent as natural children of lawful birth. For example, under the rules of inheritance, upon the death of the husband without lineal descendants, the wife is his sole heir, and upon the payment of his debts, if any, may take possession of his estate without administration. But, under the provisions of the adoption statute and the rights of inheritance conferred by it, an adopted child of the deceased husband, like a lineal descendant of the deceased, will deprive the wife of the right to take his entire estate as sole heir at law, without administration; and this is true because the statute fixing the rules of inheritance must be construed in pari materia with the adoption statute. A similar situation exists as to the statute providing for a year's support to the widow and minor children of a deceased husband and father. Thornton v. Anderson, 207 Ga. 714, 64 S.E.2d 186 (1951) (decided under former Code 1933, § 113-1002).

2. Caveat

All persons interested in administration of estate may file caveat to application. — Not only heirs, legatees, and creditors of an estate, but also all other persons concerned in the legal administration of the assets thereof, including a cosurety of the decedent on a bond on which suit has been brought, may interpose a caveat to an application for a year's support. Wardlaw v. Wardlaw, 41 Ga. App. 538, 154 S.E. 159 (1930) (decided under former Civil Code 1910, § 4041).

It is not necessary for an administrator to be a party to a caveat to a year's support. Wardlaw v. Wardlaw, 41 Ga. App. 538, 154 S.E. 159 (1930) (decided under former Civil Code 1910, § 4041).

Caveators must prove year's support is in excess of need. — When caveators produce no evidence as to the standing of the family or the manner in which the deceased and the applicant had lived prior to death, caveators have failed to produce one of the necessary elements of evidence to show that the amount set aside to the applicant was more than the applicant was entitled to as a year's support. Hayes v. Hay, 92 Ga. App. 88, 88 S.E.2d 306 (1955) (decided under former Code 1933, § 113-1002).

Statute does not require notice to the applicant for a year's support of the filing of a caveat to the application; it is the duty of the applicant to keep informed as to regular proceedings in the case, and any ignorance of such proceedings, resulting from failure to perform that duty, will not afford ground for ousting the court of the court's jurisdiction to try the issue raised by the caveat, and to set aside the judgment upon that issue. Davis v. City of Atlanta, 182 Ga. 242, 185 S.E. 279 (1936) (decided under former Code 1933, § 113-1002).

3. Judgment

Superior court appeal subject to summary judgment. — An appeal of an

Pleading and Practice (Cont'd)
3. Judgment (Cont'd)

application for a year's support award by a probate court is a de novo proceeding in the superior court and, as such, the appeal is subject to the established procedures for civil actions, thus entitling a party to invoke summary judgment. Bright v. Knecht, 182 Ga. App. 820, 357 S.E.2d 159 (1987) (decided under former O.C.G.A. § 53-5-2).

Year's support must be manifest in a judgment. — Although a judgment for year's support would have ranked ahead of payment of debts, the mere fact that plaintiffs by relationship occupied a position which would entitle the plaintiffs to apply for and obtain such a judgment, would not entitle the plaintiffs, without having it allowed in the only way provided by law to have a recovery against the administrator and the administrator's surety. A year's support to be enforceable must be manifest in a judgment. It is not in existence as such until such judgment. Howard v. Davis, 192 Ga. 505, 15 S.E.2d 865 (1941) (decided under former Code 1933, § 113-1002).

Judgment of the court of ordinary (now probate court) allowing a year's support is a judgment of a court of general jurisdiction, and the presumption is that everything necessary to be done was done. Dougherty-Little-Redwine Co. v. Hatcher, 169 Ga. 858, 151 S.E. 796 (1930) (decided under former Civil Code 1910, § 4041).

After a judgment by a court of ordinary (now probate court) setting aside a 12 months' support, that court cannot suspend or vacate such judgment merely to let in a defense which should have been offered before judgment. Dougherty-Little-Redwine Co. v. Hatcher, 169 Ga. 858, 151 S.E. 796 (1930) (decided under former Civil Code 1910, § 4041).

Judgment granting year's support invulnerable to collateral attack except lack of jurisdiction. — Every presumption is in favor of the judgment of the ordinary (now probate judge) setting apart a year's support; and it cannot be collaterally attacked, except when the record shows want of jurisdictional facts. Smith v. Smith, 187 Ga. 743, 2 S.E.2d 417 (1939) (decided under former Code 1933, § 113-1002).

Judgment setting apart a year's support is not void on the ground that the appraisers have not filed with their report a plat of the land set apart. Smith v. Smith, 187 Ga. 743, 2 S.E.2d 417 (1939) (decided under former Code 1933, § 113-1002).

When no caveat to widow's application for support was filed, and citation had issued and been published as required by law, a court of equity would not set aside the judgment of the court of ordinary (now probate court) for irregularities. Smith v. Smith, 187 Ga. 743, 2 S.E.2d 417 (1939) (decided under former Code 1933, § 113-1002).

A widow who applies for and obtains a year's support for herself and her minor children living with her, acts for the minor children as well as herself. In such case the minor children are as plaintiffs, and the judgment obtained is in their behalf. The result is that both widows and their minor children who invoke and obtain judgments granting them property out of the estates of deceased husbands and fathers cannot afterwards repudiate the judgments which they have secured for their own benefit. The position thus occupied by the minors living with their mother is very different from that of creditors, or adult heirs such as other children who were sui juris when the support was set apart. Jones v. Federal Land Bank, 189 Ga. 419, 6 S.E.2d 52 (1939) (decided under former Code 1933, § 113-1002).

Judgment of the ordinary (now probate judge) confirming and admitting to record the return of duly appointed appraisers, setting apart to a widow and minor children a year's support consisting of described property, "subject to just debts owed by" the deceased husband and father, is not void on the ground that the property has been set apart subject to existing debts of the deceased. Griffin v. Wood, 196 Ga. 510, 26 S.E.2d 921 (1943) (decided under former Code 1933, § 113-1002).

When the final judgment of the ordinary (now probate judge) setting apart a year's support has been rendered, it is too late to attack that judgment. Smith v. Smith, 73

Ga. App. 567, 37 S.E.2d 439 (1946) (decided under former Code 1933, § 113-1002).

Judgment approving the return of commissioners setting aside a year's support, when all the proceedings are regular, cannot be attacked as fraudulent because interested parties could have successfully resisted the judgment had the parties interposed timely objection. Brownlee v. Brownlee, 203 Ga. 377, 46 S.E.2d 901 (1948) (decided under former Code 1933, § 113-1002).

Judgment awarding the year's support to the widow bears the presumption that everything necessary to authorize the judgment was properly done. Such judgment is not subject to a collateral attack except for a want of jurisdiction apparent on the face of the record. Stephens v. Carter, 215 Ga. 355, 110 S.E.2d 762 (1959) (decided under former Code 1933, § 113-1002).

When defendants in year's support action in pleading the record in the year's support proceeding, allege that the executors in their caveat interposed as a defense a marital contract and the bequest to the widow in the husband's will in lieu of a year's support, and these defenses were adjudicated adversely to the estate in prior proceeding this is binding on the defendants. Stephens v. Carter, 215 Ga. 355, 110 S.E.2d 762 (1959) (decided under former Code 1933, § 113-1002).

4. Jurisdiction

Probate court has general jurisdiction. — In a proceeding to set apart a year's support, the court of ordinary (now probate court) is a court of general jurisdiction as to such matter. Smith v. Smith, 187 Ga. 743, 2 S.E.2d 417 (1939) (decided under former Code 1933, § 113-1002).

In response to a widow's application for year's support, the probate court could only award her property belonging to her husband's estate and had no jurisdiction to determine whether the property was vested in the widow, her husband's estate, or in a bankruptcy estate. McClure v. Mason, 228 Ga. App. 797, 493 S.E.2d 16 (1997) (decided under former O.C.G.A. § 53-5-2).

Original jurisdiction of a court of ordinary (now probate court) in a year's support proceeding is exclusive, and fact that the estate is in the hands of a trustee or receiver will not affect the right of the widow to proceed for it. Dougherty-Little-Redwine Co. v. Hatcher, 169 Ga. 858, 151 S.E. 796 (1930) (decided under former Civil Code 1910, § 4041).

Courts of ordinary (now probate courts) have exclusive jurisdiction to set aside a year's support. Cox v. Stowers, 204 Ga. 595, 50 S.E.2d 339 (1948) (decided under former Code 1933, § 113-1002).

Jurisdiction of bankruptcy court. — Widow is entitled to a year's support under the laws of Georgia, provided the deceased husband left any property out of which, or the proceeds of which, it may be set aside to her. If the intervention of a bankruptcy proceeding prevents appropriate action by the state court having jurisdiction, then the bankruptcy court, which exercises equitable jurisdiction, should act, and do that which ought to have been done. Seiden v. Southland Chenilles, Inc., 195 F.2d 899 (5th Cir. 1952) (decided under former Code 1933, § 113-1002).

Conflicting claims as to property ownership. — Court of ordinary (now probate court) has no jurisdiction to try and determine conflicting claims of ownership of property, arising between a widow applying for the setting apart of a year's support and a person asserting title adversely to the estate of her deceased husband. Richey v. First Nat'l Bank, 180 Ga. 751, 180 S.E. 740 (1935) (decided under former Code 1933, § 113-1002).

Probate court has no jurisdiction to try conflicting claims of title to real property on an application for a year's support. Johnson v. Johnson, 199 Ga. App. 549, 405 S.E.2d 544 (1991) (decided under former O.C.G.A. § 53-5-2).

Foreign court jurisdiction. — Consent decree of a court of another state which, in part, seeks to transfer title to realty in this state that had previously been set aside to a widow and minor children as a year's support, shows upon its face that, insofar as transferring title to realty, the court was without jurisdiction of the subject matter; and accord-

Pleading and Practice (Cont'd)
4. Jurisdiction (Cont'd)

ingly, that part of the decree is not such a judgment as comes within the full faith and credit clause of the Constitution. King v. King, 203 Ga. 811, 48 S.E.2d 465 (1948) (decided under former Code 1933, § 113-1002).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, § 730 et seq. 80 Am. Jur. 2d, Wills, §§ 968, 975.

C.J.S. — 95 C.J.S., Wills, §§ 453 et seq., 468.

ALR. — Constitutionality, construction, and application of statute requiring production of wills for probate or declaring consequences of failure or delay in that regard, 119 A.L.R. 1259.

Duty and obligation assumed by trust company or other person to which will is delivered for safekeeping, 141 A.L.R. 1277.

53-5-6. Admission of executor before qualification or of a beneficiary.

On the investigation of an issue of devisavit vel non, the admission of an executor before qualification or of a beneficiary, other than a sole beneficiary, shall not be admissible in evidence to impeach the will except where the admission is in reference to the conduct or acts of the executor or beneficiary concerning some matter relevant to the issue.

History. — Code 1981, § 53-5-6, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004).

COMMENT

This section carries forward former OCGA Sec. 53-3-7.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 2437, and former Code 1933, § 113-616, are included in the annotations for this Code section.

Administrators or executors are bound by their admissions. — Administrators or executors, plaintiffs in an action, are bound by their admissions in relation to the subject matter of the action. Sample v. Lipscomb, 18 Ga. 687 (1855) (decided under former law).

Admissions or declarations of an executor are only competent evidence as to the executor's own acts after the executor becomes clothed with such trust, and do not bind the estate which the executor represents insofar as they refer to what was told to the executor by the testator during life. Godbee v. Sapp, 53 Ga. 283 (1874) (decided under former Code 1873, § 2437).

Admissions of executor. — When admissions of an executor were as to the conduct or acts of the executor as to matters relevant to the issue on trial, the admissions were admissible on the issue of devisavit vel non. Fletcher v. Gillespie, 201 Ga. 377, 40 S.E.2d 45 (1946) (decided under former Code 1933, § 113-616).

It is not the function of one nominated as executor to preclude the rights either of legatees or heirs, by making voluntary allegations such as would foreclose the rights of either. Mitchell v. Arnall, 203 Ga.

384, 47 S.E.2d 258 (1948) (decided under former Code 1933, § 113-616).

Admissions of executor who is propounder and legatee. — Admissions of a person who was the propounder of the paper offered for probate, the nominated executor therein, and legatee under the same were competent evidence. Harvey v. Anderson, 12 Ga. 69 (1852) (decided under former law).

Admissions of an executor, who is a legatee to the extent of a life interest in the whole of testator's property, and the propounder of the will, are competent evidence upon the trial of a caveat to that will. Williamson v. Nabers, 14 Ga. 286 (1953) (decided under former Code 1933, § 113-616).

Admissions of administrator made before appointment are not admissible. — Admissions of an administrator, made before the administrator was appointed such, are not admissible to prejudice or affect the rights and interests of the heirs and creditors of the estate represented by the administrator. Thomasson v. Driskell, 13 Ga. 253 (1953) (decided under former Code 1933, § 113-616).

On the trial of issue of devisavit vel non, the admission of an executor before qualification is admissible to impeach the will when such admission is in reference to the conduct or acts of the executor as to some matter relevant to the issue. Dennis v. Weekes, 51 Ga. 24 (1974) (decided under former Code 1933, § 113-616).

Admissions by the administrator are admissible to charge the assets of intestate in the administrator's hands. Floyd v. Wallace, 31 Ga. 688 (1861) (decided under former law).

Cited in In re Estate of Ehlers, 289 Ga. App. 14, 656 S.E.2d 169 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 1230, 1231. 79 Am. Jur. 2d, Wills, §§ 425, 441, 445 et seq.

C.J.S. — 34 C.J.S., Executors and Administrators, § 942. 95 C.J.S., Wills, § 601.

53-5-7. Proof of codicil.

If a codicil republished a will except as to any amendment contained in the codicil and clearly identified the will that was republished, proof of the codicil is proof of the will.

History. — Code 1981, § 53-5-7, enacted by Ga. L. 1997, p. 1352, § 9.

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

JUDICIAL DECISIONS

Analysis

General Consideration
Pleading and Practice
1. Distribution Generally
2. Caveat
3. Judgment
4. Jurisdiction

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Laws 1838, Cobb's 1851 Digest, p. 296, former Laws 1850, Cobb's 1851 Digest, p. 297, former Code 1863, § 2531, former Code 1868, § 2530, former Code 1873, § 2751, former Code 1882, § 2571, former Civil Code 1895, § 3465, former Civil Code 1910, § 4041, former Code 1933, § 113-1002, and former O.C.G.A. §§ 53-5-1 and 53-5-2 are included in the annotations for this Code section.

Pleading and Practice

1. Distribution Generally

Statute is a branch of the statute of distributions, and prescribes how the estate of a deceased person to this extent is to be disposed of; creditors are left out and adult children are left out, until this much of the estate is withdrawn from it, and then creditors and adult children are admitted for participation in the balance. Smith v. Sanders, 208 Ga. 405, 67 S.E.2d 229 (1951) (decided under former Code 1933, § 113-1002).

Provision for a year's support is a branch of the statute of distribution, and the persons entitled to it are just as much and as absolutely entitled as they are in case of intestacy to a distributive share of the residue after the year's support is deducted and all debts are paid. Creditors are left out, and adult children are left out, until this much of the estate is withdrawn from it, when they are admitted for participation in the balance; they have no right to anything except by the statute of distributions. Rimes v. Graham, 199 Ga. 406, 34 S.E.2d 443 (1945) (decided under former Code 1933, § 113-1002).

Statute of distributions does not determine entitlement to year's support. — Statute prescribes those who are to benefit thereunder, and the ordinary rules of inheritance designate the heirs of a decedent. Neither is dependent upon the other, and the statute of distributions does not determine who are entitled to a year's support. Woodes v. Morris, 247 Ga. 771, 279 S.E.2d 704 (1981) (decided under former Code 1933, § 113-1002).

"Ordinary law of distribution" and law governing year's support are entirely distinct and independent. Woodes v. Morris, 247 Ga. 771, 279 S.E.2d 704 (1981) (decided under former Code 1933, § 113-1002).

Question of whom deceased is bound by law to support is not answered by determination of one's heirs at law. Woodes v. Morris, 247 Ga. 771, 279 S.E.2d 704 (1981) (decided under former Code 1933, § 113-1002).

Adopted child entitled to year's support. — In Georgia, the rules of inheritance, as fixed by statute, use the words "child" or "children" without mentioning therein an adopted child or children. Nevertheless, by virtue of the adoption statutes an adopted child or children take under the statute of descent as natural children of lawful birth. For example, under the rules of inheritance, upon the death of the husband without lineal descendants, the wife is his sole heir, and upon the payment of his debts, if any, may take possession of his estate without administration. But, under the provisions of the adoption statute and the rights of inheritance conferred by it, an adopted child of the deceased husband, like a lineal descendant of the deceased, will deprive the wife of the right to take his entire estate as sole heir at law, without administration; and this is true because the statute fixing the rules of inheritance must be construed in pari materia with the adoption statute. A similar situation exists as to the statute providing for a year's support to the widow and minor children of a deceased husband and father. Thornton v. Anderson, 207 Ga. 714, 64 S.E.2d 186 (1951) (decided under former Code 1933, § 113-1002).

2. Caveat

All persons interested in administration of estate may file caveat to application. — Not only heirs, legatees, and creditors of an estate, but also all other persons concerned in the legal administration of the assets thereof, including a cosurety of the decedent on a bond on which suit has been brought, may interpose a caveat to an application for a year's

support. Wardlaw v. Wardlaw, 41 Ga. App. 538, 154 S.E. 159 (1930) (decided under former Civil Code 1910, § 4041).

It is not necessary for an administrator to be a party to a caveat to a year's support. Wardlaw v. Wardlaw, 41 Ga. App. 538, 154 S.E. 159 (1930) (decided under former Civil Code 1910, § 4041).

Caveators must prove year's support is in excess of need. — When caveators produce no evidence as to the standing of the family or the manner in which the deceased and the applicant had lived prior to death, caveators have failed to produce one of the necessary elements of evidence to show that the amount set aside to the applicant was more than the applicant was entitled to as a year's support. Hayes v. Hay, 92 Ga. App. 88, 88 S.E.2d 306 (1955) (decided under former Code 1933, § 113-1002).

Statute does not require notice to the applicant for a year's support of the filing of a caveat to the application; it is the duty of the applicant to keep informed as to regular proceedings in the case, and any ignorance of such proceedings, resulting from failure to perform that duty, will not afford ground for ousting the court of the court's jurisdiction to try the issue raised by the caveat, and to set aside the judgment upon that issue. Davis v. City of Atlanta, 182 Ga. 242, 185 S.E. 279 (1936) (decided under former Code 1933, § 113-1002).

3. Judgment

Superior court appeal subject to summary judgment. — An appeal of an application for a year's support award by a probate court is a de novo proceeding in the superior court and, as such, the appeal is subject to the established procedures for civil actions, thus entitling a party to invoke summary judgment. Bright v. Knecht, 182 Ga. App. 820, 357 S.E.2d 159 (1987) (decided under former O.C.G.A. § 53-5-2).

Year's support must be manifest in a judgment. — Although a judgment for year's support would have ranked ahead of payment of debts, the mere fact that plaintiffs by relationship occupied a position which would entitle the plaintiffs to apply for and obtain such a judgment, would not entitle the plaintiffs, without having it allowed in the only way provided by law to have a recovery against the administrator and the administrator's surety. A year's support to be enforceable must be manifest in a judgment. It is not in existence as such until such judgment. Howard v. Davis, 192 Ga. 505, 15 S.E.2d 865 (1941) (decided under former Code 1933, § 113-1002).

Judgment of the court of ordinary (now probate court) allowing a year's support is a judgment of a court of general jurisdiction, and the presumption is that everything necessary to be done was done. Dougherty-Little-Redwine Co. v. Hatcher, 169 Ga. 858, 151 S.E. 796 (1930) (decided under former Civil Code 1910, § 4041).

After a judgment by a court of ordinary (now probate court) setting aside a 12 months' support, that court cannot suspend or vacate such judgment merely to let in a defense which should have been offered before judgment. Dougherty-Little-Redwine Co. v. Hatcher, 169 Ga. 858, 151 S.E. 796 (1930) (decided under former Civil Code 1910, § 4041).

Judgment granting year's support invulnerable to collateral attack except lack of jurisdiction. — Every presumption is in favor of the judgment of the ordinary (now probate judge) setting apart a year's support; and it cannot be collaterally attacked, except when the record shows want of jurisdictional facts. Smith v. Smith, 187 Ga. 743, 2 S.E.2d 417 (1939) (decided under former Code 1933, § 113-1002).

Judgment setting apart a year's support is not void on the ground that the appraisers have not filed with their report a plat of the land set apart. Smith v. Smith, 187 Ga. 743, 2 S.E.2d 417 (1939) (decided under former Code 1933, § 113-1002).

When no caveat to widow's application for support was filed, and citation had issued and been published as required by law, a court of equity would not set aside the judgment of the court of ordinary (now probate court) for irregularities. Smith v. Smith, 187 Ga. 743, 2 S.E.2d 417 (1939) (decided under former Code 1933, § 113-1002).

A widow who applies for and obtains a

Pleading and Practice (Cont'd)
3. Judgment (Cont'd)

year's support for herself and her minor children living with her, acts for the minor children as well as herself. In such case the minor children are as plaintiffs, and the judgment obtained is in their behalf. The result is that both widows and their minor children who invoke and obtain judgments granting them property out of the estates of deceased husbands and fathers cannot afterwards repudiate the judgments which they have secured for their own benefit. The position thus occupied by the minors living with their mother is very different from that of creditors, or adult heirs such as other children who were sui juris when the support was set apart. Jones v. Federal Land Bank, 189 Ga. 419, 6 S.E.2d 52 (1939) (decided under former Code 1933, § 113-1002).

Judgment of the ordinary (now probate judge) confirming and admitting to record the return of duly appointed appraisers, setting apart to a widow and minor children a year's support consisting of described property, "subject to just debts owed by" the deceased husband and father, is not void on the ground that the property has been set apart subject to existing debts of the deceased. Griffin v. Wood, 196 Ga. 510, 26 S.E.2d 921 (1943) (decided under former Code 1933, § 113-1002).

When the final judgment of the ordinary (now probate judge) setting apart a year's support has been rendered, it is too late to attack that judgment. Smith v. Smith, 73 Ga. App. 567, 37 S.E.2d 439 (1946) (decided under former Code 1933, § 113-1002).

Judgment approving the return of commissioners setting aside a year's support, when all the proceedings are regular, cannot be attacked as fraudulent because interested parties could have successfully resisted the judgment had the parties interposed timely objection. Brownlee v. Brownlee, 203 Ga. 377, 46 S.E.2d 901 (1948) (decided under former Code 1933, § 113-1002).

Judgment awarding the year's support to the widow bears the presumption that everything necessary to authorize the judgment was properly done. Such judgment is not subject to a collateral attack except for a want of jurisdiction apparent on the face of the record. Stephens v. Carter, 215 Ga. 355, 110 S.E.2d 762 (1959) (decided under former Code 1933, § 113-1002).

When defendants in year's support action in pleading the record in the year's support proceeding, allege that the executors in their caveat interposed as a defense a marital contract and the bequest to the widow in the husband's will in lieu of a year's support, and these defenses were adjudicated adversely to the estate in prior proceeding this is binding on the defendants. Stephens v. Carter, 215 Ga. 355, 110 S.E.2d 762 (1959) (decided under former Code 1933, § 113-1002).

4. Jurisdiction

Probate court has general jurisdiction. — In a proceeding to set apart a year's support, the court of ordinary (now probate court) is a court of general jurisdiction as to such matter. Smith v. Smith, 187 Ga. 743, 2 S.E.2d 417 (1939) (decided under former Code 1933, § 113-1002).

In response to a widow's application for year's support, the probate court could only award her property belonging to her husband's estate and had no jurisdiction to determine whether the property was vested in the widow, her husband's estate, or in a bankruptcy estate. McClure v. Mason, 228 Ga. App. 797, 493 S.E.2d 16 (1997) (decided under former O.C.G.A. § 53-5-2).

Original jurisdiction of a court of ordinary (now probate court) in a year's support proceeding is exclusive, and fact that the estate is in the hands of a trustee or receiver will not affect the right of the widow to proceed for it. Dougherty-Little-Redwine Co. v. Hatcher, 169 Ga. 858, 151 S.E. 796 (1930) (decided under former Civil Code 1910, § 4041).

Courts of ordinary (now probate courts) have exclusive jurisdiction to set aside a year's support. Cox v. Stowers, 204 Ga. 595, 50 S.E.2d 339 (1948) (decided under former Code 1933, § 113-1002).

Jurisdiction of bankruptcy court. — Widow is entitled to a year's support

under the laws of Georgia, provided the deceased husband left any property out of which, or the proceeds of which, it may be set aside to her. If the intervention of a bankruptcy proceeding prevents appropriate action by the state court having jurisdiction, then the bankruptcy court, which exercises equitable jurisdiction, should act, and do that which ought to have been done. Seiden v. Southland Chenilles, Inc., 195 F.2d 899 (5th Cir. 1952) (decided under former Code 1933, § 113-1002).

Conflicting claims as to property ownership. — Court of ordinary (now probate court) has no jurisdiction to try and determine conflicting claims of ownership of property, arising between a widow applying for the setting apart of a year's support and a person asserting title adversely to the estate of her deceased husband. Richey v. First Nat'l Bank, 180 Ga. 751, 180 S.E. 740 (1935) (decided under former Code 1933, § 113-1002).

Probate court has no jurisdiction to try conflicting claims of title to real property on an application for a year's support. Johnson v. Johnson, 199 Ga. App. 549, 405 S.E.2d 544 (1991) (decided under former O.C.G.A. § 53-5-2).

Foreign court jurisdiction. — Consent decree of a court of another state which, in part, seeks to transfer title to realty in this state that had previously been set aside to a widow and minor children as a year's support, shows upon its face that, insofar as transferring title to realty, the court was without jurisdiction of the subject matter; and accordingly, that part of the decree is not such a judgment as comes within the full faith and credit clause of the Constitution. King v. King, 203 Ga. 811, 48 S.E.2d 465 (1948) (decided under former Code 1933, § 113-1002).

ARTICLE 2

COMMON FORM

53-5-15. Common or solemn form.

Probate of a will may be in common form or in solemn form or both.

History. — Code 1981, § 53-5-15, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-3-8.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-601, are included in the annotations for this Code section.

Probate in common and solemn form, procedure. — Under former Code 1933, § 113-601 a will was proved in common form by a single witness and admitted to record after it was exhibited or presented to the judge, and under former Code 1933, § 113-602 the will was proved in solemn form by all the witnesses and ordered to record, after due notice of the proceeding to all heirs; the presentation or exhibition of the will to the ordinary (now probate judge) is necessary both in proving the will in common form and in proving the will in solemn form. Carmichael v. Mobley, 50 Ga. App. 574, 178 S.E. 418 (1934) (decided under former Code 1933, § 113-601).

Caveat of will. — There is no provision of law for the caveat of a will offered for probate in common form. Abercrombie v. Hair, 185 Ga. 728, 196 S.E. 447 (1938) (decided under former Code 1933, § 113-601).

Authority of next of kin to file caveat to probate in solemn form. — Neither the mere acquiescence of next of kin in a probate in common form nor their call for proof in solemn form will preclude them from filing a caveat to the will when offered in solemn form. Abercrombie v. Hair, 185 Ga. 728, 196 S.E. 447 (1938) (decided under former Code 1933, § 113-601).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 113-601, are included in the annotations for this Code section.

Probate in common form may be accomplished without notice to anyone but such probate and record is not conclusive upon anyone interested in the estate adversely to the will. 1954-56 Op. Att'y Gen. p. 916 (decided under former Code 1933, § 113-601).

53-5-16. Conclusiveness; persons protected if set aside.

(a) The probate of a will in common form is not conclusive upon anyone interested in the estate adversely to the will except as provided in Code Section 53-5-19.

(b) If set aside, probate of a will in common form does not protect the executor in any acts beyond the executor's normal duties of collecting and preserving assets of the estate and paying the debts of the estate. Bona fide purchasers without notice under legally made sales from the executor will be protected.

History. — Code 1981, § 53-5-16, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article discussing methods of summary distribution and settlement of decedent's estate, see 6 Ga. L. Rev. 74 (1971).

COMMENT

This section carries forward the provisions of the last two sentences of subsection (a) of former OCGA Sec. 53-3-9. This section clarifies that an executor under a will that is probated in common form acts in a manner similar to a temporary administrator of an intestate estate in that the executor is protected in the performance of the ordinary duties of collecting and preserving the estate assets and paying debts of the estate, but not in distributing property of the estate. This section also continues the protection of bona fide purchasers.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 2423, former Code 1882, § 2423, former Code 1895, § 3281, and former Code 1933, § 113-601, are included in the annotations for this Code section.

Proof of will in common and solemn form; procedure. — Under former Code 1933, § 113-601 a will was proved in common form by a single witness and admitted to record after it was exhibited or presented to the judge, and under former Code 1933, § 113-602, the will was proved in solemn form by all the witnesses and ordered to record, after due notice of the proceeding to all heirs; the presentation or exhibition of the will to the ordinary is necessary both in proving the will in common form and in proving the will in sol-

emn form. Carmichael v. Mobley, 50 Ga. App. 574, 178 S.E. 418 (1934) (decided under former Code 1933, § 113-601).

Will is proven in common form when the executor presents the will before the judge, and in the absence of, and without citing the parties interested, produced witnesses to prove the will. In some courts the will may be proven in this form by the oath of the executor without more. Such probate, with good reason, seems to be discouraged in the states very generally. Brown v. Anderson, 13 Ga. 171 (1853) (decided under former law).

Caveat of will. — The usual procedure is for the complaining party at interest to make application to the ordinary (now probate judge) for a citation to issue calling on the propounder to prove the will in solemn form, and then, if probate of the will in solemn form is refused, the effect is to set aside probate in common form and declare an intestacy. Abercrombie v. Hair, 185 Ga. 728, 196 S.E. 447 (1938) (decided under former Code 1933, § 113-601).

There is no provision for caveat or other objection to a probate in common form. Jones v. Dean, 188 Ga. 319, 3 S.E.2d 894 (1939) (decided under former Code 1933, § 113-601).

Nature of proceeding. — Under statutory law, a proceeding to probate a will in common form is a probate proceeding pure and simple, the probate and record not being conclusive upon anyone interested in the estate adversely to the will, and, if afterwards set aside, not protecting the executor in any of the executor's acts further than the payment of the debts of the estate. Brodhead v. Shoemaker, 44 F. 518, 111 L.R.A. 567 (N.D. Ga. 1890) (decided under former Code 1882, § 2423).

Probate in common form affords but little protection to anyone; and the executor acts at the executor's peril under such a probate, except in the payment of debts of the estate. Jones v. Dean, 188 Ga. 319, 3 S.E.2d 894 (1939) (decided under former Code 1933, § 113-601).

Probate in common form may be made in vacation without notice on the testimony of a single witness and the will admitted to record, and the executor may begin to act under the will, but this probate is not conclusive on anyone adversely interested. Heath v. Jones, 168 F.2d 460 (5th Cir. 1948) (decided under former Code 1933, § 113-601).

Seven years for probate to become conclusive. — While a judgment of a court of ordinary (now probate court) probating a will in common form is not without limited effect and after seven years becomes conclusive upon all persons not under disability, yet until then it is "not conclusive upon anyone interested in the estate adversely to the will, and such person … may require proof in solemn form and interpose a caveat." Abercrombie v. Hair, 185 Ga. 728, 196 S.E. 447 (1938) (decided under former Code 1933, § 113-601).

Will proved in common form and admitted to record is admissible in evidence. Peters v. West, 70 Ga. 343 (1883) (decided under former Code 1873, § 2423).

Bona fide purchasers protected. — When a will was probated in common form under the statute and the executor, under proper order, sold land of the estate, heir (though having no notice of the probate) cannot recover the land from one who bona fide and without notice purchased such land at the executor's sale. Venable v. Veal, 112 Ga. 677, 37 S.E. 887 (1901) (decided under former Code 1895, § 3281).

Cited in Gaither v. Gaither, 23 Ga. 521 (1857); Sutton v. Hancock, 118 Ga. 436, 45 S.E. 504 (1903); Davison v. Sibley, 140 Ga. 707, 79 S.E. 855 (1913); Young v. Freeman, 153 Ga. 827, 113 S.E. 204 (1922); Cunningham v. Cozzort, 109 Ga. App. 816, 137 S.E.2d 559 (1964); Oakley v. Anderson, 235 Ga. 607, 221 S.E.2d 31 (1975).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 113-601, are included in the annotations for this Code section.

Probate in common form may be

accomplished without notice to anyone but such probate and record is not conclusive upon anyone interested in the estate adversely to the will. 1954-56 Op. Att'y Gen. p. 916 (decided under former Code 1933, § 113-601).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 735, 736.

C.J.S. — 33 C.J.S., Executors and Administrators, § 293. 95 C.J.S., Wills, §§ 447 et seq., 472, 473, 536, 537. 96 C.J.S., Wills, § 785.

ALR. — Order or decree of distribution of decedent's estate as protection of executor or administrator against claims of one not named therein who was entitled to a share of the estate, 106 A.L.R. 817.

53-5-17. Procedure.

(a) A will may be proved in common form upon the testimony of a single subscribing witness and without service or notice to anyone. If the will is self-proved, compliance with signature requirements for execution is presumed and other requirements for execution are presumed without the testimony of any subscribing witness.

(b) The petition to probate a will in common form shall set forth the same information required in a petition to probate a will in solemn form. The petition shall conclude with a prayer for the issuance of letters testamentary.

History. — Code 1981, § 53-5-17, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-19/HB 865.

The 2020 amendment, effective January 1, 2021, inserted "service or" in the first sentence in subsection (a).

COMMENT

This section carries forward portions of former OCGA Sec. 53-3-9. Subsection (a) of this section combines the first sentence of subsection (a) and subsection (c) of former OCGA Sec. 53-3-9. Subsection (b) of this section carries forward subsection (b) of former OCGA Sec. 53-3-9. Former OCGA Sec. 53-3-10 (relating to the procedure when a testator dies in a county other than the county of residence) is repealed. See Chapter 11 for general provisions regarding the filing of petitions in the probate court.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 2423, former Code 1882, § 2423, former Code 1895, § 3281, and former Code 1933, § 113-601, are included in the annotations for this Code section.

Proof of will in common and solemn form; procedure. — Under former Code 1933, § 113-601 a will was proved in common form by a single witness and admitted to record after it was exhibited or presented to the judge, and under former Code 1933, § 113-602, the will was proved in solemn form by all the witnesses and ordered to record, after due notice of the proceeding to all heirs; the presentation or exhibition of the will to the ordinary is necessary both in proving the will in common form and in proving the will in sol-

emn form. Carmichael v. Mobley, 50 Ga. App. 574, 178 S.E. 418 (1934) (decided under former Code 1933, § 113-601).

Will is proven in common form when the executor presents the will before the judge, and in the absence of, and without citing the parties interested, produced witnesses to prove the will. In some courts the will may be proven in this form by the oath of the executor without more. Such probate, with good reason, seems to be discouraged in the states very generally. Brown v. Anderson, 13 Ga. 171 (1853) (decided under former law).

Caveat of will. — The usual procedure is for the complaining party at interest to make application to the ordinary (now probate judge) for a citation to issue calling on the propounder to prove the will in solemn form, and then, if probate of the will in solemn form is refused, the effect is to set aside probate in common form and declare an intestacy. Abercrombie v. Hair, 185 Ga. 728, 196 S.E. 447 (1938) (decided under former Code 1933, § 113-601).

There is no provision for caveat or other objection to a probate in common form. Jones v. Dean, 188 Ga. 319, 3 S.E.2d 894 (1939) (decided under former Code 1933, § 113-601).

Nature of proceeding. — Under statutory law, a proceeding to probate a will in common form is a probate proceeding pure and simple, the probate and record not being conclusive upon anyone interested in the estate adversely to the will, and, if afterwards set aside, not protecting the executor in any of the executor's acts further than the payment of the debts of the estate. Brodhead v. Shoemaker, 44 F. 518, 111 L.R.A. 567 (N.D. Ga. 1890) (decided under former Code 1882, § 2423).

Probate in common form affords but little protection to anyone; and the executor acts at the executor's peril under such a probate, except in the payment of debts of the estate. Jones v. Dean, 188 Ga. 319, 3 S.E.2d 894 (1939) (decided under former Code 1933, § 113-601).

While a judgment of a court of ordinary (now probate court) probating a will in common form is not without limited effect and after seven years becomes conclusive upon all persons not under disability, yet until then it is "not conclusive upon anyone interested in the estate adversely to the will, and such person … may require proof in solemn form and interpose a caveat." Abercrombie v. Hair, 185 Ga. 728, 196 S.E. 447 (1938) (decided under former Code 1933, § 113-601).

Probate in common form may be made in vacation without notice on the testimony of a single witness and the will admitted to record, and the executor may begin to act under it, but this probate is not conclusive on anyone adversely interested. Heath v. Jones, 168 F.2d 460 (5th Cir. 1948) (decided under former Code 1933, § 113-601).

Will proved in common form and admitted to record is admissible in evidence. Peters v. West, 70 Ga. 343 (1883) (decided under former Code 1873, § 2423).

Bona fide purchasers protected. — When a will was probated in common form under the statute and the executor, under proper order, sold land of the estate, heir (though having no notice of the probate) cannot recover the land from one who bona fide and without notice purchased such land at the executor's sale. Venable v. Veal, 112 Ga. 677, 37 S.E. 887 (1901) (decided under former Code 1895, § 3281).

Refusal to probate will in common form. — Probate court performed a judicial act when the court refused to probate a will in common form; therefore, the executor did not have a clear legal right to mandamus relief. Henderson v. McVay, 269 Ga. 7, 494 S.E.2d 653 (1998).

Cited in Gaither v. Gaither, 23 Ga. 521 (1857); Sutton v. Hancock, 118 Ga. 436, 45 S.E. 504 (1903); Davison v. Sibley, 140 Ga. 707, 79 S.E. 855 (1913); Young v. Freeman, 153 Ga. 827, 113 S.E. 204 (1922); Cunningham v. Cozzort, 109 Ga. App. 816, 137 S.E.2d 559 (1964); Oakley v. Anderson, 235 Ga. 607, 221 S.E.2d 31 (1975).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 113-601, are included in the annotations for this Code section.

Probate in common form may be accomplished without notice to anyone but such probate and record is not conclusive upon anyone interested in the estate adversely to the will. 1954-56 Op. Att'y Gen. p. 916 (decided under former Code 1933, § 113-601).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 735, 736.

C.J.S. — 34 C.J.S., Executors and Administrators, § 378 et seq. 95 C.J.S., Wills, §§ 447 et seq, 472, 473, 536, 537. 96 C.J.S., Wills, § 785.

ALR. — Order or decree of distribution of decedent's estate as protection of executor or administrator against claims of one not named therein who was entitled to a share of the estate, 106 A.L.R. 817.

53-5-18. Court order.

The order to probate a will in common form may be granted by the probate court at any time.

History. — Code 1981, § 53-5-18, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries over the concept of former OCGA Sec. 53-3-11.

RESEARCH REFERENCES

C.J.S. — 95 C.J.S., Wills, § 447 et seq.

53-5-19. When conclusive upon parties in interest.

Probate in common form shall become conclusive upon all parties in interest four years from the date the order admitting such will to probate in common form is entered by the court in such proceeding, except upon minor heirs who require proof in solemn form and interpose a caveat within four years after reaching the age of majority. In such case, if the will is refused probate in solemn form and no prior will is admitted to probate, an intestacy shall be declared only as to the minor or minors and not as to others whose right to caveat is barred by the lapse of time.

History. — Code 1981, § 53-5-19, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-20/HB 865.

The 2020 amendment, effective January 1, 2021, substituted "date the order admitting such will to probate in common form is entered by the court in such proceeding" for "time of probate" in the first sentence of this Code section.

COMMENT

This section carries forward subsection (b) of former OCGA Sec. 53-3-12. Subsection (a) of the former Code section (relating to wills probated before July 1, 1984) is repealed as no longer necessary.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Laws 1845, Cobb's 1851 Digest, p. 348, former Code 1863, § 2394, former Code 1882, § 2425, former Civil Code 1895, § 3283, former Civil Code 1910, § 3857, and former Code 1933, § 113-605, are included in the annotations for this Code section.

Constitutionality. — Statute is not unconstitutional as depriving persons of their property without due process of law. Sutton v. Hancock, 118 Ga. 436, 45 S.E. 504 (1903) (decided under former Civil Code 1895, § 3283).

Probate in common form conclusive upon no one until expiration of seven years. — When a will is proved in common form and unattacked for seven years, it is conclusive against all parties except minor heirs. Churchill v. Corker, 25 Ga. 479 (1858) (decided under Laws 1845, Cobb's 1851 Digest, p. 348); Anderson v. Green, 46 Ga. 361 (1872) (decided under former Code 1863, § 2394); Peters v. West, 70 Ga. 343 (1883) (decided under former Code 1882, § 2425); Medlock v. Merritt, 102 Ga. 212, 29 S.E. 185 (1897) (decided under former Code 1895, § 3283); Davidson v. Sibley, 140 Ga. 707, 79 S.E. 855 (1913) (decided under former Civil Code 1910, § 3857.

After the lapse of seven years, a judgment of probate becomes conclusive as to the factum of due execution of the will, unless the fact appears on the will's face that it was not executed pursuant to law. Gay v. Sanders, 101 Ga. 601, 28 S.E. 1019 (1897) (decided under former Civil Code 1895, § 3283); Robertson v. Hill, 127 Ga. 175, 56 S.E. 289 (1906) (decided under former Civil Code 1895, § 3283).

Under statutory law, both adults and minors have seven years after the probate in common form within which to call for proof in solemn form. If a minor arrives at majority during the seven years next succeeding the probate, and at a time when more than four years of that period remains, the minor has, after arrival at age, the remainder of the seven-year period within which to file a contest. If the minor arrives at majority after the expiration of the seven years, or at a time during the seven-year period when less than four years remains, the minor has only four years after reaching majority to file the contest. Sutton v. Hancock, 118 Ga. 436, 45 S.E. 504 (1903) (decided under former Civil Code 1895, § 3283).

While a judgment of a court of ordinary (now probate court) probating a will in common form is not without limited effect and after seven years becomes conclusive upon all persons not under disability, yet until then it is "not conclusive upon anyone interested in the estate adversely to the will, and such person … may require proof in solemn form and interpose a caveat." Abercrombie v. Hair, 185 Ga. 728, 196 S.E. 447 (1938) (decided under former Code 1933, § 113-605).

Time within which will must be probated. — Except as to proof in solemn form after probate in common form, there is no statute of limitations upon the time within which a will may be probated, and if a will is finally offered, its proof and record cannot be denied upon the ground of delay by the propounder, nor because of acts on the propounder's part from which an estoppel might arise in other cases. Walden v. Mahnks, 178 Ga. 825, 174 S.E. 538 (1934) (decided under former Code 1933, § 113-605).

Caveat of will. — There is no provision of law for the caveat of a will offered for probate in common form. Abercrombie v. Hair, 185 Ga. 728, 196 S.E. 447 (1938) (decided under former Code 1933, § 113-605).

Cited in Jones v. Dean, 188 Ga. 319, 3 S.E.2d 894 (1939); Fitzgerald v. Morgan, 193 Ga. 802, 20 S.E.2d 73 (1942); Heath v.

Jones, 168 F.2d 460 (5th Cir. 1948); Hodges v. Libbey, 120 Ga. App. 246, 170 S.E.2d 37 (1969).

RESEARCH REFERENCES

C.J.S. — 95 C.J.S., Wills, § 800 et seq.
ALR. — Statute limiting time for probate of will as applicable to will probated in another jurisdiction, 87 A.L.R.2d 721.

ARTICLE 3

SOLEMN FORM

RESEARCH REFERENCES

ALR. — Testamentary Capacity as Affected by Use of Medication, Intoxicants, or Drugs, 57 A.L.R.7th 2.

53-5-20. Conclusiveness.

(a) Probate in solemn form is conclusive upon all persons served with notice, including persons waiving service of notice or served with notice through a guardian ad litem or other appropriate representative, and upon all beneficiaries under the will who are represented by the personal representative.

(b) As to heirs and other persons required to be served with notice by Code Section 53-5-22 who are not effectively served with notice in a manner adequate to satisfy subsection (a) of this Code section, a proceeding to probate in solemn form shall otherwise be as conclusive as if probate had been in common form.

(c) Except as otherwise provided in subsections (a) and (b) of this Code section, a proceeding to probate in solemn form is conclusive against all persons, regardless of service or notice, six months from the date the order admitting such will to probate in solemn form is entered by the court in such proceeding.

History. — Code 1981, § 53-5-20, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-21/HB 865.

The 2020 amendment, effective January 1, 2021, designated the first sentence of the previously existing provisions as subsection (a) and, in subsection (a), substituted "persons served with notice, including persons waiving service of notice or served with notice through a guardian ad litem or other appropriate representative," for "parties notified" and substituted "personal representative" for "executor"; designated the second sentence of the previously existing provisions as subsection (b) and, in subsection (b), inserted "and other persons required to be served with notice by Code Section 53-5-22 who are" and substituted "served with notice in a manner adequate to satisfy subsection (a) of this Code section" for "notified"; and added subsection (c).

Cross references. — Subscribing witness's testimony, § 24-9-903.

Law reviews. — For article discussing methods of summary distribution and set-

tlement of decedent's estate, see 6 Ga. L. Rev. 74 (1971). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 71 Mercer L. Rev. 327 (2019).

For comment on Byrd v. Riggs, 209 Ga. 930, 76 S.E.2d 774 (1953), see 16 Ga. B.J. 338 (1954); 18 Ga. B.J. 211 (1955). For comment on the constitutionality of Ga. L. 1958, pp. 657, 658; as amended by Ga. L. Ex. Sess., 1964, pp. 16, 17, reducing the number of required witnesses to a will to two, in light of the constitutional provision that no law shall refer to more than one subject matter, see 1 Ga. St. B.J. 126 (1964).

COMMENT

This section carries forward the substance of the last two sentences of subsection (a) of former OCGA Sec. 53-3-13.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-602, and former O.C.G.A. § 53-3-13 are included in the annotations for this Code section.

Caveator was party and could not later protest. — It was proper to dismiss without a hearing a caveat to a will based on lack of testamentary capacity because it was clear that the caveator's allegations were fatally deficient. The caveator had not sought to set aside the probate court's order probating the will; by signing a letter of assent, the caveator had consented to the immediate probate of the will, which established, among other things, that the testator had sufficient mental capacity; and although the caveator contended that distribution of the estate should be governed by an alleged contract between the parties, the caveator had not appealed the probate court's finding that the court lacked subject matter jurisdiction to consider the alleged contract. In re Estate of Brice, 288 Ga. App. 449, 654 S.E.2d 420 (2007).

Probate of a will does not decide upon the right of disposal; it decides merely upon the factum of the will. Smith v. Davis, 203 Ga. 175, 45 S.E.2d 609 (1947) (decided under former Code 1933, § 113-602).

Court of ordinary (now probate court) has original and exclusive jurisdiction over the probate of wills; and the issue to be decided on an application for probate is devisavit vel non, and does not include any issue as to the validity of the testator's title. Cone v. Johnston, 202 Ga. 420, 43 S.E.2d 545 (1947) (decided under former Code 1933, § 113-602).

In a proceeding to probate a will in solemn form, the only issue is devisavit vel non, will or not. Smith v. Davis, 203 Ga. 175, 45 S.E.2d 609 (1947) (decided under former Code 1933, § 113-602).

Fact that the issue in an application for probate is devisavit vel non does not mean that proof of occurrences subsequent to the proper execution of a valid will that, in law, voids the document is inadmissible. Lawson v. Hurt, 217 Ga. 827, 125 S.E.2d 480 (1962) (decided under former Code 1933, § 113-602).

Issue of devisavit vel non does not include any issue as to the title or the ownership of property, and a court of ordinary (now probate court), and a superior court on appeal from that court, has no jurisdiction to try and determine the question of the validity or invalidity of a contract by legatees disposing of property contrary to the terms of a will offered for probate. Cone v. Johnston, 202 Ga. 420, 43 S.E.2d 545 (1947) (decided under former Code 1933, § 113-602).

Cited in Witcher v. JSD Props., LLC, 286 Ga. 717, 690 S.E.2d 855 (2010); Zinkhan v. Bruce, 305 Ga. App. 510, 699 S.E.2d 833 (2010).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 113-602, are included in the annotations for this Code section.

Probate in solemn form required notice to all heirs at law under former Code 1933, § 113-602 and such notice should be personal if the party resides in the state, but may be made by publication upon proper order of court when such party resided outside the state or was unknown under former Code 1933, § 43-5-21. 1954-56 Op. Att'y Gen. p. 916 (decided under former Code 1933, § 113-602).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, § 735 et seq. 80 Am. Jur. 2d, Wills, §§ 932, 937, 1035 et seq., 1063.

C.J.S. — 95 C.J.S., Wills, §§ 447 et seq., 472, 473, 616 et seq., 800 et seq.

ALR. — Probate of will or proceedings subsequent thereto as affecting right to probate later codicil or will, and rights and remedies of parties thereunder, 107 A.L.R. 249; 157 A.L.R. 1351.

Probate of copy of lost will as precluding later contest of will under doctrine of res judicata, 55 A.L.R.3d 755.

Wills: challenge in collateral proceeding to decree admitting will to probate, on ground of fraud inducing complainant not to resist probate, 84 A.L.R.3d 1119.

Right to probate subsequently discovered will as affected by completed prior proceedings in intestate administration, 2 A.L.R.4th 1315.

53-5-21. Procedure.

(a) A will may be proved in solemn form after service of notice upon the persons required to be served, upon the testimony of all the witnesses in life and within the jurisdiction of the court, or by proof of their signatures and that of the testator as provided in Code Section 53-5-23; provided, however, that the testimony of only one witness shall be required to prove the will in solemn form if no caveat is filed. If a will is self-proved, compliance with signature requirements and other requirements of execution is presumed subject to rebuttal without the necessity of the testimony of any witness upon filing the will and affidavit annexed or attached thereto.

(b) The petition to probate a will in solemn form shall set forth the full name, the place of domicile, and the date of death of the testator; the mailing address of the petitioner; the names, ages or majority status, and addresses of all the heirs, stating each such heir's relationship to the testator; and whether, to the knowledge of the petitioner, any other proceedings with respect to the probate of another purported will of the testator are pending in this state and, if so, the names and addresses of the propounders and the names, addresses, and ages or majority status of the beneficiaries under the other purported will. If a testamentary guardian is being appointed in accordance with subsection (b) of Code Section 29-2-4, the names and mailing addresses of any persons required to be served with notice pursuant to such Code section

shall be provided by the petitioner. In the event full particulars are lacking, the petition shall state the reasons for any omission. The petition shall conclude with a prayer for issuance of letters testamentary. If all of the heirs acknowledge service of the petition and notice and shall in their acknowledgment assent thereto, and if there are no other proceedings pending in this state with respect to the probate of another purported will of the decedent, the will may be probated and letters testamentary thereupon may issue without further delay; provided, however, that letters of guardianship shall only be issued in accordance with Code Section 29-2-4.

History. — Code 1981, § 53-5-21, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2014, p. 780, § 4-2/SB 364; Ga. L. 2020, p. 377, § 1-22/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (a), substituted "service of notice upon the persons required to be served" for "due notice" and substituted "Code Section 53-5-23; provided, however, that the testimony" for "Code Section 53-5-23. The testimony"; and substituted "all the heirs, stating each such heir's relationship" for "the surviving spouse and of all the other heirs, stating their relationship" in subsection (b).

Cross references. — Subscribing witness's testimony, § 24-9-903.

Law reviews. — For article discussing methods of summary distribution and settlement of decedent's estate, see 6 Ga. L. Rev. 74 (1971).

For comment on Byrd v. Riggs, 209 Ga. 930, 76 S.E.2d 774 (1953), see 16 Ga. B.J. 338 (1954); 18 Ga. B.J. 211 (1955). For comment on the constitutionality of Ga. L. 1958, pp. 657, 658; as amended by Ga. L. Ex. Sess., 1964, pp. 16, 17, reducing the number of required witnesses to a will to two, in light of the constitutional provision that no law shall refer to more than one subject matter, see 1 Ga. St. B.J. 126 (1964).

COMMENT

This section carries forward the witnessing requirements of subsections (a) and (c) of former OCGA Sec. 53-3-13 and the requirements for the contents of the petition set out in subsection (b) of former OCGA Sec. 53-3-13. The section clarifies that it is not necessary to list the exact age of those individuals who have achieved majority status at the time the petition is filed. See Chapter 11 for general provisions regarding the filing of petitions in the probate court.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-602, and former O.C.G.A. § 53-3-13 are included in the annotations for this Code section.

Propounder who offered a will for probate assumed the non-shifting burden of persuasion as to the validity of that document, including the requirement of showing by a preponderance of the evidence that the signature was that of the decedent. Heard v. Lovett, 273 Ga. 111, 538 S.E.2d 434 (2000).

It was error for the superior court to direct a verdict in favor of a propounder because under O.C.G.A. § 53-4-46 the propounder was required to prove that the propounder's mother did not deliberately discard or destroy the original of the will with the purpose of revoking the will, but the propounder did not satisfy the propounder's statutory duty, and the propounder should have filed a petition to

probate a copy of a will in lieu of a lost original, which would have notified the probate court of the appropriate standards and burdens of proof; the plain language of O.C.G.A. § 53-4-46(b) clearly requires that the presumption of intent to revoke be rebutted in order for a copy of a will to be probated, and Georgia law does not allow a propounder to probate a will without fulfilling the pertinent evidentiary requirements, even when no caveat has been filed. Tudor v. Bradford, 289 Ga. 28, 709 S.E.2d 235 (2011).

It was error for the superior court to direct a verdict in favor of a propounder because pursuant to current Ga. Unif. Prob. Ct. R. 5.3.3 the propounder was required to provide a caption on the propounder's petition to probate a will purported to be the last will and testament of the propounder's mother that set out the exact nature of the pleading or the type of petition, which was to probate a copy of a will in lieu of a lost original; however, not only did the propounder fail to caption the propounder's petition properly, the propounder also failed to make any interlineations or provide the requisite additional information in the petition as required by Georgia Probate Court Standard Form 5 to use that form to probate a copy of the mother's will. Tudor v. Bradford, 289 Ga. 28, 709 S.E.2d 235 (2011).

Admission of self-proved will. — Under O.C.G.A. § 53-4-24(c), when a will is self-proved, it "may be admitted to probate without the testimony of any subscribing witness." In fact, compliance with the requirements of execution are presumed without the live testimony or affidavits of witnesses; that is, under O.C.G.A. § 53-5-21(a), the affidavit creates a presumption regarding the prima facie case, subject to rebuttal. Singelman v. Singelman, 273 Ga. 894, 548 S.E.2d 343 (2001).

In a sister's challenge to her brother's will, the probate court erred in finding that the will was not sufficiently proven due to the executor's failure to produce the witnesses; the will had an attached self-proving affidavit and could be admitted without other proof that formalities of execution were met, pursuant to O.C.G.A. § 53-4-24. Reeves v. Webb, 297 Ga. 405, 774 S.E.2d 641 (2015).

Former statute unconstitutional. — See McKnight v. Boggs, 253 Ga. 537, 322 S.E.2d 283 (1984) (decided under former Code 1933, § 113-602).

Statute prescribes certain essential prerequisites before a valid judgment probating a will in solemn form can be rendered. Miller v. Miller, 104 Ga. App. 224, 121 S.E.2d 340 (1961) (decided under former Code 1933, § 113-602).

Application to probate in solemn form affords opportunity to all parties interested for a hearing by the court on any objection the parties may have to the probate of the will, and those with notice are concluded by the judgment of probate. While the caveator has the burden of proving the grounds of the caveat, the initial burden is upon the propounder to prove the testamentary capacity of the testator, and that the testator acted freely and voluntarily in the execution of the will. Jones v. Dean, 188 Ga. 319, 3 S.E.2d 894 (1939) (decided under former Code 1933, § 113-602).

Proper attestation clause presumes statutory execution of will. — Attestation clause stating that testator signed will "in the presence of witnesses who, at her request and in her presence and in the presence of each other, have hereunto subscribed our names as witnesses the same day and date," is a sufficient attestation clause such that its introduction into evidence raised a presumption of the proper execution of the will. Thornton v. Hulme, 218 Ga. 480, 128 S.E.2d 744 (1962) (decided under former Code 1933, § 113-602).

Judgment of probate and domicile is a judgment in rem and therefore, as an act of the sovereign power, its effect cannot be disputed within the jurisdiction. Riley v. New York Trust Co., 315 U.S. 343, 62 S. Ct. 608, 86 L. Ed. 885 (1942) (decided under former Code 1933, § 113-602).

Probate of later will requires prior reversal of judgment ordering probate of first will. When a person who filed a caveat to a will which was probated in solemn form thereafter attempted to probate an alleged later will, without setting aside or reversing the judgment ordering the probate of the first will in solemn form, a verdict was demanded against

probate of the alleged later will. Byrd v. Riggs, 209 Ga. 930, 76 S.E.2d 774 (1953), for comment, see 16 Ga. B.J. 338 (1954); 18 Ga. B.J. 211 (1955) (decided under former Code 1933, § 113-602).

Proof generally. — Proof of the execution of a will in case of probate in solemn form and proof of the execution of a will in a case to establish and probate a copy when the will is missing may be made in precisely the same manner and by the same character of evidence; and in both evidence other than the testimony of the subscribing witnesses, after the available witnesses have been produced at the hearing, is admissible for the purpose of proving the execution of the will, and in each this may be done despite the testimony of the witnesses against the will. Fletcher v. Gillespie, 201 Ga. 377, 40 S.E.2d 45 (1946) (decided under former Code 1933, § 113-602).

Proof may be made in any legal form. — Law directs that on an application to probate in solemn form the proof be made by the witnesses, yet such proof may be made by any legal evidence, and is not limited to the testimony of the subscribing witnesses, and despite the fact that the witnesses may testify against the will. Fletcher v. Gillespie, 201 Ga. 377, 40 S.E.2d 45 (1946) (decided under former Code 1933, § 113-602).

Propounder must make prima facie case as to factum of will. — On the trial of an issue arising upon the propounding of a will and a caveat thereto, the burden, in the first instance, is on the propounder to make out a prima facie case by showing the factum of the will, and that at the time of the will's execution the testator apparently had sufficient mental capacity to make the will, and, in making the will, acted freely and voluntarily. Spivey v. Spivey, 202 Ga. 644, 44 S.E.2d 224 (1947) (decided under former Code 1933, § 113-602).

On the trial of an issue arising upon the propounding of a will and a caveat thereto, the burden, in the first instance, is on the propounder to make out a prima facie case, by showing the factum of the will, and that at the time of the will's execution the testator apparently had sufficient mental capacity to make the will, and, in making it, acted freely and voluntarily. Ehlers v. Rheinberger, 204 Ga. 226, 49 S.E.2d 535 (1948) (decided under former Code 1933, § 113-602).

Propounder, upon offering will for probate, shall produce to the court the witnesses to the will's execution, to prove the factum of the will, that it was freely and voluntarily made, and also apparent testamentary capacity. Johnson v. Sullivan, 247 Ga. 663, 278 S.E.2d 640 (1981) (decided under former Code 1933, § 113-602).

Personal appearance by all available witnesses not required. — Propounder of a will is required only to prove the will in accordance with O.C.G.A. Ch. 11, T. 9, which does not, of necessity, require personal appearance by all available witnesses in solemn form proceeding. Norton v. Georgia R.R. Bank & Trust, 248 Ga. 847, 285 S.E.2d 910 (1982), aff'd, 253 Ga. 596, 322 S.E.2d 870 (1984) (decided under former O.C.G.A. § 53-3-13).

Prima-facie case of will's authenticity made. — When the record of the superior court proceedings shows that the record of the probate court, where the will was shown to be executed with requisite formalities, was brought up and introduced into evidence, this probate record included a photostatic copy of the original will, which original was retained by the clerk of the probate court as required by former O.C.G.A. § 53-3-5, and according to the two attesting witnesses to the will, the testator apparently had sufficient mental capacity to make the testator's will and in making the will acted freely and voluntarily in 1972, the propounder made out a prima facie case, showing the factum of the will and that the will was freely and voluntarily executed. Pendley v. Pendley, 251 Ga. 30, 302 S.E.2d 554 (1983) (decided under former O.C.G.A. § 53-3-13).

Summary judgment sustained. — Undisputed testimony of witnesses admitted in probate court will sustain superior court's grant of summary judgment admitting the will to probate. Norton v. Georgia R.R. Bank & Trust, 248 Ga. 847, 285 S.E.2d 910 (1982), aff'd, 253 Ga. 596, 322 S.E.2d 870 (1984) (decided under former O.C.G.A. § 53-3-13).

Production of witnesses indispensable to prima facie case by propounder. — Probate in solemn form requires that "all the witnesses" be produced, if the witnesses be in life and within the jurisdiction of the court; if a will has four witnesses, all must be produced if the witnesses are accessible. Bloodworth v. McCook, 193 Ga. 53, 17 S.E.2d 73 (1941) (decided under former Code 1933, § 113-602); Miller v. Miller, 104 Ga. App. 224, 121 S.E.2d 340 (1961) (decided under former Code 1933, § 113-602).

To make out a prima facie case, where a caveat has been filed and to be entitled to a judgment of probate in solemn form, the propounder must introduce at the hearing all the subscribing witnesses, if living and accessible, or proof of their signatures, if dead or inaccessible. Spivey v. Spivey, 202 Ga. 644, 44 S.E.2d 224 (1947) (decided under former Code 1933, § 113-602).

If a caveat has been filed all subscribing witnesses must be introduced for examination, even though the propounder knows that the witnesses' testimony will be unfavorable to the propounder, and if some or all of the subscribing witnesses cannot testify as to the testamentary capacity and mental condition of the testator, or give testimony adverse to the propounder and favorable to the caveator, such failure of memory or hostility will not necessarily defeat the will, since the propounder may make the proof required by law by other witnesses who can testify as to the essential facts, and upon sufficient proof being made the will may be probated. Spivey v. Spivey, 202 Ga. 644, 44 S.E.2d 224 (1947) (decided under former Code 1933, § 113-602).

To make out a prima facie case, and to be entitled to a judgment of probate in solemn form, the propounder must introduce at the hearing all the subscribing witnesses, if living and accessible, or proof of their signatures, if dead or inaccessible. Ehlers v. Rheinberger, 204 Ga. 226, 49 S.E.2d 535 (1948) (decided under former Code 1933, § 113-602).

To be entitled to a judgment of probate in solemn form, the propounder must introduce at the hearing all the subscribing witnesses, if living and accessible, or proof of their signatures, if dead or inaccessible. The witnesses must be introduced, for examination, even though the propounder knows that their testimony will be unfavorable to the propounder. Miller v. Miller, 104 Ga. App. 224, 121 S.E.2d 340 (1961) (decided under former Code 1933, § 113-602).

Upon the trial of an application to prove a will in solemn form, the witnesses are, all of them, unless accounted for, indispensably necessary witnesses. Miller v. Miller, 104 Ga. App. 224, 121 S.E.2d 340 (1961) (decided under former Code 1933, § 113-602).

When four persons affixed their signature below the signature of the testator and three were present at the probate proceedings and testified (the fourth was out of the state and her signature was proved by her mother), all four persons were properly accounted for. Thornton v. Hulme, 218 Ga. 480, 128 S.E.2d 744 (1962) (decided under former Code 1933, § 113-602).

Probating in solemn form. — Will cannot be probated in solemn form upon the affidavits of the subscribing witnesses to the will. Miller v. Miller, 104 Ga. App. 224, 121 S.E.2d 340 (1961) (decided under former Code 1933, § 113-602).

When witness outside jurisdiction of court, proof of signature may substitute for presence. — When a witness is inaccessible at the time of probate in solemn form by reason of being without the jurisdiction of the state, proof of the witness's signature may be made. Dennis v. McCrary, 237 Ga. 605, 229 S.E.2d 367 (1976) (decided under former Code 1933, § 113-602).

Presence of witnesses affords opportunity for cross-examination. — Main reason of the rule for calling all witnesses in a proceeding for probate in solemn form is to give the other party an opportunity of cross-examining the witnesses. Miller v. Miller, 104 Ga. App. 224, 121 S.E.2d 340 (1961) (decided under former Code 1933, § 113-602).

Prima facie case by propounder shifts burden of proof to caveator. — When propounder, in will contest, established the factum of the will and codicil and by proof of the attendant circum-

stances indicating mental capacity and freedom of will and action, a prima facie case for the validity of the will and codicil was made such as would shift the burden upon the caveator to show that the instruments were invalid by reason of a degree of undue influence exercised upon the testator, such as would deprive the testator of the testator's own free will and substitute therefor that of the beneficiary. Ehlers v. Rheinberger, 204 Ga. 226, 49 S.E.2d 535 (1948) (decided under former Code 1933, § 113-602).

Probate of self-proved will upheld. — Because testimony from the attorney who prepared and witnessed the decedent's self-proved will, an associate who also witnessed the will's execution, and the legal secretary who notarized the will supported a finding that the decedent had the testamentary capacity at the time the will was executed, the trial court did not err in admitting the will to probate. Tuttle v. Ryan, 282 Ga. 652, 653 S.E.2d 50 (2007) (decided under former O.C.G.A. § 53-3-13).

Cited in Heath v. Jones, 168 F.2d 460 (5th Cir. 1948); Byrd v. Riggs, 211 Ga. 493, 86 S.E.2d 285 (1955); Banes v. Derricotte, 215 Ga. 892, 114 S.E.2d 12 (1960); Oakley v. Anderson, 235 Ga. 607, 221 S.E.2d 31 (1975); Melton v. Shaw, 237 Ga. 250, 227 S.E.2d 326 (1976); Payne v. Payne, 242 Ga. 694, 251 S.E.2d 283 (1978); Dismuke v. Dismuke, 195 Ga. App. 613, 394 S.E.2d 371 (1990); Harvey v. Sullivan, 272 Ga. 392, 529 S.E.2d 889 (2000).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 113-602, are included in the annotations for this Code section.

Probate in solemn form required notice to all heirs at law under former Code 1933, § 113-602 and such notice should be personal if the party resides in the state, but may be made by publication upon proper order of court when such party resided outside the state or was unknown under former Code 1933, § 43-5-21. 1954-56 Op. Att'y Gen. p. 916 (decided under former Code 1933, § 113-602).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, § 735 et seq. 80 Am. Jur. 2d, Wills, §§ 808 et seq., 816, 906 et seq., 920, 921.

C.J.S. — 95 C.J.S., Wills, §§ 447 et seq., 472, 473, 616 et seq., 800 et seq.

ALR. — Probate of will or proceedings subsequent thereto as affecting right to probate later codicil or will, and rights and remedies of parties thereunder, 107 A.L.R. 249; 157 A.L.R. 1351.

Probate of copy of lost will as precluding later contest of will under doctrine of res judicata, 55 A.L.R.3d 755.

Wills: challenge in collateral proceeding to decree admitting will to probate, on ground of fraud inducing complainant not to resist probate, 84 A.L.R.3d 1119.

Right to probate subsequently discovered will as affected by completed prior proceedings in intestate administration, 2 A.L.R.4th 1315.

53-5-22. Service of notice.

(a) Probate in solemn form requires service of notice on all the heirs of the testator and, if there is any other purported will of the testator for which probate proceedings are pending in this state, on all the beneficiaries under and propounders of such purported will. Service of notice of a petition for probate in solemn form shall be by personal service if the party resides in this state and is known and shall be served at least

30 days before probate is to be made, except that, if such service of notice is waived, the 30 day provision shall not apply.

(b) For purposes of serving notice on beneficiaries under a purported will for which probate proceedings are pending in this state, notice shall be served on:

(1) Each beneficiary:

(A) Who has a present interest, including but not limited to a vested remainder interest but not including trust beneficiaries where there is a trustee; and

(B) Whose identity and whereabouts are known or may be determined by reasonable diligence;

(2) The duly acting conservator or guardian of each individual beneficiary with a present interest or power, other than a mere trust beneficiary, who is not sui juris; and

(3) Each trustee.

Service of notice shall not be required in the case of a person whose interest, even though vested, cannot be possessed until the passage of time or the happening of a contingency. The probate court may, on the motion of any party in interest or on its own motion, modify the service of notice required in the case of numerous beneficiaries of the same or similar class where the value of each testamentary gift is, or appears to be, nominal. Upon the motion of any party in interest or upon its own motion, the court may determine whether the interest of any beneficiary required to be served with notice under this subsection is adequately represented, including any contingent interest of a beneficiary, and if such representation is found to be inadequate, the court may appoint a guardian ad litem to represent each beneficiary or order such other service of notice as may be appropriate to a beneficiary of a contingent interest. If a trustee named in the will indicates a refusal to represent the beneficiaries of the testamentary trust, the court may order that notice be served directly on the beneficiaries of the trust. The provisions of Code Section 53-12-8 shall be applicable to a trust beneficiary required to be served with notice or represented under this subsection.

(c) Service of a notice of petition for probate in solemn form shall be in accordance with the provisions of Chapter 11 of this title and, if made personally or by mail, shall include a copy of the petition and of the will for which probate is sought. If service is to be made by publication, the published notice shall set forth the court, the time the order for service by publication was granted, the name of the decedent, the fact that a petition has been filed seeking the probate of the will of the decedent in solemn form, and the name of the petitioner who seeks letters testa-

mentary or the continuance in force of any letters testamentary previously granted. The notice shall command all parties to whom it is directed to file objection, if there is any.

History. — Code 1981, § 53-5-22, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 10; Ga. L. 1998, p. 1586, § 17; Ga. L. 2002, p. 1316, § 3; Ga. L. 2020, p. 377, § 1-23/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (a), in the first sentence, substituted "service of notice on" for "due notice to", deleted a comma following "heirs of the testator", and substituted "on all the beneficiaries under" for "then such notice shall also be given to the beneficiaries", and, in the second sentence, substituted "shall be by personal service" for "shall be personal", substituted "30 days" for "ten days", and substituted "if such service of notice is waived, the 30 day provision" for "if waived, the ten-day provision"; and, in subsection (b), in the introductory language, substituted "serving notice on" for "giving notice to" and "served on" for "given to", inserted "conservator or'" in paragraph (b)(2), and, in the undesignated language at the end of subsection (b), substituted "Service of notice" for "Notice" in the first sentence, in the second and third sentences, inserted "the motion of any party in interest or on its own" preceding "motion" and "service of" preceding "notice", substituted "served with notice" for "notified" in the third sentence, substituted "served directly on" for "given directly to" in the fourth sentence, and added the last sentence.

Cross references. — Subscribing witness's testimony, § 24-9-903.

Law reviews. — For article discussing methods of summary distribution and settlement of decedent's estate, see 6 Ga. L. Rev. 74 (1971). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

For comment on Byrd v. Riggs, 209 Ga. 930, 76 S.E.2d 774 (1953), see 16 Ga. B.J. 338 (1954); 18 Ga. B.J. 211 (1955). For comment on the constitutionality of Ga. L. 1958, pp. 657, 658; as amended by Ga. L. Ex. Sess., 1964, pp. 16, 17, reducing the number of required witnesses to a will to two, in light of the constitutional provision that no law shall refer to more than one subject matter, see 1 Ga. St. B.J. 126 (1964).

COMMENT

This section replaces the Service and Notice provisions of former OCGA Section 53-3-13 and 53-3-14 with a reference to the provisions of new Chapter 11 (general provisions relating to filing petitions in the probate court). Subsection (c) also includes a new requirement that the service of the petition include a copy of the will for which probate is sought.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 113-602 and 113-607, and former O.C.G.A. §§ 53-3-13 and 53-3-14 are included in the annotations for this Code section.

Section found unconstitutional. — See McKnight v. Boggs, 253 Ga. 537, 322 S.E.2d 283 (1984).

Continuing duty to give notice. — Former O.C.G.A. § 53-3-13 required the propounder of any will to give notice to the propounders and beneficiaries of any other wills of the testator offered for probate in the same county. This duty of notice does not end on the date of the filing of the first will for probate. It is a duty which continues until a will is admitted to probate. Garner v. Harrison, 260 Ga. 866, 400 S.E.2d 925 (1991) (decided under former O.C.G.A. § 53-3-13).

Judgment of probate in solemn form, after due notice, is conclusive and is not subject to collateral attack in any other court. Rigby v. Powell, 233 Ga. 158, 210 S.E.2d 696 (1974), overruled on

other grounds, Wilson v. Nichols, 253 Ga. 84, 316 S.E.2d 752 (1984) (decided under former Code 1933, § 113-602).

Will may be probated in solemn form and letters testamentary thereupon issue in vacation, provided all of the heirs at law are sui juris and shall acknowledge service of the petition and notice, and shall in such acknowledgment assent thereto. Miller v. Miller, 104 Ga. App. 224, 121 S.E.2d 340 (1961) (decided under former Code 1933, § 113-602).

Notification of probate by publication insufficient as to heir in armed forces. — In the probate of a will in solemn form, the absence from the state, at the time of probate, of an heir at law who resided within the state, solely because of service in the armed forces of the United States, does not change his domicile or residence so as to authorize service on him of a notice of probate by publication. Foster v. Foster, 207 Ga. 519, 63 S.E.2d 318 (1951) (decided under former Code 1933, § 113-602).

Notice generally. — Notice to the husband of an application to prove a will in solemn form, when the wife is next of kin to the deceased, is not notice to her, so as to bar her in a subsequent application to caveat the will. Stone v. Green, 30 Ga. 340 (1860) (decided under former law).

Reasonable diligence in ascertaining heirs required. — Legislature undoubtedly meant that before a propounder might correctly state that heirs were "unknown," the propounder must have exercised at least some reasonable diligence in ascertaining the heirs, and may not simply rely upon the propounder's personal knowledge without reasonable inquiry. Oakley v. Anderson, 235 Ga. 607, 221 S.E.2d 31 (1975) (decided under former Code 1933, § 113-607).

Notification of probate by publication insufficient when absent heir is member of armed forces. — In the probate of a will in solemn form, the absence from the state, at the time of probate, of an heir at law who resided within the state, solely because of service in the armed forces of the United States, does not change one's domicile or residence so as to authorize service on that person of a notice of probate by publication. Foster v. Foster, 207 Ga. 519, 63 S.E.2d 318 (1951) (decided under former Code 1933, § 113-607).

Sufficiency of notice. — Citation in a proceeding for probate in solemn form that tracked the language of subsection (c) of former O.C.G.A. § 53-3-14 and stated specifically that the recipient needed to appear before the court on a date certain was sufficient notice that the named date was the deadline for appearing in probate court or filing a written objection. Higginbotham v. Rice, 271 Ga. 262, 517 S.E.2d 784 (1999), reversing Rice v. Higginbotham, 235 Ga. App. 378, 508 S.E.2d 736 (1998) (decided under former O.C.G.A. § 53-3-14).

Cited in Heath v. Jones, 168 F.2d 460 (5th Cir. 1948); Byrd v. Riggs, 211 Ga. 493, 86 S.E.2d 285 (1955); Sutton v. Hutchinson, 226 Ga. 99, 172 S.E.2d 663 (1970); Dismuke v. Dismuke, 195 Ga. App. 613, 394 S.E.2d 371 (1990).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 113-607, are included in the annotations for this Code section.

Probate in solemn form required notice to all heirs at law under former Code 1933, § 113-602 and such notice should be personal if the party resided in the state, but may be made by publication upon proper order of court when such party resided outside the state or was unknown. 1954-56 Op. Att'y Gen. p. 916 (decided under former Code 1933, § 113-607).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, § 735 et seq. 80 Am. Jur. 2d, Wills, §§ 808 et seq., 816, 920, 921.

C.J.S. — 95 C.J.S., Wills, §§ 447 et seq., 472, 473, 545 et seq., 557, 616, 800 et seq.

ALR. — Probate of will or proceedings subsequent thereto as affecting right to probate later codicil or will, and rights and remedies of parties thereunder, 107 A.L.R. 249; 157 A.L.R. 1351.

Probate of copy of lost will as precluding later contest of will under doctrine of res judicata, 55 A.L.R.3d 755.

Wills: challenge in collateral proceeding to decree admitting will to probate, on ground of fraud inducing complainant not to resist probate, 84 A.L.R.3d 1119.

Right to probate subsequently discovered will as affected by completed prior proceedings in intestate administration, 2 A.L.R.4th 1315.

ARTICLE 4

WITNESSES; SETTLEMENT AGREEMENT; EXPENSES

53-5-23. Methods of examining witnesses; photocopy of will.

(a) In all proceedings for the probate of a will in common form or solemn form, witnesses to the will may be examined in person or by written interrogatories which shall be answered in writing and under oath before a notary public or by depositions or other discovery procedures under the same circumstances as other civil cases. The probate court shall have the power to compel the attendance of witnesses in the same manner as the superior court.

(b) Where witnesses are to be examined as authorized by this Code section, a photocopy of the will may be exhibited to the witnesses in lieu of the original will. The testimony of a witness to whom a photocopy of a will has been exhibited shall be given the same weight as though the original will had been exhibited to the witness.

(c) The provisions of this Code section shall not be construed as repealing any other statutory provision prescribing a method or procedure for the taking of testimony by interrogatories or depositions, but as supplementary of such other provisions and cumulative to such other provisions and as providing additional means or methods of taking the testimony of subscribing witnesses to a will in proceedings for the probate of the will. The taking or procuring of testimony in the manner prescribed by this Code section shall be sufficient for all purposes of the probate proceedings, notwithstanding any other statute.

History. — Code 1981, § 53-5-23, enacted by Ga. L. 1996, p. 504, § 10.

Cross references. — Interrogatories generally, § 9-11-33.

COMMENT

This section carries over provisions of former OCGA Secs. 53-3-20 and 53-3-21. Former OCGA Sec. 53-2-15, which provided for the affidavits of attesting witnesses

who resided outside the county, is repealed as the provisions of the new Code section are sufficiently broad to encompass a variety of acceptable methods of examination of witnesses. See Code Section 53-11-7 for an explanation of the term "notary public," which appears in the first sentence of this section.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 3861, are included in the annotations for this Code section.

Admission of self-proved will. — Under O.C.G.A. § 53-4-24(c), when a will is self-proved, the will "may be admitted to probate without the testimony of any subscribing witness." In fact, compliance with the requirements of execution are presumed without the live testimony or affidavits of witnesses; that is, under O.C.G.A. § 53-5-21(a), the affidavit creates a presumption regarding the prima facie case, subject to rebuttal. Singelman v. Singelman, 273 Ga. 894, 548 S.E.2d 343 (2001).

Subscribing witnesses could testify by written interrogatories. — Child's claim that a probate court erred by allowing the subscribing witnesses to testify by written interrogatories was rejected as even in the case of a will that was not self-proved, witnesses to the will could be examined by written interrogatories. Tanksley v. Parker, 278 Ga. 877, 608 S.E.2d 596 (2005).

Directed verdict for the caveators of a will was improper, although the witnesses to the will had died, given prior testimony from one witness by interrogatory and deposition that the decedent, who was blind, had signed the will voluntarily and knew it was the decedent's will; under O.C.G.A. § 53-5-23(a), this evidence presented a jury question. Ammons v. Clouds, 295 Ga. 225, 758 S.E.2d 282 (2014).

Failure to caption petition. — It was error for the superior court to direct a verdict in favor of a propounder because pursuant to current Ga. Unif. Prob. Ct. R. 5.3.3 the propounder was required to provide a caption on the propounder's petition to probate a will purported to be the last will and testament of the propounder's mother that set out the exact nature of the pleading or the type of petition, which was to probate a copy of a will in lieu of a lost original; however, not only did the propounder fail to caption the propounder's petition properly, the propounder also failed to make any interlineations or provide the requisite additional information in the petition as required by Georgia Probate Court Standard Form 5 to use that form to probate a copy of the mother's will. Tudor v. Bradford, 289 Ga. 28, 709 S.E.2d 235 (2011).

Propounder who offered a will for probate. — It was error for the superior court to direct a verdict in favor of a propounder because under O.C.G.A. § 53-4-46, the propounder was required to prove that the propounder's mother did not deliberately discard or destroy the original of the will with the purpose of revoking the will, but the propounder did not satisfy the propounder's statutory duty, and the propounder should have filed a petition to probate a copy of a will in lieu of a lost original, which would have notified the probate court of the appropriate standards and burdens of proof; the plain language of O.C.G.A. § 53-4-46(b) clearly requires that the presumption of intent to revoke be rebutted in order for a copy of a will to be probated, and Georgia law does not allow a propounder to probate a will without fulfilling the pertinent evidentiary requirements, even when no caveat has been filed. Tudor v. Bradford, 289 Ga. 28, 709 S.E.2d 235 (2011).

Cited in Wells v. Thompson, 140 Ga. 119, 78 S.E. 823, 47 L.R.A. (n.s.) 722, 1914C Ann. Cas. 898 (1913); McFarland v. McFarland, 143 Ga. 598, 85 S.E. 758 (1915); Reeves v. Webb, 297 Ga. 405, 774 S.E.2d 641 (2015).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, § 21. 80 Am. Jur. 2d, Wills, §§ 829, 880, 881.

C.J.S. — 95 C.J.S., Wills, §§ 461 et seq., 593, 595, 661 et seq., 668 et seq.

ALR. — Admissibility in evidence of enlarged photographs or photostatic copies, 72 A.L.R.2d 308.

53-5-24. Unavailability of subscribing witnesses.

When it appears that a will cannot be proved as otherwise provided by law because at the time the will is offered for probate one or more of the subscribing witnesses to the will is dead or mentally or physically incapable of testifying or otherwise inaccessible, the court may admit the will to probate in common or solemn form upon the testimony in person or by affidavit or by deposition of at least two credible disinterested witnesses that the signature to the will is that of the individual whose will it purports to be or upon other sufficient proof of such signature. This Code section shall not preclude the court, in its discretion, from requiring, in addition, the testimony in person or by deposition of any available subscribing witness or proof of such other pertinent facts and circumstances as the court may deem necessary to admit the will to probate.

History. — Code 1981, § 53-5-24, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward the substance of former OCGA Sec. 53-3-18.

JUDICIAL DECISIONS

Proof of signature from lawyer and paralegal. — Although the witnesses to a will were deceased, the lawyer who prepared the will and the lawyer's paralegal were not permitted to testify that the signature on the will was the decedent's because the lawyer and paralegal did not demonstrate a familiarity with the decedent's signature. Ammons v. Clouds, 295 Ga. 225, 758 S.E.2d 282 (2014).

Cited in Harvey v. Sullivan, 272 Ga. 392, 529 S.E.2d 889 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 80 Am. Jur. 2d, Wills, § 853.

C.J.S. — 95 C.J.S., Wills, §§ 616 et seq., 626, 661 et seq.

53-5-25. Settlement agreement.

(a) As used in this Code section, the term:

(1) "Court" means a probate court or any superior court on appeal or transfer from a probate court.

(2) "Interested persons" means all persons whose interests would be affected by the approval of a settlement agreement in the manner provided in this Code section.

(b) The court may approve a settlement agreement under which probate is granted or denied or providing for a disposition of the property contrary to the terms of the will, if all interested persons consent and any duly qualified personal representative or temporary administrator is served with notice of the petition to approve such settlement agreement.

(c) A proceeding to approve a settlement agreement under this Code section may be commenced by an interested person or by any duly qualified personal representative or temporary administrator. Service of notice of a petition to approve a settlement agreement under this Code section shall be made in the manner provided by Chapter 11 of this title to all the interested persons, any duly qualified personal representative or temporary administrator, and such other persons as the court may direct.

(d) Approval of any settlement agreement that provides for the probate of the will, the sustaining of the caveat, or the disposition of the property contrary to the terms of the will shall be after such additional service of notice and such hearing as the court may direct in the exercise of its sound discretion. At any such hearing, the court may require or receive such evidence as the court may deem appropriate and may determine whether there is a bona fide contest or controversy.

(e) All interested persons who are sui juris shall be authorized to enter into a settlement agreement, which shall be assented to in writing by all such interested persons.

(f) All interested persons who are not sui juris or who are unborn or unknown shall be represented in such proceedings by an independent guardian ad litem. It shall be the duty of the guardian ad litem to investigate the proposed settlement and report to the court such guardian's findings and recommendations. The court shall take the recommendations into consideration but shall not be bound by such recommendations; provided, however, that, for purposes of subsection (b) of this Code section, the guardian ad litem's recommendation that the court approve the settlement agreement shall constitute consent to the settlement agreement by the guardian ad litem on behalf of all interested persons represented by such guardian.

(g) If a trust designated in the will to take an interest in real or personal property would have such interest affected by the settlement agreement:

(1) The provisions of such agreement affecting such interest shall satisfy the requirements of Code Section 53-12-9 in order to be

binding on the trust, the trustee, any trust director, and the trust beneficiaries; and

(2) A probate court not subject to Article 6 of Chapter 9 of Title 15, upon its own motion or upon the motion of any interested person or duly qualified personal representative or temporary administrator, shall enter an order transferring the proceeding to approve the settlement agreement to the superior court to which an appeal would lie under Code Section 5-3-2.

(h) A judgment entered by the court approving the settlement agreement shall be conclusive in the same manner as probate in solemn form, as provided by Code Section 53-5-20.

(i) Entering into or petitioning a court regarding a settlement agreement under this Code section shall not constitute a violation of a condition in terrorem under Code Section 53-4-68.

History. — Code 1981, § 53-5-25, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-24/HB 865.

The 2020 amendment, effective January 1, 2021, rewrote this Code section, which formerly read: "(a) Upon petition of the interested parties, any superior court on appeal or any probate court which is so authorized by Article 6 of Chapter 9 of Title 15 may approve a settlement agreement under which probate is granted or denied, providing for a disposition of the property contrary to the terms of the will. Approval of any settlement agreement that provides for the sustaining of the caveat or the disposition of the property contrary to the terms of the will shall be after a hearing, notice of which shall be given as the court may direct, at which evidence is introduced and at which the court finds as a matter of fact that there is a bona fide contest or controversy.

"(b) All individuals who are sui juris and affected by such a settlement agreement shall be authorized to enter into such an agreement which shall be assented to in writing by all the heirs of the testator and by all sui juris beneficiaries affected by such a settlement.

"(c) All individuals who are not sui juris, or are unborn beneficiaries, heirs, or persons unknown shall be represented in such proceedings by an independent guardian ad litem. It shall be the duty of the guardian ad litem to investigate the proposed settlement and report to the court the guardian's findings and recommendations. The court shall take the recommendations into consideration but shall not be bound by such recommendations.

"(d) A judgment entered in the court and based upon the settlement agreement shall be binding on all parties including individuals not sui juris, unborn beneficiaries or heirs, and persons unknown who are represented before the court by the guardian ad litem appointed for that purpose."

Cross references. — Guardians ad litem and appraisers for year's support in probate court proceedings, Uniform Rules for the Probate Courts, Rule 23.

Law reviews. — For article discussing methods of summary distribution and settlement of decedent's estate, see 6 Ga. L. Rev. 74 (1971). For article discussing possibility of compromise settlement between the heirs and devisees as disincentive for unfair distribution of will, see 10 Ga. L. Rev. 447 (1976). For annual survey of law of wills, trusts, and administration of estates, see 38 Mercer L. Rev. 417 (1986). For survey article on wills, trusts, guardianships, and fiduciary administration for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003).

COMMENT

This section carries forward former OCGA Sec. 53-3-22 but changes the former requirement that the court find that the caveat was meritorious to a requirement that the court find that there was a bona fide controversy or contest.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-3-22 are included in the annotations for this Code section.

Approval of trust necessary for approval of settlement. — Trust was a beneficiary affected by a proposed settlement of a probate dispute as the trust was named as a beneficiary of the will; since the trust had not consented to a proposed settlement of the probate dispute, there was no valid settlement among all of the beneficiaries, and the trial court erred in approving the settlement over the trustees' objections. Leone Hall Price Found. v. Baker, 276 Ga. 318, 577 S.E.2d 779 (2003).

Application only when settlement contrary to will. — By the statute's plain terms, O.C.G.A. § 53-5-25 applies only when a settlement disposes of estate property contrary to the terms of the will. In re Estate of Nesbit, 299 Ga. App. 496, 682 S.E.2d 641 (2009).

Settlement set aside. — Because the probate court erred in finding that a settlement agreement between heirs to their decedent parent's estate was enforceable, given that a disabled sibling's interests were not represented, and no evidence was presented that a non-disabled sibling assented to or participated in the agreement, the court erred in approving the agreement, warranting a finding that the agreement be set aside. Freeman v. Covington, 282 Ga. App. 113, 637 S.E.2d 815 (2006).

Settlement agreement prerequisite. — O.C.G.A. § 53-5-25 did not apply when a pro se case filed to invalidate a decedent's will and to terminate a trust and partnership agreement created in conjunction with the will did not involve a settlement agreement or the category of persons protected by the statute. Babb v. Babb, 293 Ga. App. 140, 666 S.E.2d 396, cert. denied,No. S08C1874, 2008 Ga. LEXIS 884 (Ga. 2008).

When approval of court not required. — When all the parties interested in the estate of a testator as heirs or beneficiaries under the will are legally competent to contract, they may settle controversies by agreement and need not seek the approval of a court. Beckworth v. Beckworth, 255 Ga. 241, 336 S.E.2d 782 (1985); Hennessey v. Froehlich, 219 Ga. App. 98, 464 S.E.2d 246 (1995) (decided under former O.C.G.A. § 53-3-22).

RESEARCH REFERENCES

Am. Jur. 2d. — 80 Am. Jur. 2d, Wills, §§ 969, 984 et seq.

C.J.S. — 95 C.J.S., Wills, §§ 490 et seq., 536, 537.

ALR. — Compromise or settlement of controversy over will as changing nature of interest or estate under will, 5 A.L.R. 1384.

Conveyance by life tenant and remaindermen in esse as cutting off interest of unborn persons under devise for life with remainder to a class, 25 A.L.R. 770.

Agreement, before death of third person, between his prospective heirs, devisees, or legatees as to their respective shares in the estate, 74 A.L.R. 441.

Failure of decree or order of distribution of decedent's estate to describe specifically the property or property interests involved, or misdescription thereof, 120 A.L.R. 630.

Right of heirs, next of kin, or others who would have benefited by denial of probate of will, to share in the consideration for an agreement to which they were not parties, to withdraw objections to probate, 120 A.L.R. 1495.

Validity and enforceability of agreement

to drop or compromise will contest or withdraw objections to probate, or of agreement to induce others to do so, 42 A.L.R.2d 1319.

Right of heir's assignee to contest will, 39 A.L.R.3d 696.

53-5-26. Persons entitled to recover expenses.

Upon petition to the probate court, a person named as an executor in a purported will of a decedent shall be entitled to recover from the estate of the decedent the expenses incurred in offering the will for probate in common or solemn form, including reasonable attorney's fees, provided the person proceeded in good faith. The probate court shall determine whether the person proceeded in good faith and the amount of the expenses. The order of the probate court shall be subject to appeal as is provided in other cases.

History. — Code 1981, § 53-5-26, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward the substance of former OCGA Sec. 53-3-23.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1943, p. 423, § 1, and former O.C.G.A. § 53-3-23 are included in the annotations for this Code section.

Payment by estate of executor's expenses. — Probate court did not err in authorizing payment by the estate of an executor's expenses in probating a testator's will because there was evidence that the executor had reasonable grounds to believe that the will the executor propounded was valid and operative, and the probate court found no evidence of any undue influence affecting the testator in the execution of the propounded will, much less undue influence of appellee on the testator. Simmons v. Harms, 287 Ga. 176, 695 S.E.2d 38 (2010).

Payment of executor's motion for expenses. — Probate court's order granting an executor's motion for payment of expenses of probate pursuant to O.C.G.A. § 53-5-26 was not prohibited by the supersedeas imposed by the filing of the initial notice of appeal because the order permitted the executor to have the estate pay expenses, including reasonable attorney's fees, incurred by the executor in the probate of the will and while acting in good faith, and it was neither based upon nor related to the carrying into effect of the judgment on appeal. Simmons v. Harms, 287 Ga. 176, 695 S.E.2d 38 (2010).

Good faith is necessary for the administrator as well as the executor who seeks to bind the estate for attorney fees. Hudson v. Abercrombie, 258 Ga. 729, 374 S.E.2d 83 (1988) (decided under former O.C.G.A. § 53-3-23).

Question of good will turns on the circumstances of each case and former O.C.G.A. § 53-3-23 did not limit the discretion given the trial court to determine good faith of the propounder of a will who was seeking to recover attorney fees. Holland v. Farmer, 217 Ga. App. 546, 458 S.E.2d 175 (1995) (decided under former O.C.G.A. § 53-3-23).

Mere fact that a propounder of an earlier will attempts to "defeat" a later will does not prove the propounder did not act in good faith, and lack of good faith is not conclusively proved by the fact that the propounder of an earlier will has a "personal interest" in the will. Holland v.

Farmer, 217 Ga. App. 546, 458 S.E.2d 175 (1995) (decided under former O.C.G.A. § 53-3-23).

Fraud in procurement of will prevents recovery. — A finding of fraud or undue influence in the procurement of the will sought to be probated indicates bad faith and prevents recovery. Sauls v. Estate of Avant, 143 Ga. App. 469, 238 S.E.2d 564 (1977) (decided under Ga. L. 1943, p. 423, § 1).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 471, 517.

C.J.S. — 34 C.J.S., Executors and Administrators, § 1140. 95 C.J.S., Wills, §§ 787, 791, 793.

ALR. — Right to allowance out of the estate of attorney's fees in attempt to establish or defeat a will, 10 A.L.R. 783; 40 A.L.R.2d 1407.

Attorney's lien on decedent's estate, 50 A.L.R. 657.

Power of probate court to require attorney to return to estate or trust overpayment on account of fees or services, 70 A.L.R. 478.

Allowance out of decedent's estate for services rendered by attorney not employed by executor or administrator, 142 A.L.R. 1459.

Validity, construction, and effect of provision in will regarding amount payable for attorney's services, 148 A.L.R. 362.

Attorney's fees and expenses incurred by personal representative in successful defense of will contest as chargeable to the residuary estate or as apportionable among beneficiaries, 20 A.L.R.2d 1226.

Personal liability of executor or administrator for fees of attorney employed by him for the benefit of the estate, 13 A.L.R.3d 518.

Amount of attorneys' compensation in absence of contract or statute fixing amount, 57 A.L.R.3d 475.

Amount of attorneys' compensation in proceedings involving wills and administration of decedents' estates, 58 A.L.R.3d 317.

53-5-27. Nonjudicial settlement agreement.

(a)(1) As used in this Code section, the term "court" means a probate court or superior court on appeal or transfer from a probate court.

(2) Except as provided in subsection (b) of this Code section, the personal representative nominated in the will or duly qualified so to serve and all persons whose interests would be affected may enter into a binding nonjudicial settlement agreement with respect to any matter involving a will.

(b) A nonjudicial settlement agreement shall be valid only to the extent it does not violate a material intention of the testator under Article 6 of Chapter 4 of this title and includes terms and conditions that properly could be approved by the court under Code Section 53-5-25 or other applicable law.

(c) A nonjudicial settlement agreement entered into in accordance with this Code section shall be final and binding on all parties to such agreement, including individuals not sui juris, unborn individuals, and persons unknown who are represented by a guardian who may represent and bind such parties under Code Section 53-5-25 or 53-11-2, as if ordered by a court with competent jurisdiction over the will, the estate of the decedent, and the parties.

(d) Any person bound by a nonjudicial settlement agreement under subsection (c) of this Code section may request that the court approve such agreement, determine whether the representation provided under Code Section 53-5-25 or 53-11-2 was adequate, determine whether such agreement violates a material intention of the testator under Article 6 of Chapter 4 of this title, determine whether such agreement contains terms and conditions the court properly could have approved, or make any other similar determination.

(e) If a trust designated in the will to take an interest in real or personal property would have such interest affected by the nonjudicial settlement agreement:

(1) The provisions of such agreement affecting such interest shall satisfy the requirements of Code Section 53-12-9 in order to be binding on the trust, the trustee, any trust director, and the trust beneficiaries; and

(2) A probate court not subject to Article 6 of Chapter 9 of Title 15, upon the request of any person bound by a nonjudicial settlement agreement that the court determine whether such agreement contains terms and conditions the court properly could have approved, shall enter an order transferring the proceeding to the superior court to which an appeal would lie under Code Section 5-3-2 for the determination of all questions under subsection (d) of this Code section.

(f) Entering into or petitioning a court regarding a nonjudicial settlement agreement under this Code section shall not constitute a violation of a condition in terrorem under Code Section 53-4-68.

History. — Code 1981, § 53-5-27, enacted by Ga. L. 2020, p. 377, § 1-25/HB 865.

Effective date. — This Code section became effective January 1, 2021.

ARTICLE 5

FOREIGN AND OUT-OF-STATE WILLS; NONDOMICILIARIES

Law reviews. — For article, "Foreign Wills in Georgia," see 14 Ga. B.J. 410 (1952). For article, "Probate and Administration of Small Estates in Georgia: Some Proposals for Reform," see 6 Ga. L. Rev. 74 (1971). For article, "The Probate and Establishment of Domestic and Foreign Wills: An Analysis of Statutory Requirements," see 13 Ga. L. Rev. 133 (1978).

RESEARCH REFERENCES

ALR. — Nonresidence of decedent owning real property in the state as affecting application of local statute relating to descent of real property, 119 A.L.R. 523.

Conflict of laws respecting wills as affected by statute of forum providing for will executed in accordance with law of another state, 169 A.L.R. 554.

What constitutes "estate" of nonresident decedent within statute providing for local ancillary administration where decedent died leaving an estate in jurisdiction, 34 A.L.R.2d 1270.

Right of nonresident surviving spouse of minor children to allowance of property exempt from administration or to family allowance from local estate of nonresident decedent, 51 A.L.R.2d 1026.

Probate, in state where assets are found, of will of nonresident which has not been admitted to probate in state of domicil, 20 A.L.R.3d 1033.

Modern status: inheritability or descendability of right to contest will, 11 A.L.R.4th 907.

Part 1

General Provisions

53-5-30. Definitions.

For purposes of this article:

(1) "Domiciliary jurisdiction" is the jurisdiction outside this state in which a nondomiciliary is domiciled at death.

(2) "Foreign will" is the will of a nondomiciliary who dies while domiciled in a jurisdiction that is not a state or territory governed by the Constitution of the United States and who at death owns property located in this state or a cause of action the venue of which lies in this state.

(3) "Nondomiciliary" is a decedent who dies while domiciled in a jurisdiction that is outside this state.

(4) "Out-of-state will" is the will of a nondomiciliary who dies while domiciled in a state or territory that is governed by the Constitution of the United States and who at death owns property located in this state or a cause of action the venue of which lies in this state.

History. — Code 1981, § 53-5-30, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section replaces former OCGA Sec. 53-3-40. This section distinguishes two types of wills: the wills of testators who die domiciled in any state of the United States other than Georgia or any other territory governed by the laws of the United States ("out-of-state" wills) and the wills of testators who die in another country or territory ("foreign" wills). The will of a testator who dies while domiciled outside Georgia is subject to the provisions of this Article only if the testator owned at death located in Georgia or was possessed of a cause of action the venue of which is Georgia.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-3-40 are included in the annotations for this Code section.

Residency at death determinative. — Will, executed in a foreign state by a nonresident who thereafter becomes and is a resident of this state at death is not a "foreign will." Zeh v. Griffin, 257 Ga. 364, 359 S.E.2d 899 (1987) (decided under former O.C.G.A. § 53-3-40).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, § 741.

C.J.S. — 95 C.J.S., Wills, § 515.

53-5-31. Requisites for admission to probate.

A foreign will or an out-of-state will may be admitted to original common or solemn form probate under the rules governing probate of wills of testators who die domiciled in this state upon proof that the will is valid under the laws of this state and that it has not been offered for probate or establishment in the domiciliary jurisdiction or that it has been offered for probate but either no timely caveat or similar objection was filed in the domiciliary jurisdiction or the grounds of a pending caveat or similar objection are not such as would, if proved, cause the denial of probate.

History. — Code 1981, § 53-5-31, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For comment discussing Georgia probate of will witnessed, executed, and probated in another state, in light of In re Barrie's Estate, 240 Iowa 431, 35 N.W.2d 658 (1949), see 1 Mercer L. Rev. 135 (1949).

COMMENT

This section replaces former OCGA Secs. 53-5-42, which applied only to wills that devised real property located in Georgia. This section uses the term "original probate" to refer to the original probate in Georgia of the will of a nondomiciliary. Both foreign wills and out-of-state wills that are valid wills under the laws of the state of Georgia can be admitted to original probate in Georgia. Section 53-3-43 (relating to foreign wills that bequeathed personalty) is repealed.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, §§ 3297, 3299, and 3300, former Civil Code 1910, §§ 3871, 3873, and 3874, and former Code 1933, § 113-702, are included in the annotations for this Code section.

Execution according to Georgia law. — Although a foreign will, which has been admitted to probate in the state where the testator lived at the time of death, may be probated in this state by the "production of an exemplification of the probate proceedings", the probate of a foreign will in Georgia is a nullity as respects real estate in Georgia where the will is attested by only two witnesses, and not by three witnesses as required by the former laws of Georgia. Gibson v. Gaines,

46 Ga. App. 458, 167 S.E. 782 (1933) (decided under former Civil Code 1910, §§ 3871, 3873 and 3874).

Administrator with the will annexed of a foreign will attested to by only two witnesses and not three as required by Georgia law, which has been probated in Georgia could not, by virtue of such probate, administer on real estate in Georgia and, where the administrator probated such foreign will in a court of ordinary (now probate court) in Georgia, in the manner as required by law, and at the same time made application for leave to sell, for the purpose of paying debts, real estate located in Georgia, it was a valid objection to such order of sale interposed by an heir at law of the testator that the probate of the will in Georgia was a nullity because it was not executed in accordance with the former laws of Georgia. Gibson v. Gaines, 46 Ga. App. 458, 167 S.E. 782 (1933) (decided under former Civil Code 1910, §§ 3871, 3873 and 3874).

Ownership of realty and residency necessary for jurisdiction by county probate court. — Mere ownership of realty in a certain county would not confer jurisdiction upon the court of ordinary (now probate court) of such county to probate an alleged will, unless the decedent died a nonresident of this state, since the probate of a will must be made in the county of the residence of the alleged testator if a resident of this state; and, if not a resident of this state, the will may be probated in any county where real estate belonging to the testator is situated. Hungerford v. Spalding, 183 Ga. 547, 189 S.E. 2 (1936) (decided under former Code 1933, § 113-702).

When a nonresident intestate left assets in two counties of this state, administration can be granted in either, and the ordinary (now probate judge) first commencing the exercise of jurisdiction will retain jurisdiction. Crawley v. Selby, 208 Ga. 530, 67 S.E.2d 775 (1951) (decided under former Code 1933, § 113-702).

Cited in Knight v. Wheedon, 104 Ga. 309, 30 S.E. 794 (1898); McCowan v. Brooks, 113 Ga. 384, 39 S.E. 112 (1901); Casters v. Murray, 122 Ga. 396, 50 S.E. 131, 2 Ann. Cas. 590 (1905); Cook v. Sheats, 222 Ga. 70, 148 S.E.2d 382 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 736, 741.

C.J.S. — 95 C.J.S., Wills, §§ 515, 558 et seq.

ALR. — Imputation to attesting witness of notice of contents of instrument, 4 A.L.R. 716.

Retrospective application of statute concerning execution of wills, 111 A.L.R. 910.

Nonresidence of decedent owning real property in the state as affecting application of local statute relating to descent of real property, 119 A.L.R. 523.

Decree of court of domicile respecting validity or construction of will, or admitting it or denying its admission to probate, as conclusive as regards real estate in another state devised by will, 131 A.L.R. 1023.

Conflict of laws respecting wills as affected by statute of forum providing for will executed in accordance with law of another state, 169 A.L.R. 554.

Statute limiting time for probate of will as applicable to will probated in another jurisdiction, 87 A.L.R.2d 721.

53-5-32. Effect of admission to probate.

If a foreign will or an out-of-state will is admitted to original probate in common or solemn form, the terms of the will shall be given effect under the laws of this state and shall be subject to the same defenses and objections as a will of a testator who died domiciled in this state.

History. — Code 1981, § 53-5-32, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For comment discussing Georgia probate of will witnessed,

executed, and probated in another state, in light of In re Barrie's Estate, 240 Iowa 431, 35 N.W.2d 658 (1949), see 1 Mercer L. Rev. 135 (1949).

COMMENT

This section expands the concept found in former OCGA Sec. 53-3-42 that a foreign will or out-of-state will that is admitted to original probate in Georgia will be interpreted under the laws of the state of Georgia and subject to any defenses or objections that are available against the will of a Georgia domiciliary.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, §§ 3297, 3299, and 3300, former Civil Code 1910, §§ 3871, 3873, and 3874, and former Code 1933, § 113-702, are included in the annotations for this Code section.

Execution according to Georgia law. — Although a foreign will, which has been admitted to probate in the state where the testator lived at the time of death, may be probated in this state by the "production of an exemplification of the probate proceedings", the probate of a foreign will in Georgia is a nullity as respects real estate in Georgia where the will is attested by only two witnesses, and not by three witnesses as required by the former laws of Georgia. Gibson v. Gaines, 46 Ga. App. 458, 167 S.E. 782 (1933) (decided under former Civil Code 1910, §§ 3871, 3873 and 3874).

Administrator with the will annexed of a foreign will attested to by only two witnesses and not three as required by Georgia law, which has been probated in Georgia could not, by virtue of such probate, administer on real estate in Georgia and, where the administrator probated such foreign will in a court of ordinary (now probate court) in Georgia, in the manner as required by law, and at the same time made application for leave to sell, for the purpose of paying debts, real estate located in Georgia, it was a valid objection to such order of sale interposed by an heir at law of the testator that the probate of the will in Georgia was a nullity because it was not executed in accordance with the former laws of Georgia. Gibson v. Gaines, 46 Ga. App. 458, 167 S.E. 782 (1933) (decided under former Civil Code 1910, §§ 3871, 3873 and 3874).

Ownership of realty and residency necessary for jurisdiction by county probate court. — Mere ownership of realty in a certain county would not confer jurisdiction upon the court of ordinary (now probate court) of such county to probate an alleged will, unless the decedent died a nonresident of this state, since the probate of a will must be made in the county of the residence of the alleged testator if a resident of this state; and, if not a resident of this state, the will may be probated in any county where real estate belonging to the testator is situated. Hungerford v. Spalding, 183 Ga. 547, 189 S.E. 2 (1936) (decided under former Code 1933, § 113-702).

When a nonresident intestate left assets in two counties of this state, administration can be granted in either, and the ordinary (now probate judge) first commencing the exercise of jurisdiction will retain jurisdiction. Crawley v. Selby, 208 Ga. 530, 67 S.E.2d 775 (1951) (decided under former Code 1933, § 113-702).

Cited in Knight v. Wheedon, 104 Ga. 309, 30 S.E. 794 (1898); McCowan v. Brooks, 113 Ga. 384, 39 S.E. 112 (1901); Casters v. Murray, 122 Ga. 396, 50 S.E. 131, 2 Ann. Cas. 590 (1905); Cook v. Sheats, 222 Ga. 70, 148 S.E.2d 382 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 736, 741.

C.J.S. — 95 C.J.S., Wills, §§ 515, 558 et seq.

ALR. — Imputation to attesting witness of notice of contents of instrument, 4 A.L.R. 716.

Retrospective application of statute concerning execution of wills, 111 A.L.R. 910.

Nonresidence of decedent owning real property in the state as affecting application of local statute relating to descent of real property, 119 A.L.R. 523.

Decree of court of domicile respecting validity or construction of will, or admitting it or denying its admission to probate, as conclusive as regards real estate in another state devised by will, 131 A.L.R. 1023.

Conflict of laws respecting wills as affected by statute of forum providing for will executed in accordance with law of another state, 169 A.L.R. 554.

Statute limiting time for probate of will as applicable to will probated in another jurisdiction, 87 A.L.R.2d 721.

53-5-33. Requisites for admission to ancillary probate.

(a) A foreign will or an out-of-state will duly admitted to probate or established under the laws of the domiciliary jurisdiction may be admitted to ancillary probate in solemn form upon proof that the will has not been offered for probate in this state in proceedings in which a caveat to such probate has been finally sustained or is pending.

(b) For purposes of ancillary probate of out-of-state wills, when the out-of-state will has been admitted to probate or established in the domiciliary jurisdiction, the will may be admitted to ancillary probate in solemn form upon production of a properly certified copy of the will and a properly authenticated copy of the final proceedings in the jurisdiction in which the will was probated or established, certified according to Code Section 24-9-922, and may be attacked or resisted on the same grounds as other judicial proceedings from a state of the United States.

(c) For purposes of ancillary probate of a foreign will, if the foreign will has been probated or established under the laws of the domiciliary jurisdiction, a certified copy of the will and an authenticated copy of the final proceedings in the jurisdiction in which the will was probated or established, under the seal of the court, shall be prima-facie evidence of the due execution of the will and the will may be admitted to ancillary probate but may be objected to by caveat or rebutted by proof, as in the case of a will offered for original probate.

History. — Code 1981, § 53-5-33, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2011, p. 99, § 97/HB 24.

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

COMMENT

This section replaces former OCGA Secs. 53-3-41, 53-3-46 (which dealt only with wills that bequeathed personal property), and 53-3-48 (which dealt only with wills probated in a foreign country). Subsection (a), a new section, provides for the ancillary probate in Georgia of a will that has been validly probated or established in another jurisdiction and that has not been offered for probate and successfully caveated in Georgia. Subsection (b) carries forward former OCGA Secs. 53-3-41 and 53-3-46. Under this section and Code Section 24-7-24, the judicial proceedings by which out-of-state wills have been admitted to probate in the domiciliary jurisdiction shall be given the same full faith and credit as they have in the domiciliary jurisdiction. Subsection (c) expands the provisions of former OCGA Sec. 53-3-48, which applied only to wills that bequeathed personal property.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 3875, former Code 1933, § 113-613, and Ga. L. 1959, p. 136, § 4, are included in the annotations for this Code section.

Foreign will devising real property located in Georgia must conform to Georgia law of attestation. Although a foreign will, which has been admitted to probate in the state where the testator lived at the time of death, may be probated in this state by the "production of an exemplification of the probate proceedings," the probate of a foreign will in Georgia is a nullity as respects real estate in Georgia where the will is attested by only two witnesses, and not by three witnesses as required by the former laws of Georgia. Gibson v. Gaines, 46 Ga. App. 458, 167 S.E. 782 (1933) (decided under former Civil Code 1910, § 3875).

An administrator with the will annexed of a foreign will attested to by only two witnesses and not three as required by Georgia law, which has been probated in Georgia could not, by virtue of such probate, administer on real estate in Georgia and, where the administrator probated such foreign will in a court of ordinary (now probate court) in Georgia, in the manner as required, and at the same time made application for leave to sell, for the purpose of paying debts, real estate located in Georgia, it was a valid objection to such order of sale interposed by an heir at law of the testator that the probate of the will in Georgia was a nullity because it was not executed in accordance with the former laws of Georgia. Gibson v. Gaines, 46 Ga. App. 458, 167 S.E. 782 (1933) (decided under former Civil Code 1910, § 3875).

Admission of foreign will bequeathing personalty. — When a will bequeathing realty and personalty was executed according to the law of the state where the testator resided, and was duly probated in that state, it may be treated in this state as a valid bequest of such personalty, although the will was not attested by as many as three witnesses as required by the law of Georgia, accordingly a court did not err in admitting in evidence a certified copy of a New York will, it appearing that the only property claimed by the plaintiff under such will consisted of notes secured by deeds to real estate in Georgia; and that no interest in the real estate itself was claimed thereunder. Fraser v. Rummele, 195 Ga. 839, 25 S.E.2d 662 (1943) (decided under former Code 1933, § 113-613).

Cited in Cook v. Sheats, 222 Ga. 70, 148 S.E.2d 382 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, §§ 21, 729.

C.J.S. — 95 C.J.S., Wills, § 592. 96 C.J.S., Wills, §§ 805, 806, 808 et seq.

ALR. — Conflict of laws respecting wills as affected by statute of forum providing for will executed in accordance with law of another state, 169 A.L.R. 554.

Conflict of laws as to pretermission of heirs, 99 A.L.R.3d 724.

53-5-34. Effect of admission to ancillary probate.

If a foreign will or an out-of-state will is admitted to ancillary probate in this state, the validity and terms of the will shall be given effect under the laws of the domiciliary jurisdiction.

History. — Code 1981, § 53-5-34, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section provides that wills that have already been probated or established in another state or territory or country shall take effect under the laws of that jurisdiction rather than under the laws of the state of Georgia. This section changes the common law rule that the validity of a will that devised real property was judged under the laws of the situs of the property.

53-5-35. Muniments of title to realty.

(a) Wills that are probated or established in another state shall constitute muniments of title for the transfer and conveyance of real property in this state to the beneficiaries named in the will and such will shall be admitted in evidence in this state as muniments of title without being probated in this state when:

(1) Such a will is accompanied by properly authenticated copies of the record admitting the will to probate in another state, certified according to Code Section 24-9-922; and

(2) The certified copy of such a will is recorded in the office of the clerk of the superior court in the county in which the real property is situated in the record in which deeds are recorded in this state.

(b) This Code section shall apply to all cases in which real property is held or claimed under wills not probated in this state and to all actions brought to recover or protect real property in this state.

History. — Code 1981, § 53-5-35, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2011, p. 99, § 98/HB 24.

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

For comment discussing Georgia probate of will witnessed, executed, and probated in another state, in light of In re

Barrie's Estate, 240 Iowa 431, 35 N.W.2d 658 (1949), see 1 Mercer L. Rev. 135 (1949).

COMMENT

This section carries forward former OCGA Sec. 53-3-47.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, §§ 3881 and 3882, former Code 1933, §§ 113-709 and 113-710, and former O.C.G.A. § 53-3-47 are included in the annotations for this Code section.

Foreign wills as assignments of title to realty in Georgia; procedure. — Devisees to whom lands are devised under foreign wills acquire title to such lands, when assented to by the executors of such wills, without their probate in this state; and copies of such wills, when witnessed according to the laws of this state and accompanied by an exemplification of the record probating such wills, certified according to the act of Congress and duly recorded, are muniments of title to the lands so devised. White v. First Nat'l Bank, 174 Ga. 281, 162 S.E. 701 (1932) (decided under former Civil Code 1910, §§ 3881 and 3882).

Will which is executed, witnessed, and probated in another state shall constitute a muniment of title for the transfer and conveyance of real property in Georgia to the distributees or devisees mentioned in a will when accompanied by an exemplification of the record admitting the will to probate, certified according to former Code 1933, § 38-627 (see O.C.G.A. § 24-7-24) and properly recorded in the office of the clerk of the superior court of the county where the land is situated. Tripp v. Hutchings, 214 Ga. 330, 104 S.E.2d 423 (1958) (decided under former Code 1933, §§ 113-709 and 113-710).

When a foreign will was properly recorded as a muniment of title and the ancillary executor appointed to act in Georgia was directed to sell the Georgia real estate and to pay over to the testator's wife a sum certain and the balance to the trust estate therein created, title vested even though the executor named failed to qualify and, in fact, could not qualify since the will could not be probated in this state. Tripp v. Hutchings, 214 Ga. 330, 104 S.E.2d 423 (1958) (decided under former Code 1933, §§ 113-709 and 113-710).

Cited in Chattanooga Iron & Coal Corp. v. Shaw, 157 Ga. 869, 122 S.E. 597 (1924); Nuckolls v. Merritt, 216 Ga. 35, 114 S.E.2d 427 (1960); Economou v. Economou, 196 Ga. App. 196, 395 S.E.2d 830 (1990).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, §§ 113-709, and 113-710 are included in the annotations for this Code section.

Wills probated in Canada may be encompassed within the provisions of former Code 1933, §§ 113-709 and 113-710. 1976 Op. Att'y Gen. No. U76-27 (decided under former Code 1933, §§ 113-709 and 113-710).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, § 729.

C.J.S. — 95 C.J.S., Wills, § 517.

53-5-36. Jurisdiction.

The probate court of any county in this state in which is located any property owned by the decedent or any cause of action of which the decedent was possessed at death the venue of which lies in this state shall have original or ancillary jurisdiction of a foreign or out-of-state will.

History. — Code 1981, § 53-5-36, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section describes the county in which the ancillary or original probate of foreign or out-of-state wills will take place.

53-5-37. Qualification of executor or administrator.

Upon the admission of a foreign will or an out-of-state will to ancillary probate, an executor named by or pursuant to the will to serve in this state or, in the absence of objection, a duly qualified and acting executor, administrator, or personal representative for the estate under the laws of the jurisdiction in which the will was originally probated or established shall be entitled to qualify as executor or administrator with the will annexed in this state. If such person shall fail to qualify within a reasonable time after the will is admitted to ancillary probate or if objection is filed and the probate court shall find good cause why such person should not serve, the court shall name as administrator with the will annexed a person who could otherwise be named administrator with the will annexed under the laws of this state. No person may qualify as executor or administrator with the will annexed under this Code section if such person is not otherwise qualified to act as a fiduciary in this state.

History. — Code 1981, § 53-5-37, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section describes who may serve as the executor or administrator with will annexed of an out-of-state will that is probated in Georgia. No provisions are included for the appointment of the executor or administrator with will annexed of a foreign will or out-of-state will that is originally probated in Georgia because such wills are subject to the general provisions of Georgia law. This section provides specifically that a person must be otherwise qualified to serve as a fiduciary in Georgia (see, e.g., Sec. 53-6-1; Sec. 7-1-242; Part 3 of Article 16 of Chapter 12 of Title 53) in order to be qualified to serve under this section. In the case of ancillary probate, ancillary letters testamentary will be issued to the person who qualifies to serve as the executor or administrator with the will annexed.

53-5-38. Distribution of intestate nondomiciliary's real property.

If a nondomiciliary dies intestate owning real property located in this state, the real property shall be distributed to that decedent's heirs in accordance with the laws of intestacy of this state.

History. — Code 1981, § 53-5-38, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section clarifies that the intestacy laws of Georgia shall govern the distribution of real property located in Georgia owned by a person who dies intestate while domiciled elsewhere. The distribution of the intestate decedent's personal property is not subject to the laws of Georgia.

53-5-39. Appointment of administrator of intestate nondomiciliary's estate.

When a nondomiciliary dies intestate owning real property located in any county of this state, the probate court of such county, on petition of any heir, creditor, or any duly qualified administrator or personal representative of the decedent, shall appoint an administrator of the estate in this state, in conformity with the proceedings required for the appointment of an administrator of a decedent who died domiciled in this state. Unless there is objection and good cause to the contrary shown, the duly qualified administrator or personal representative shall be appointed as the administrator of the estate in this state. No person may qualify as administrator under this Code section if such person is not otherwise qualified to act as a personal representative in this state.

History. — Code 1981, § 53-5-39, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section specifies who may serve as the administrator in Georgia of the real property in Georgia that was owned by a decedent who died intestate while domiciled elsewhere. This section provides specifically that a person must be otherwise qualified to serve as a fiduciary in Georgia (see, e.g., qualifications in OCGA Sec. 53-6-1; Sec. 7-1-242; Part 3 of Article 16 of Chapter 12 of Title 53) in order to be qualified to serve under this section.

53-5-40. Notice given by ancillary personal representative.

Upon qualification, the ancillary personal representative shall give notice to all creditors of the nondomiciliary decedent who are domiciled in this state in the same manner as is required for decedents who die domiciled in this state.

History. — Code 1981, § 53-5-40, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 18.

COMMENT

This section had no counterpart in former OCGA Title 53.

53-5-41. Laws or court orders governing administration of estate by ancillary personal representative.

An ancillary personal representative shall be subject to the laws of this state governing the administration of estates generally, except that by order of the probate court granted after notice to the persons known to have an interest in or claim against the estate in this state as an unsatisfied heir, beneficiary, or creditor residing in this state, the personal representative may be directed to:

(1) Pay only those debts determined by the probate court to constitute administrative expenses or other debts incurred by the personal representative and debts payable to creditors residing or situated in this state;

(2) Make distribution to any heirs or beneficiaries residing or situated in this state to the extent that the probate court determines to be practicable and not to the detriment of a testamentary scheme; and

(3) If the provisions of paragraph (1) or (2) of this Code section or both paragraphs apply to the estate, distribute all property remaining in the hands of the ancillary personal representative to the personal representative qualified in the domiciliary jurisdiction rather than to the distributees of the estate.

History. — Code 1981, § 53-5-41, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section had no counterpart in former OCGA Title 53.

Part 2

Foreign Personal Representatives

53-5-42. Powers.

When an individual dies domiciled outside of this state possessed of a claim to or against real or personal property or a cause of action within this state, if ancillary probate or administration has not been granted and is not pending in this state and there is a personal

representative duly qualified and serving under the laws of the domiciliary jurisdiction, ancillary probate or administration shall not be required and the duly qualified personal representative may:

(1) Take possession of personal property of the decedent located within this state and collect accounts or other sums due and payable to the decedent;

(2) Sell and convey any property of the decedent located within this state;

(3) Transfer the decedent's stock in any bank or other corporation in this state and withdraw deposits made by the decedent and receive dividends declared on the decedent's stock;

(4) Sue in any court in this state to enforce any cause of action or recover any property of the decedent or the foreign personal representative;

(5) Settle or compromise debts, claims, actions, causes of action, or controversies and give receipts, releases, or acquittances;

(6) Exercise and enforce anywhere in this state any and all rights, powers, or privileges possessed by the decedent or the personal representative pursuant to deeds or bills of sale to secure debts, mortgages, financing statements, or other instruments given as security for debt or as liens of any kind, including foreclosing, taking possession of property to which either is entitled as security, and protecting any and all interests or rights of either as a creditor in bankruptcy, receivership, or other proceedings as fully as could any other person entitled to do so; and

(7) Give deeds of assent and otherwise transfer or execute evidence of ownership of real and personal property located within this state pursuant to the decedent's will or under the laws of intestacy.

Any of the foregoing powers of the personal representative shall be exercised in the same manner and in conformity with all requirements applicable to a personal representative of a decedent who dies domiciled in this state. If the personal representative of a decedent who dies domiciled outside this state is acting pursuant to the decedent's will, the personal representative may exercise such powers to the extent and in the manner contemplated by the will as if the will had been admitted to probate within this state. The filing of a petition for ancillary probate or administration in this state shall suspend all authority of the personal representative to perform any act within this state as such personal representative, but such authority shall be reinstated if the petition is dismissed or if the proceedings are otherwise finally terminated without a grant of probate or administration in this state. Any suspension of authority shall not serve to abate any action pending in

any court in this state to which the personal representative is a party; when appropriate, the court may substitute a personal representative who becomes qualified in this state in place of the personal representative. The provisions of this Code section shall apply only if the personal representative is a citizen of the United States.

History. — Code 1981, § 53-5-42, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

The provisions of this section and the other sections in this Part Two replace former OCGA Sec. 53-3-49 and Secs. 53-6-120 through 53-6-126.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 10A Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 905.

53-5-43. Evidence of authority.

A copy of letters, or like documentation authenticated in accordance with Code Section 24-9-922, evidencing the qualification of the personal representative of the decedent who died domiciled outside this state, shall constitute prima-facie evidence of the authority of the personal representative to act in this state. Whenever a personal representative shall execute and deliver any deed of assent or conveyance with respect to real property located within this state, the personal representative shall attach to such deed as an exhibit the authenticated copy of the letters, and a certified copy of the will in the case of a testate decedent. The clerks of the superior courts of this state shall not be authorized to accept for filing and recording any deed given by such personal representative that does not conform to the foregoing requirements. Unless a third party has actual knowledge of the existence or pendency of ancillary probate or administration with respect to the decedent within this state, the third party who is dealing with the personal representative in reliance on the personal representative's letters and, in the case of a testate decedent, the out-of-state or foreign will, shall be fully protected.

History. — Code 1981, § 53-5-43, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2011, p. 99, § 99/HB 24.

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

COMMENT

See Code Section 24-7-24 for the rules governing proof of judicial records from other states.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 10A Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 905.

53-5-44. Application to protect interest in property.

Any person having an interest or claim as heir, beneficiary, or creditor with respect to any real or personal property located within this state of an individual who dies domiciled outside of this state may petition a probate court having jurisdiction for ancillary probate or administration and may apply to a court of equity to compel the personal representative to protect that person's interest. The court of equity may require ancillary probate or administration, transfer the matter to a probate court in this state having jurisdiction, and order the preservation of the existing status of the property pending the granting of ancillary probate or administration.

History. — Code 1981, § 53-5-44, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section replaces former OCGA Sec. 53-6-123.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 10A Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 905.

53-5-45. Jurisdiction.

(a) A personal representative of a decedent who died domiciled outside this state submits personally to the jurisdiction of the courts of this state in any proceeding relating to the estate by:

(1) Receiving payment of money or taking delivery of personal property belonging to the estate of the decedent; or

(2) Doing any act as a personal representative in this state that would have given the state jurisdiction over the actor as an individual.

Jurisdiction under paragraph (1) of this subsection is limited to the money or value of personal property collected.

(b) In addition to the jurisdiction conferred under subsection (a) of this Code section, a personal representative of a decedent who died

domiciled outside this state is subject to the jurisdiction of the courts of this state to the same extent that the decedent was subject to jurisdiction immediately prior to death.

History. — Code 1981, § 53-5-45, enacted by Ga. L. 1996, p. 504, § 10.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 10A Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 905.

53-5-46. Service of process.

(a) Service of process may be made upon the personal representative of a decedent who dies domiciled outside this state by registered or certified mail, addressed to the personal representative's last reasonably ascertainable address, requesting a return receipt signed by the addressee only. Service of process upon such a personal representative may also be perfected by statutory overnight delivery as provided in Code Section 9-10-12 if the receipt provided by the commercial delivery company is signed by the addressee. Notice by first-class mail is sufficient if certified or registered mail service to the addressee is unavailable. Service may be made upon the personal representative in the manner in which service could have been made under other laws of this state on either the personal representative or the decedent immediately prior to death.

(b) If service is made on the personal representative as provided in subsection (a) of this Code section, the personal representative shall be allowed at least 30 days within which to appear and respond.

History. — Code 1981, § 53-5-46, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2000, p. 1589, § 15.

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the Act shall be applicable with respect to notices delivered on or after July 1, 2000.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 10A Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 905.

53-5-47. Effect of adjudication.

An adjudication with respect to personal property rendered in any jurisdiction in favor of or against any personal representative of the estate of a decedent who died outside this state is as binding upon the personal representative as if that person were a party to the adjudication.

History. — Code 1981, § 53-5-47, enacted by Ga. L. 1996, p. 504, § 10.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 10A Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 905.

ARTICLE 6

JURISDICTION

53-5-50. Original jurisdiction; petition and pleading requirements.

(a) The probate court shall have original jurisdiction over any petition to vacate, set aside, or amend its order admitting a will to probate.

(b) A petition under subsection (a) of this Code section may be brought in the probate court to vacate, set aside, or amend its order admitting a will to probate based upon:

(1) Another will being entitled to be admitted to probate;

(2) A codicil to the probated will being entitled to be admitted to probate;

(3) Lack of jurisdiction;

(4) Fraud, accident, or mistake or the acts of the adverse party unmixed with the negligence or fault of the petitioner; or

(5) A nonamendable defect that appears upon the face of the record or pleadings.

(c)(1) Any such petition based upon paragraph (1) of subsection (b) of this Code section shall be combined with a petition to probate the other will in solemn form.

(2) Any such petition based upon paragraph (2) of subsection (b) of this Code section shall be combined with a petition to probate the codicil in solemn form.

(3) In any such petition based upon paragraph (1) or (2) of subsection (b) of this Code section, the court shall consider the petition to probate in solemn form together with the petition to vacate, set aside, or amend; and the court shall grant relief as is appropriate with respect to each matter.

(d) In any such petition based upon paragraph (5) of subsection (b) of this Code section, it is not sufficient that the pleadings fail to state a

claim upon which relief can be granted, but the pleadings must affirmatively show no claim in fact existed.

History. — Code 1981, § 53-5-50, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-26/HB 865.

The 2020 amendment, effective January 1, 2021, rewrote this Code section, which read: "(a) The probate court shall have original jurisdiction over any action to vacate, set aside, or amend its order admitting a will to probate which alleges:

"(1) That another will is entitled to be admitted to probate; or

"(2) That a codicil to the probated will is entitled to be admitted to probate

"(b) Any such action shall be combined with a petition to probate in solemn form the other will or codicil. The court shall consider the petition to probate together with the action to vacate, set aside, or amend; and the court shall grant relief as is appropriate with respect to each matter."

Law reviews. — For annual survey on wills, trusts, guardianships, and fiduciary administration, see 71 Mercer L. Rev. 327 (2019).

COMMENT

This section carries forward former OCGA Sec. 53-3-60. See Code Sec. 53-5-3, which establishes the time limit within which a will may be offered for probate.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former O.C.G.A. § 53-3-60 are included in the annotations for this Code section.

Applicability of section. — Statute, which gives original jurisdiction to the probate court over an action in which it alleged that a later will is entitled to be admitted to probate, is not applicable to an appeal filed before the effective date of former O.C.G.A. § 53-3-60. Lee v. Wainwright, 256 Ga. 478, 350 S.E.2d 238 (1986) (decided under former O.C.G.A. § 53-3-60).

Civil Practice Act not applicable to petition to set-aside in probate proceeding. — Probate court erred in rejecting the step-son's set-aside petition on the basis that the petition did not satisfy O.C.G.A. § 9-11-60(d) as that provision set out the narrow grounds on which a motion to set aside a judgment could be brought under the Civil Practice Act, O.C.G.A. T. 9, C. 11, but set-aside petitions in probate proceedings were special statutory proceedings, and the specific rules of practice and procedure for such petitions were set out at O.C.G.A. §§ 53-5-50 and 53-5-51; thus, to the extent that those specific rules of practice and procedure conflicted with the Civil Practice Act, pursuant to O.C.G.A. § 9-11-81, the Civil Practice Act did not apply; thus, the probate court's order ruling on the set-aside petition was reversed. In re Estate of Jones, 346 Ga. App. 877, 815 S.E.2d 599 (2018).

Because the Civil Practice Act's (O.C.G.A. T. 9, C. 11) procedure for attacking a judgment through a set-aside motion was more restrictive than the Probate Code's procedure for attacking an order admitting a will to probate on the ground that another will should be admitted to probate, the constraints of the Civil Practice Act did not apply in the probate proceeding, and the probate court erred in denying the step-son's set-aside petition for failing to meet the requirements of the Civil Practice Act, rather than ruling on the merits of the petition. In re Estate of Jones, 346 Ga. App. 877, 815 S.E.2d 599 (2018).

53-5-51. Contents of petition; service of notice; issuance of relief.

(a) A petition made pursuant to Code Section 53-5-50 shall set forth the allegations on which such petition is based and the name and address of the then acting personal representative, if any, of the estate, or, if none, the beneficiaries of the previously probated will required to be served by Code Section 53-5-22. Such petition shall conclude with a prayer for the issuance of an order vacating, setting aside, or amending the earlier probate and, if such petition is based upon paragraph (1) or (2) of subsection (b) of Code Section 53-5-50, for the probate of the newly propounded will or codicil in solemn form and for the issuance of new letters testamentary.

(b) The beneficiaries under the previously probated will shall be represented in the action by the then acting personal representative, if any; and service of notice upon the personal representative in the same manner as provided for by law under Chapter 11 of this title shall be the equivalent of service of notice upon the beneficiaries.

(c) If there is no then acting personal representative, such petition and the citation issued thereon shall be served upon the beneficiaries who are required to be served by Code Section 53-5-22 of the previously probated will, in the same manner as upon the heirs, unless all such parties assent to such petition.

(d) If the then acting personal representative acknowledges service of such petition and notice and assents to the relief in the acknowledgment of service of such petition and notice, the relief prayed for in such petition may issue without delay. In the event there is no then acting personal representative, if all the beneficiaries acknowledge service of such petition and notice and assent in their acknowledgments, such relief may issue without delay.

History. — Code 1981, § 53-5-51, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-27/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (a), in the first sentence, substituted "A petition" for "The petition" and "such petition" for "the action", and, in the second sentence, substituted "Such petition" for "The petition" at the beginning, substituted "probate and, if such petition is based upon paragraph (1) or (2) of subsection (b) of Code Section 53-5-50, for" for "probate;", substituted "newly propounded will" for "new will", and substituted "form and for" for "form; and"; inserted "of notice" preceding "upon the beneficiaries" at the end of subsection (b); in subsection (c), substituted "such petition and the citation issued thereon" for "the petition" near the beginning, and substituted "such petition" for "the petition" at the end; and, in subsection "(d), in the first sentence, substituted "such petition and notice and" for "the petition and" and substituted "of such petition and notice, the relief prayed for in such petition" for "the relief upon the petition", and, in the second sentence, substituted "such petition and notice and assent in their acknowledgments, such relief" for "the petition and assent in their acknowledgments, the relief".

Law reviews. — For annual survey on wills, trusts, guardianships, and fiduciary

administration, see 71 Mercer L. Rev. 327 (2019).

COMMENT

This section replaces former OCGA Sec. 53-3-61.

JUDICIAL DECISIONS

Civil Practice Act not applicable to petition to set-aside in probate proceeding. — Probate court erred in rejecting the step-son's set-aside petition on the basis that the petition did not satisfy O.C.G.A. § 9-11-60(d) as that provision set out the narrow grounds on which a motion to set aside a judgment could be brought under the Civil Practice Act, O.C.G.A. T. 9, C. 11, but set-aside petitions in probate proceedings were special statutory proceedings, and the specific rules of practice and procedure for such petitions were set out at O.C.G.A. §§ 53-5-50 and 53-5-51; thus, to the extent that those specific rules of practice and procedure conflicted with the Civil Practice Act, pursuant to O.C.G.A. § 9-11-81, the Civil Practice Act did not apply; thus, the probate court's order ruling on the set-aside petition was reversed. In re Estate of Jones, 346 Ga. App. 877, 815 S.E.2d 599 (2018).

Because the Civil Practice Act's (O.C.G.A. T. 9, Ch. 11) procedure for attacking a judgment through a set-aside motion was more restrictive than the Probate Code's procedure for attacking an order admitting a will to probate on the ground that another will should be admitted to probate, the constraints of the Civil Practice Act did not apply in the probate proceeding, and the probate court erred in denying the step-son's set-aside petition for failing to meet the requirements of the Civil Practice Act, rather than ruling on the merits of the petition. In re Estate of Jones, 346 Ga. App. 877, 815 S.E.2d 599 (2018).

53-5-52. Time limitation; filing of petition constitutes claim against estate.

(a) A petition based upon paragraph (1) or (2) of subsection (b) of Code Section 53-5-50 shall be brought before:

(1) The probate of the previously probated will becomes conclusive upon the petitioner under Code Section 53-5-19 or 53-5-20; and

(2) The expiration of the time within which the newly propounded will must be offered for probate under Code Section 53-5-3.

(b) A petition based upon paragraph (3) of subsection (b) of Code Section 53-5-50 may be brought at any time.

(c) In all other instances, a petition made pursuant to this article shall be brought within three years from entry of the order admitting a will to probate.

(d) The filing of a petition made pursuant to this article shall constitute a claim against a decedent's estate that arose before the death of the decedent for purposes of Code Section 9-3-36.

History. — Code 1981, § 53-5-52, enacted by Ga. L. 2020, p. 377, § 1-28/HB 865.

Effective date. — This Code section became effective January 1, 2021.

53-5-53. Applicability of article.

The provisions of this article shall govern in proceedings in the probate court to vacate, set aside, or amend an order admitting a will to probate, and the provisions of Code Section 9-11-60 shall not be applicable to such proceedings.

History. — Code 1981, § 53-5-53, enacted by Ga. L. 2020, p. 377, § 1-28/HB 865.

Effective date. — This Code section became effective January 1, 2021.

ARTICLE 7

UNIFORM TRANSFER ON DEATH SECURITY REGISTRATION

Cross references. — Securities, T. 10, C. 5. Investment securities, T. 11, C. 8. Registration and deposit of securities, § 53-12-300 et seq.

Law reviews. — For annual survey article discussing wills, trusts and administration of estates, see 51 Mercer L. Rev. 487 (1999).

For note on 1999 enactment of this article, see 16 Ga. St. U.L. Rev. 283 (1999).

RESEARCH REFERENCES

U.L.A. — Uniform Transfer on Death Security Registration Act (U.L.A.) § 1 et seq.

53-5-60. Short title.

This article shall be known and may be cited as the "Uniform Transfer on Death Security Registration Act."

History. — Code 1981, § 53-5-60, enacted by Ga. L. 1999, p. 805, § 1.

RESEARCH REFERENCES

U.L.A. — Uniform Transfer on Death Security Registration Act (U.L.A.) § 1 et seq.

53-5-61. Definitions.

As used in this article, the term:

(1) "Beneficiary form" means a registration of a security which indicates the present owner of the security and the intention of the

owner regarding the person who will become the owner of the security upon the death of the owner.

(2) "Register," including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities.

(3) "Registering entity" means a person who originates or transfers a security title by registration and includes a broker maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities.

(4) "Security" means a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer and includes a certificated security, an uncertificated security, and a security account.

(5) "Security account" means:

(A) A reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to the account before the owner's death; or

(B) A cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner's death.

History. — Code 1981, § 53-5-61, enacted by Ga. L. 1999, p. 805, § 1.

53-5-62. Ownership of a security.

Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entireties, or as owners of community property held in survivorship form and not as tenants in common.

History. — Code 1981, § 53-5-62, enacted by Ga. L. 1999, p. 805, § 1.

53-5-63. Authorization of beneficiary form.

A security may be registered in beneficiary form if the form is authorized by this or a similar statute of the state of organization of the issuer or registering entity, the location of the registering entity's principal office, the office of its transfer agent or its office making the registration, or by this or a similar statute of the state listed as the owner's address at the time of registration. A registration governed by the law of a jurisdiction in which this or a similar statute is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law.

History. — Code 1981, § 53-5-63, enacted by Ga. L. 1999, p. 805, § 1.

53-5-64. Registration of a beneficiary form.

A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners.

History. — Code 1981, § 53-5-64, enacted by Ga. L. 1999, p. 805, § 1.

53-5-65. Words used in beneficiary form.

Registration in beneficiary form may be shown by the words "transfer on death" or the abbreviation "TOD," or by the words "pay on death" or the abbreviation "POD," after the name of the registered owner and before the name of a beneficiary.

History. — Code 1981, § 53-5-65, enacted by Ga. L. 1999, p. 805, § 1.

53-5-66. Designation of transfer in beneficiary form.

The designation of a transfer on death beneficiary on a registration in beneficiary form has no effect on ownership until the owner's death. A registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all the then surviving owners without the consent of the beneficiary.

History. — Code 1981, § 53-5-66, enacted by Ga. L. 1999, p. 805, § 1.

53-5-67. Ownership of registered security after death.

On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survive the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

History. — Code 1981, § 53-5-67, enacted by Ga. L. 1999, p. 805, § 1.

53-5-68. Duties of registering entity; implementation of registration; applicability of Code Section 53-5-67; protective effect.

(a) A registering entity is not required to offer or to accept a request for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by this article.

(b) By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner as provided in this article.

(c) A registering entity is discharged from all claims to a security by the estate, creditors, heirs, or devisees of a deceased owner if it registers a transfer of the security in accordance with Code Section 53-5-67 and does so in good faith reliance on the registration, on this article, and on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity. The protections of this article do not extend to a reregistration or payment made after a registering entity has received written notice from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under this article.

(d) The protection provided by this article to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds.

History. — Code 1981, § 53-5-68, enacted by Ga. L. 1999, p. 805, § 1.

53-5-69. Effect of beneficiary form.

(a) A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this article and is not testamentary.

(b) This article does not limit the rights of creditors of security owners against beneficiaries and other transferees under other laws of this state.

History. — Code 1981, § 53-5-69, enacted by Ga. L. 1999, p. 805, § 1.

53-5-70. Terms and conditions of beneficiary form; illustrations.

(a) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests for registrations in beneficiary form and for implementation of registrations in beneficiary form, including requests for cancellation of previously registered transfer on death beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions so established may provide for proving death, avoiding or resolving any problems concerning fractional shares, designating primary and contingent beneficiaries, and substituting a named beneficiary's descendants to take in the place of the named beneficiary in the event of the beneficiary's death. Substitution may be indicated by appending to the name of the primary beneficiary the letters "LDPS," standing for lineal descendants per stirpes. This designation substitutes a deceased beneficiary's descendants who survive the owner for a beneficiary who fails to so survive, the descendants to be identified and to share in accordance with the law of the beneficiary's domicile at the owner's death governing inheritance by descendants of an intestate. Other forms of identifying beneficiaries who are to take on one or more contingencies and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form may be contained in a registering entity's terms and conditions.

(b) The following are illustrations of registrations in beneficiary form which a registering entity may authorize:

(1) Sole owner-sole beneficiary: John S. Brown TOD (or POD) John S. Brown, Jr.;

(2) Multiple owners-sole beneficiary: John S. Brown Mary B. Brown JT TEN TOD John S. Brown, Jr.;

(3) Multiple owners-primary and secondary (substituted) beneficiaries: John S. Brown Mary B. Brown JT TEN TOD John S. Brown, Jr., SUB BENE Peter Q. Brown or John S. Brown Mary B. Brown JT TEN TOD John S. Brown, Jr., LDPS.

History. — Code 1981, § 53-5-70, enacted by Ga. L. 1999, p. 805, § 1.

53-5-71. Applicability of article.

This article applies to registrations of securities in beneficiary form made before or after July 1, 1999, by decedents dying on or after July 1, 1999.

History. — Code 1981, § 53-5-71, enacted by Ga. L. 1999, p. 805, § 1.

CHAPTER 6

ADMINISTRATORS AND PERSONAL REPRESENTATIVES

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Cross references. — Time limitation on actions against administrators and executors, § 9-3-27. Petitions for declaratory judgments involving acts by executors and administrators, questions arising in administration of estates or trusts, § 9-4-4. Jurisdiction of judge of probate court to grant administration on estates generally, § 15-9-31.

Editor's notes. — This chapter was effective January 1, 1998, to the extent that no vested rights of title, year's support, succession, or inheritance are impaired, as provided by the version of Code Section 53-1-1 enacted by Ga. L. 1996, p. 504, § 10, as amended by Ga. L. 1997, p. 1352, § 1.

Ga. L. 1996, p. 504, § 10, effective January 1, 1998, repealed the Code sections formerly codified at this chapter, and enacted the current chapter. The former chapter consisted of §§ 53-6-1 through 53-6-151, and was based on Laws 1764, Cobb's 1851 Digest, pp. 302, 304, 305; Laws 1784, Cobb's 1851 Digest, p. 304; Laws 1789, Cobb's 1851 Digest, p. 305; Laws 1792, Cobb's 1851 Digest, pp. 306-309; Laws 1799, Cobb's 1851 Digest, pp. 311, 312; Laws 1805, Cobb's 1851 Digest, p. 283; Laws 1807, Cobb's 1851 Digest, p. 315; Laws 1808, Cobb's 1851 Digest, p. 283; Laws 1810, Cobb's 1851 Digest, p. 316; Laws 1827, Cobb's 1851 Digest, p. 294; Laws 1828, Cobb's 1851 Digest, p. 327; Laws 1839, Cobb's 1851 Digest, p. 286; Laws 1847, Cobb's 1851 Digest, p. 377; Laws 1850, Cobb's 1851 Digest, pp. 340, 341; Ga. L. 1851-52, p. 49, § 1; Ga. L. 1851-52, p. 99, § 1; Ga. L. 1851-52, p. 100, § 1; Ga. L. 1855-56, p. 146, § 1; Ga. L. 1855-56, p. 228, § 3; Ga. L. 1859, p. 33, §§ 3, 6; Ga. L. 1860, p. 32, § 1; Orig. Code 1863, §§ 2395, 2403-2405, 2408, 2410, 2411, 2414, 2416, 2418, 2456-2461, 2464-2467, 2547-2555, 2571-2574; Laws 1864, Cobb's 1851 Digest, p. 303; Ga. L. 1865-66, p. 29, § 1; Ga. L. 1865-66, p. 30, § 3; Ga. L. 1865-66, p. 83, § 1; Ga. L. 1866, p. 66, §§ 1, 2; Code 1868, §§ 2391, 2399-2401, 2404, 2406, 2407, 2410, 2412, 2414, 2451-2458, 2461, 2463-2465, 2548-2553, 2555, 2556, 2573-2576; Ga. L. 1868, p. 25, § 1; Code 1873, §§ 2426, 2434-2436, 2439, 2441, 2442, 2445, 2448, 2450, 2487-2494, 2498, 2500, 2502-2504, 2554, 2589-2597, 2614-2618; Ga. L. 1876, p. 36, § 1; Code 1882, §§ 2426, 2434, 2435, 2436, 2439, 2441, 2442, 2445, 2448, 2450, 2488-2494, 2497, 2498, 2500, 2502-2504, 2589-2597, 2614-2618; Ga. L. 1882-83, p. 79, §§ 1-14; Ga. L. 1893, p. 36, § 1; Civil Code 1895, §§ 3284, 3293-3295, 3308, 3310, 3311, 3313, 3316, 3318, 3359, 3360, 3362-3367, 3371, 3372, 3376-3389, 3393-3395, 3484-3492, 3521-3525; Ga. L. 1903, p. 75, §§ 1, 2; Civil Code 1910, §§ 3858, 3867-3869, 3884, 3886, 3887, 3889, 3892, 3894, 3935, 3936, 3938-3940, 3943, 3947, 3948, 3952-3965, 3969-3971, 4062-4072, 4101-4105; Ga. L. 1929, p. 168, § 1; Code 1933, §§ 113-1101, 113-1102, 113-1201, 113-1202, 113-1205 through 113-1215, 113-1221, 113-1227, 113-1228, 113-1301 through 113-1314, 113-1503, 113-2001 through 113-2011, 113-2401 through 113-2406; Ga. L. 1943, p. 416, §§ 1-6; Ga. L. 1947, p. 1448, §§ 1-4; Ga. L. 1952, p. 87, §§ 1-3; Ga. L. 1958, p. 657, §§ 23, 25; Ga. L. 1962, p. 122, § 1; Ga. L. 1962, p. 610, § 1; Ga. L. 1962, p. 613, § 1; Ga. L. 1964, p. 300, § 1; Ga. L. 1969, p. 1139, §§ 1, 2; Ga. L. 1970, p. 523, § 1; Ga. L. 1972, p. 449, § 1; Ga. L. 1973, p. 481, § 1; Ga. L. 1973, p. 547, §§ 1-3; Ga. L. 1978, p. 1509, § 1; Ga. L. 1979, p. 1325, § 1; Ga. L. 1981, p. 547, § 1; Ga. L. 1982, p. 3, § 53; Ga. L. 1982, p. 2107, § 53; Ga. L. 1984, p. 22, § 53; Ga. L. 1984, p. 937, §§ 2-4; Ga. L. 1986, p. 200, § 1; Ga. L. 1987, p. 477, § 1; Ga. L. 1987, p. 539, § 1; Ga. L. 1988, p. 371, § 1; Ga. L. 1989, p. 914, §§ 1, 2; Ga. L. 1990, p. 350, §§ 2, 3; Ga. L. 1991, p. 394, §§ 3, 4; Ga. L. 1991, p. 810, § 10; Ga. L. 1992, p. 983, § 1; Ga. L. 1994, p. 1173, § 3.

Law reviews. — For annual survey of law of wills, trusts, and administration of estates, see 40 Mercer L. Rev. 471 (1988).

ARTICLE 1
GENERAL PROVISIONS

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, § 1 et seq.

53-6-1. Eligibility.

Any individual who is sui juris, regardless of citizenship or residency, is eligible to serve as a personal representative or temporary administrator of a decedent who dies domiciled in this state, subject to the requirements for qualification set forth in this chapter. Any other person is eligible to serve as a personal representative or temporary administrator of a decedent who dies domiciled in this state, subject to the requirements set forth in this chapter, provided the person is otherwise qualified to act as a fiduciary in this state.

History. — Code 1981, § 53-6-1, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 19.

COMMENT

This section broadens former OCGA Sec. 53-6-22 and 53-6-23 by allowing an individual to serve as the personal representative of a Georgia decedent's estate regardless of whether that individual is a resident of Georgia or a citizen of the United States. The second sentence of this section clarifies that other persons who are authorized to act as fiduciaries in this state may act as personal representatives. See OCGA Sec. 53-1-2 for the definitions of "person" and "personal representative". See OCGA Secs. 7-1-242 and Part 3 of Article 16 of Chapter 12 of Title 53 for provisions relating to the qualification of certain persons to act as fiduciaries.

RESEARCH REFERENCES

ALR. — Who is resident within meaning of statute prohibiting appointment of nonresident executor or administrator, 9 A.L.R.4th 1223.

53-6-2. Executor de son tort.

Any person who, without authority of law, wrongfully intermeddles with or converts the personalty of a decedent whose estate is unrepresented shall be deemed an executor de son tort and as such shall be liable to the creditors and heirs or beneficiaries of the estate for double the value of the property so possessed and converted. Such executor shall not be allowed to set off any debt due the executor by the decedent or voluntarily paid by the executor out of the assets. If the executor dies, the executor's personal representative shall be liable in the same manner and to the same extent as would the executor were the executor still living.

History. — Code 1981, § 53-6-2, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-6-3 and replaces the term "executor in his own wrong" with the term "executor de son tort".

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-1102, are included in the annotations for this Code section.

Accountability as executor and holder of life estate. — When an executor also held a life estate in property, the executor's broad power as life tenant was not determinative of the executor's liability for an accounting of the estate in the executor's capacity as executor, in the face of the remainderman's claims of fraud and mismanagement. Cannon v. Bangs, 269 Ga. 671, 502 S.E.2d 224 (1998).

Trial court erred to the extent the court applied the presumption in O.C.G.A. § 7-1-813(a) to funds which the executors withdrew from the original joint accounts and placed in accounts solely in their name because to the extent they took funds in excess of their ownership from a joint account containing funds owned by two beneficiaries and placed those funds in an account in their name, they severed the joint account relationship and extinguished the presumption that the funds belonged to them. Shirley v. Sailors, 329 Ga. App. 850, 766 S.E.2d 201 (2014).

Alteration of compensatory award after appeal. — Trial court erred when the court altered the award to the decedent's estate of compensatory damages, under O.C.G.A. § 53-6-2, after the executor's unsuccessful first appeal. In re Estate of Tapley, 312 Ga. App. 234, 718 S.E.2d 92 (2011).

Cited in Comerford v. Hurley, 246 Ga. 501, 271 S.E.2d 782 (1980); Woodes v. Morris, 247 Ga. 771, 279 S.E.2d 704 (1981).

ARTICLE 2

APPOINTMENT

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, § 157 et seq.

Am. Jur. Pleading and Practice Forms. — Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 129 et seq.

53-6-10. Nomination by testator.

(a) No formal words are necessary for the nomination of an executor. An expression by the testator of a desire that the person carry into effect the testator's wishes shall amount to a nomination as executor.

(b) Unless adjudged unfit, nominated executors shall have the right to qualify in the order set out in the will.

(c) An individual who has not reached the age of majority may be nominated as an executor but may not qualify until reaching the age of majority.

(d) If the will names a person to fill a vacancy in the office of executor or provides a method of selecting a personal representative to fill the vacancy, any vacancy shall be filled or selection made as provided in the will.

History. — Code 1981, § 53-6-10, enacted by Ga. L. 1996, p. 504, § 10.
Cross references. — Administration of ward's estate by guardian, §§ 29-2-23, 29-2-24, 29-2-42 et seq. Age of majority, § 39-1-1.

COMMENT

Subsection (a) carries forward the substance of former OCGA Sec. 53-6-20. Subsection (b) clarifies that the order in which nominated executors and successor or alternative executors may qualify is that set out by the testator in the will. Subsection (c) carries forward the substance of former OCGA Sec. 53-6-21 and deletes the provision that allowed the testator to direct that an underage individual could qualify. Subsection (d) clarifies that vacancies in the office of executor shall be filled as provided in the will. This subsection reflects the provisions for trustees that appear at Code Sec. 53-12-170(b). See Code Sec. 53-1-2 for the definitions of "executor," "nominated executor," and "personal representative".

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, § 159.
Am. Jur. Pleading and Practice Forms. — 10 Am. Jur. Pleading and Practice Forms, Executors and Administrators, §§ 3, 43, 44.

53-6-11. Qualification.

(a) If the nominated executor does not qualify within 90 days after the order admitting the will to probate is entered or is proved to be dead or incapacitated or renounces the right to serve, the next nominated executor in the order set out in the will may qualify. If the next nominated executor fails to qualify within 90 days after the expiration of the time period by which the first nominated executor must qualify or is proved to be dead or incapacitated or renounces the right to serve, any nominated executor may qualify. If no nominated executor appears to qualify within a reasonable time or if there is no other executor named in the will, the estate shall be deemed to be unrepresented.

(b) A nominated executor who fails to qualify within the time period set out in subsection (a) of this Code section is deemed to have declined the right to serve as executor; provided, however, that this declination does not preclude the nominated executor from qualifying to serve as executor or administrator with the will annexed at a later time.

History. — Code 1981, § 53-6-11, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 20.
Cross references. — Tolling of limitations during period between death of person and commencement of representation upon his estate, §§ 9-3-92, 9-3-93.

COMMENT

This section replaces former OCGA Secs. 53-3-4, 53-6-70, and 53-6-71. This section requires a person who is named in the will as executor to qualify to serve within 90 days of the date the will is admitted to probate or be deemed to have declined the right to serve. If the nominated executor does not qualify within 90 days, the person who is named in the will as the next alternative or successor executor may qualify. But if that next nominated executor does not qualify within 90 days, any person named in the will may qualify to serve as executor; if no one applies to do so, the estate is deemed to be unrepresented. See Code Sec. 53-6-13, which provides for the appointment of an administrator with will annexed in any case in which a testate estate is or becomes unrepresented. This section also provides that the failure to qualify within the specified time period does not automatically preclude the nominated executor from qualifying at a later time. See Code Sec. 53-6-12, which provides the same rule in the event a nominated executor voluntarily declines to serve. See Code Sec. 53-1-2 for the definitions of "administrator with the will annexed," "executor," and "nominated executor".

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 3868 and former Code 1933, § 113-615, are included in the annotations for this Code section.

Cited in Trustees of the Univ. of Ga. v. Denmark, 141 Ga. 390, 81 S.E. 238 (1914); Young v. Freeman, 153 Ga. 827, 113 S.E. 204 (1922); Irwin v. Peek, 171 Ga. 375, 155 S.E. 515 (1930); Carmichael v. Mobley, 50 Ga. App. 574, 178 S.E. 418 (1934); Robinson v. Georgia Sav. Bank & Trust Co., 106 F.2d 944 (5th Cir. 1939); Lewis v. Patterson, 191 Ga. 348, 12 S.E.2d 593 (1940); Fletcher v. Gillespie, 201 Ga. 377, 40 S.E.2d 45 (1946); Armstrong v. Merts, 76 Ga. App. 465, 46 S.E.2d 529 (1948); Allen v. Heys, 204 Ga. 635, 51 S.E.2d 417 (1949); Wheeler v. Wheeler, 82 Ga. App. 831, 62 S.E.2d 579 (1950); Oakley v. Anderson, 235 Ga. 607, 221 S.E.2d 31 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, § 198 et seq. 79 Am. Jur. 2d, Wills, § 730.

C.J.S. — 33 C.J.S., Executors and Administrators, § 34. 95 C.J.S., Wills, §§ 441, 443, 444.

ALR. — Statutes dealing with existing intestate administration, upon discovery of will, 65 A.L.R.2d 1201.

Statute limiting time for probate of will as applicable to will probated in another jurisdiction, 87 A.L.R.2d 721.

What circumstances excuse failure to submit will for probate within time limit set by statute, 17 A.L.R.3d 1361.

Right to probate subsequently discovered will as affected by completed prior proceedings in intestate administration, 2 A.L.R.4th 1315.

53-6-12. Declination.

A nominated executor may decline in writing the right to serve as executor, but this shall not preclude the nominated executor from qualifying at a later time to serve as executor or administrator with the will annexed to fill a vacancy.

History. — Code 1981, § 53-6-12, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section replaces former OCGA Secs. 53-6-70 and 53-6-71 and changes the rule that prohibited an executor who had renounced the office from ever serving as executor or administrator with will annexed of the estate. See Code Sec. 53-6-13, which provides for the appointment of an administrator with the will annexed in any case in which the estate is or become[s] unrepresented. See Code Sec. 53-1-2 for the definitions of "administrator with the will annexed," "executor," and "nominated executor".

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-6-71 are included in the annotations for this Code section.

Attempt to reinstate executor denied. — After a widow renounced her right to serve as executor, but attempted to reinstate herself after the court denied appointment to the widow's choice as administrator, there was no error in the trial court's denial of the motion to substitute the widow as executor or the denial of a motion for judgment on the pleadings based on the attempted substitution. Dismuke v. Dismuke, 195 Ga. App. 613, 394 S.E.2d 371 (1990), cert. denied, No. S95C1495, 1995 Ga. LEXIS 1050 (1995), cert. denied, No. S98C1936, 1999 Ga. LEXIS 39 (1999) (decided under former O.C.G.A. § 53-6-71).

53-6-13. Appointment by court.

Unless another nominated executor qualifies within the time provided in Code Section 53-6-11, the probate court shall appoint an administrator with the will annexed of a testate estate when:

(1) No executor is nominated in the will;

(2) The nominated executor has not reached the age of majority, to serve until the disability ceases;

(3) The executor dies, resigns, or otherwise becomes disqualified to serve; or

(4) A testate estate is unrepresented for any other reason.

History. — Code 1981, § 53-6-13, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward the substance of former OCGA Secs. 53-6-29 and 53-6-31. See Code Sec. 53-1-2 for the definitions of "administrator with the will annexed," "executor," and "nominated executor".

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-6-29 are included in the annotations for this Code section.

Construed with § 53-6-24. — Because former O.C.G.A. § 53-6-24 did not declare that all the beneficiaries under a will must agree to the naming of an administrator with will annexed, the rule of construction in O.C.G.A. § 1-3-1(d)(5), that a joint authority given to any number of persons or officers may be executed by a majority of them unless it is otherwise declared applied. Dismuke v. Dismuke, 195 Ga. App. 613, 394 S.E.2d 371 (1990), cert. denied, No. S95C1495, 1995 Ga. LEXIS 1050 (1995), cert. denied, No. S98C1936, 1999 Ga. LEXIS 39 (1999) (decided under former O.C.G.A. § 53-6-29).

Since a will did not name a successor executor in the event the named executor was incompetent, the trial court correctly followed the procedure of former O.C.G.A. §§ 53-6-24 and 53-6-29 in appointing the testator's son as administrator with the will annexed when the son was the choice of the majority of heirs under the will. Robbins v. Vanbrackle, 267 Ga. 871, 485 S.E.2d 468 (1997) (decided under former O.C.G.A. § 53-6-29).

Appointment of successor executor. — Subsection (b) of former O.C.G.A. § 53-6-24, providing for appointment of successor executor, applies only in the absence of a testamentary provision covering such appointment. Thomas v. Thomas, 262 Ga. 707, 425 S.E.2d 287 (1993) (decided under former O.C.G.A. § 53-6-29).

53-6-14. Selection by beneficiaries.

(a) For purposes of this Code section, a beneficiary who is capable of expressing a choice is one:

(1) Who has a present interest, including but not limited to a vested remainder interest but not including trust beneficiaries where there is a trustee; and

(2) Whose identity and whereabouts are known or may be determined by reasonable diligence.

(b) An administrator with the will annexed may be unanimously selected by the beneficiaries of the will who are capable of expressing a choice unless the sole beneficiary is the decedent's surviving spouse and an action for divorce or separate maintenance was pending between the decedent and the surviving spouse at the time of death. When no such unanimous selection is made, the probate court shall make the appointment that will best serve the interests of the estate, considering the following preferences:

(1) Any beneficiary or the trustee of any trust that is a beneficiary under the will; or

(2) Those persons listed in paragraphs (3) through (5) of Code Section 53-6-20.

(c) For purposes of this Code section, a beneficiary's choice is expressed by:

(1) That beneficiary, if the beneficiary is sui juris;

(2) That beneficiary's duly acting conservator or guardian or, if there is no conservator or guardian, the person having custody of the beneficiary, if the beneficiary is not sui juris;

(3) The trustee of a trust that is a beneficiary under the will, where there is a trustee;

(4) The beneficiary of a trust that is a beneficiary under the will, where there is no trustee; provided, however, that for purposes of this paragraph, a trust beneficiary may be represented as provided in Code Section 53-12-8; or

(5) The personal representative of a deceased beneficiary receiving a present interest under the will.

History. — Code 1981, § 53-6-14, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 11; Ga. L. 2020, p. 377, § 1-29/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (c), inserted "the beneficiary is" in paragraph (c)(1), substituted "duly acting conservator or guardian or, if there is no conservator or guardian" for "guardian or, if none" in paragraph (c)(2), substituted "will, where there is a trustee;' for "will; or" at the end of paragraph (c)(3), inserted paragraph (c)(4) and redesignated former paragraph (c)(4) as paragraph (c)(5).

Law reviews. — For annual survey of law of wills, trusts, and administration of estates, see 38 Mercer L. Rev. 417 (1986). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

COMMENT

This section replaces former OCGA Sec. 53-6-24(b) and repeals the requirement of former OCGA Sec. 53-6-23 that an administrator with the will annexed who is not also an heir be a citizen of the United States residing in Georgia. See Code Sec. 53-6-1 for the eligibility requirements for personal representatives. See Code Sec. 53-11-2 for provisions relating to the appointment of a guardian for an individual who is not sui juris. See Code Sec. 53-1-2 for the definitions of "administrator with the will annexed," "beneficiary," and "personal representative."

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-6-24 are included in the annotations for this Code section.

Appointment of personal representative. — When the statute did not resolve a contest for appointment as personal representative, and the appellate court was not provided a transcript of the proceedings before the trial court, the appellate court had to presume the evidence before the trial court authorized the court's judgment that the appointment of the person the court selected was in the best interests of the estate. Sherard v. Aldridge, 251 Ga. App. 445, 554 S.E.2d 590 (2001).

Selection of most nearly related relative. — Selection of intestate's daughter, rather than a grandson, to act as administrator was proper because the daughter was nearer to the intestate by blood and two of the three next of kin who were distributees had selected the daughter to so act. Brannen v. Boyce, 190 Ga. App.

385, 378 S.E.2d 743 (1989) (decided under former O.C.G.A. § 53-6-24).

Effect of divorce or separation. — Surviving spouse is not entitled to serve as administrator of her estranged spouse's estate merely because the couple's divorce decree was not made the final order of the court at the time of spouse's death. Simpson v. King, 259 Ga. 420, 383 S.E.2d 120 (1989) (decided under former O.C.G.A. § 53-6-24).

Effect of pending divorce. — When there was a divorce pending at the time of decedent's death, the surviving spouse was disqualified to act as administrator but, since the decedent died without lineal heirs, such disqualification did not change the spouse's status as the sole heir; neither decedent's father nor decedent's siblings were "next of kin" interested in the estate as distributees and the father had no standing to challenge the probate court's proper appointment of the county administrator as administrator of the estate. McClinton v. Sullivan, 263 Ga. 711, 438 S.E.2d 71 (1994) (decided under former O.C.G.A. § 53-6-24).

Acquiescence in an application is not tantamount to nomination. General Accident Ins. Co. v. Wells, 179 Ga. App. 440, 346 S.E.2d 886 (1986) (decided under former O.C.G.A. § 53-6-24).

Creditors may not appoint non-creditor. — When appointee was not a creditor of the estate, the appointee was not qualified to be appointed by the estate's creditors under paragraph (6) of former O.C.G.A. § 53-6-24. General Accident Ins. Co. v. Wells, 179 Ga. App. 440, 346 S.E.2d 886 (1986) (decided under former O.C.G.A. § 53-6-24).

Caveator is not prohibited from being appointed as administrator. Glad v. Scott, 187 Ga. App. 748, 371 S.E.2d 271 (1988) (decided under former O.C.G.A. § 53-6-24).

Beneficiaries' right to choose administrator. — Because the statute did not declare that all the beneficiaries under a will must agree to the naming of an administrator with will annexed, the rule of construction in O.C.G.A. § 1-3-1(d)(5), that a joint authority given to any number of persons or officers may be executed by a majority of them unless it is otherwise declared applied. Dismuke v. Dismuke, 195 Ga. App. 613, 394 S.E.2d 371 (1990), cert. denied, No. S95C1495, 1995 Ga. LEXIS 1050 (1995), cert. denied, No. S98C1936, 1999 Ga. LEXIS 39 (1999) (decided under former O.C.G.A. § 53-6-24).

Revocation of letters of administration. — Since the findings and conclusions of the probate court established that a former spouse's marital status was not correctly stated in the former spouse's application for letters of administration, and that this incorrect information was a material factor in the issuance of those letters, it was not an abuse of discretion to remove the former spouse as administrator of the deceased's estate. In re Estate of Dunn, 236 Ga. App. 211, 511 S.E.2d 575 (1999) (decided under former O.C.G.A. § 53-6-24).

Appointment of successor executor. — Former subsection (b), providing for appointment of a successor executor, applied only in the absence of a testamentary provision covering such appointment. Thomas v. Thomas, 262 Ga. 707, 425 S.E.2d 287 (1993) (decided under former O.C.G.A. § 53-6-24).

Cited in Blount v. Spell, 172 Ga. App. 411, 323 S.E.2d 211 (1984); Wilson v. Willard, 183 Ga. App. 204, 358 S.E.2d 859 (1987); Clarke v. Clarke, 188 Ga. App. 198, 372 S.E.2d 475 (1988).

RESEARCH REFERENCES

ALR. — Adverse interest or position as disqualification for appointment of administrator, executor, or other personal representative, 11 A.L.R.4th 638.

53-6-15. Petition for letters of administration with will annexed.

(a) Every petition for letters of administration with the will annexed shall be made in accordance with the procedures set forth in Code Section 53-5-21 if the will has not yet been admitted to probate and shall include a prayer for issuance of letters of administration with the will annexed. Such petition shall set forth the names, addresses, and ages or majority status of the beneficiaries who are capable of expressing a choice, as defined in subsection (a) of Code Section 53-6-14, and the circumstances giving rise to the need for an administrator with the will annexed. Such petition and the citation issued thereon shall be served by the court on the beneficiaries of the will who are capable of expressing a choice in the manner provided by Chapter 11 of this title. If the petition for letters of administration with the will annexed is based upon the expiration of a reasonable time for any nominated executor to qualify, any nominated executor who has failed to qualify shall also be served with notice by the court in the manner provided by Chapter 11 of this title.

(b) If the will has been admitted to probate, the petition for letters of administration with the will annexed shall set forth the names, addresses, and ages or majority status of the beneficiaries who are capable of expressing a choice, as described in subsection (a) of Code Section 53-6-14, the date on which the will was admitted to probate, and the circumstances giving rise to the need for an administrator with the will annexed. Such petition and the citation issued thereon shall be served by the court on the beneficiaries of the will and the personal representative, if any, of the estate of any deceased executor whose death created the vacancy in the manner provided by Chapter 11 of this title.

(c) In the case of an estate partially administered and unrepresented because of the death of the previous executor, the judge shall determine whether the interest of the first estate and the persons interested in the first estate will best be served by the appointment of an administrator with the will annexed or of the executor, if any, appointed under the will of the deceased previous executor.

History. — Code 1981, § 53-6-15, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 12; Ga. L. 1998, p. 1586, § 21; Ga. L. 2020, p. 377, § 1-30/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (a), substituted "Such petition" for "The petition" at the beginning of the second and third sentences, in the third sentence, substituted "and the citation issued thereon shall be served by the court", for "shall be served"', and substituted "provided by Chapter 11" for "described in Chapter 11", and added "with notice by the court in the manner provided by Chapter 11 of this title" at the end of the last sentence; in subsection (b), in the last sentence, substituted "Such petition and the citation issued thereon shall be served by the court" for "The petition shall be served" substituted "per-

sonal representative, if any, of the estate of" for "executor, if any of", and substituted "provided by Chapter 11" for "described in Chapter 11"; and, in subsection (c), substituted "best be served" for "be best served" and inserted "of" preceding "the executor".

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

COMMENT

This section indicates that the procedure for petitioning for letters of administration with the will annexed is the same as the procedure for letters testamentary if the will has not yet been probated. If the will has already been probated, the petition for letters of administration with the will annexed need only set forth the facts surrounding the probate of the will and the circumstances that require the appointment of the administrator with the will annexed and need only be served on the beneficiaries of the will. See Code Sec. 53-1-2 for the definitions of "administrator with the will annexed" and "beneficiary." See Code Secs. 53-11-3 through 53-11-6 for provisions relating to service.

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, § 233 et seq.

Am. Jur. Pleading and Practice Forms. — Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 105.

53-6-16. Oath or affirmation of executor and administrator with will annexed.

(a) Every executor and every administrator with the will annexed, upon qualification, shall take and subscribe an oath or affirmation in substantially the following form:

> "I do solemnly swear (or affirm) that this writing contains the true last will of _____, deceased, so far as I know or believe, and that I will well and truly execute the same in accordance with the laws of Georgia. So help me God."

(b) The oath or affirmation of an executor or administrator with the will annexed as provided in subsection (a) of this Code section may be subscribed before the judge or clerk of any probate court of this state. The probate court appointing the executor or administrator with the will annexed shall have the authority to grant a commission to a judge or clerk of any court of record of any other state to administer the oath or affirmation.

History. — Code 1981, § 53-6-16, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-6-33, but requires only that the oath be given in substantially the form set out in the statute. See Code Sec. 53-1-2 for the definitions of "administrator with the will annexed" and "executor".

ARTICLE 3

LETTERS OF ADMINISTRATION

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, § 256 et seq.

Am. Jur. Pleading and Practice Forms. — Am. Jur. Pleading and Practice Forms, Executors and Administrators, §§ 140, 152 et seq.

53-6-20. Selection or appointment of administrator.

An administrator may be unanimously selected by all the heirs of a deceased intestate unless the sole heir is the decedent's surviving spouse and an action for divorce or separate maintenance was pending between the deceased intestate and the surviving spouse at the time of death. With respect to any heir who is not sui juris, consent may be given by the guardian of the individual. When no such unanimous selection is made, the probate court shall make the appointment that will best serve the interests of the estate, considering the following order of preferences:

(1) The surviving spouse, unless an action for divorce or separate maintenance was pending between the deceased intestate and the surviving spouse at the time of death;

(2) One or more other heirs of the intestate or the person selected by the majority in interest of them;

(3) Any other eligible person;

(4) Any creditor of the estate; or

(5) The county administrator.

History. — Code 1981, § 53-6-20, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 22.

Law reviews. — For annual survey of law of wills, trusts, and administration of estates, see 38 Mercer L. Rev. 417 (1986).

COMMENT

This section replaces subsection (a) of former OCGA Sec. 53-6-24. See Code Sec. 53-1-2 for the definitions of "administrator," "county administrator," "heir," and "person". See Code Sec. 53-6-1 for the eligibility requirements of personal representatives.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. §§ 53-6-24 and 53-6-25 are included in the annotations for this Code section.

Selection of most nearly related relative. — Selection of intestate's daughter, rather than a grandson, to act as administrator was proper because the daughter was nearer to the intestate by blood and two of the three next of kin who were distributees had selected the daughter to so act. Brannen v. Boyce, 190 Ga. App. 385, 378 S.E.2d 743 (1989) (decided under former O.C.G.A. § 53-6-24).

Effect of divorce or separation. — Surviving spouse is not entitled to serve as administrator of her estranged spouse's estate merely because the couple's divorce decree was not made the final order of the court at the time of spouse's death. Simpson v. King, 259 Ga. 420, 383 S.E.2d 120 (1989) (decided under former O.C.G.A. § 53-6-24).

Effect of pending divorce. — When there was a divorce pending at the time of decedent's death, the surviving spouse was disqualified to act as administrator but, since the decedent died without lineal heirs, such disqualification did not change the spouse's status as the sole heir; neither decedent's father nor decedent's siblings were "next of kin" interested in the estate as distributees and the father had no standing to challenge the probate court's proper appointment of the county administrator as administrator of the estate. McClinton v. Sullivan, 263 Ga. 711, 438 S.E.2d 71 (1994) (decided under former O.C.G.A. § 53-6-24).

Acquiescence in an application is not tantamount to nomination. General Accident Ins. Co. v. Wells, 179 Ga. App. 440, 346 S.E.2d 886 (1986) (decided under former O.C.G.A. § 53-6-24).

Creditors may not appoint non-creditor. — When appointee was not a creditor of the estate, the appointee was not qualified to be appointed by the estate's creditors under paragraph (6) of former O.C.G.A. § 53-6-24. General Accident Ins. Co. v. Wells, 179 Ga. App. 440, 346 S.E.2d 886 (1986) (decided under former O.C.G.A. § 53-6-24).

Caveator is not prohibited from being appointed as administrator. Glad v. Scott, 187 Ga. App. 748, 371 S.E.2d 271 (1988) (decided under former O.C.G.A. § 53-6-24).

Beneficiaries' right to choose administrator. — Because the statute did not declare that all the beneficiaries under a will must agree to the naming of an administrator with will annexed, the rule of construction in O.C.G.A. § 1-3-1(d)(5), that a joint authority given to any number of persons or officers may be executed by a majority of them unless it is otherwise declared applied. Dismuke v. Dismuke, 195 Ga. App. 613, 394 S.E.2d 371 (1990), cert. denied, No. S95C1495, 1995 Ga. LEXIS 1050 (1995), cert. denied, No. S98C1936, 1999 Ga. LEXIS 39 (1999) (decided under former O.C.G.A. § 53-6-24).

Revocation of letters of administration. — Since the findings and conclusions of the probate court established that a former spouse's marital status was not correctly stated in the former spouse's application for letters of administration, and that this incorrect information was a material factor in the issuance of those letters, it was not an abuse of discretion to remove the former spouse as administrator of the deceased's estate. In re Estate of Dunn, 236 Ga. App. 211, 511 S.E.2d 575 (1999) (decided under former O.C.G.A. §§ 53-6-24 and 53-6-25).

Appointment of successor executor. — Subsection (b), providing for appointment of a successor executor, applies only in the absence of a testamentary provision covering such appointment. Thomas v. Thomas, 262 Ga. 707, 425 S.E.2d 287 (1993) (decided under former O.C.G.A. § 53-6-24).

Cited in Blount v. Spell, 172 Ga. App. 411, 323 S.E.2d 211 (1984); Wilson v. Willard, 183 Ga. App. 204, 358 S.E.2d 859 (1987); Clarke v. Clarke, 188 Ga. App. 198, 372 S.E.2d 475 (1988).

RESEARCH REFERENCES

ALR. — Adverse interest or position as disqualification for appointment of administrator, executor, or other personal representative, 11 A.L.R.4th 638.

53-6-21. Petition to court; contents.

(a) Every petition for letters of administration shall be made to the probate court of the county of domicile of the decedent, or, if the decedent was not domiciled in this state, then in a county where the estate or some portion of it is located.

(b) The petition shall set forth the full name, the legal domicile, and the date of death of the decedent; the mailing address and place of domicile of the petitioner; the names, ages or majority status, and addresses of heirs, stating their relationship to the decedent; and, in the event full particulars are lacking, the reasons for any omission. The petition shall conclude with a prayer for issuance of letters of administration. If a prior personal representative has qualified and a copy of the original petition is attached, it is unnecessary for the new petition to repeat relevant and unchanged information from the original petition.

History. — Code 1981, § 53-6-21, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 13.

Cross references. — Provisions regarding jurisdiction of probate court over estate of nonresident with property or causes of action located in more than one county, § 15-9-32.

Law reviews. — For article surveying wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

COMMENT

This section replaces subsection (a) of former OCGA Sec. 53-6-26. See Code Sec. 53-1-2 for definitions of "administrator" and "personal representative." The provisions for an "administrator de bonis non" that appeared in former 53-6-30 are repealed. As this section indicates, if an administrator who has already qualified is for some reason unable to serve or continue serving, the person who replaces that administrator will also be referred to as an "administrator". The petition for that person's letters need not repeat all the information that appeared in the original petition, but rather need contain only such information as is different from the information in the original petition.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-6-26 are included in the annotations for this Code section.

Jurisdiction. — After a probate court of one county assumed jurisdiction over the administration of an estate, that court is presumed to have jurisdiction; and an application made to the probate court of another county for the purpose of administering such estate cannot be entertained

while the first court retains jurisdiction. Guyett v. Guyett, 160 Ga. App. 622, 287 S.E.2d 632 (1981) (decided under former O.C.G.A. § 53-6-26).

Cited in Escareno v. Carl Nolte Sohne GmbH, 270 Ga. 264, 507 S.E.2d 743 (1998).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 10 Am. Jur. Pleading and Practice Forms, Executors and Administrators, §§ 43, 44.

53-6-22. Notice.

Notice of the petition for letters of administration shall be served by the court by first-class mail on each heir with a known address at least 30 days prior to the date on or before which any objection is required to be filed. If there is any heir whose current address is unknown or any heir who is unknown, notice shall be served on any such heir by being published in the official newspaper of the county in which the petition is made once each week for four weeks prior to the week that includes the date on or before which any objection must be filed.

History. — Code 1981, § 53-6-22, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 14; Ga. L. 2020, p. 377, § 1-31/HB 865.

The 2020 amendment, effective January 1, 2021, in this Code section, in the first sentence, substituted "served by the court by first-class mail on" for "mailed by first-class mail to", and substituted "30 days" for "13 days", and, in the second sentence, substituted "served on any such heir by being published in the official newspaper of the county in which the petition is made'" for "published" and substituted "that includes" for "which includes".

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

53-6-23. Issuance.

Letters of administration may issue to any person selected as provided by Code Section 53-6-20, and a new citation need not be published if the administrator is someone other than the person named in the citation.

History. — Code 1981, § 53-6-23, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward the substance of former OCGA Sec. 53-6-28.

53-6-24. Oath or affirmation of administrator.

(a) Every administrator, upon qualification (which qualification may be done at any time if appointed at a regular term), shall take and subscribe an oath or affirmation in substantially the following form:

"I do solemnly swear (or affirm) that _____, deceased, died intestate so far as I know or believe, and that I will well and truly administer the estate in accordance with the laws of Georgia. So help me God."

(b) The oath or affirmation of an administrator as provided in subsection (a) of this Code section may be subscribed before the judge or clerk of any probate court of this state. The probate court appointing the administrator shall have the authority to grant a commission to a judge or clerk of any court of record of any state to administer the oath or affirmation.

History. — Code 1981, § 53-6-24, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward the provisions of former OCGA Sec. 53-6-32 but requires only that the oath be taken in substantially the form set out in the statute.

ARTICLE 4

TEMPORARY ADMINISTRATION

Law reviews. — For article, "Marriage, Death and Taxes: The Estate Planning Impact of Windsor and Obergefell on Georgia's Same Sex Spouses," see 21 Ga. St. Bar. J. 9 (Oct. 2015).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, § 1037 et seq.

Am. Jur. Pleading and Practice Forms. — Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 864 et seq.

53-6-30. Power of court; appointment of administrator; appeal.

(a) The probate court may at any time and without service or notice to anyone grant temporary letters of administration on an unrepresented estate to continue in full force and effect until the temporary administrator is discharged or a personal representative is appointed.

(b) The probate court may appoint such person as temporary administrator as the court determines to be in the best interests of the estate. Pending an issue of devisavit vel non upon any paper propounded as a will that has not been admitted to probate in common form, the executor nominated in the purported will shall have preference in the appointment of a temporary administrator.

(c) There shall be no appeal from an order granting temporary letters of administration, either to the superior court under subsection (a) of

Code Section 5-3-2 or to the Supreme Court or the Court of Appeals under subsection (a) of Code Section 15-9-123.

History. — Code 1981, § 53-6-30, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 23; Ga. L. 2020, p. 377, § 1-32/HB 865.

The 2020 amendment, effective January 1, 2021, substituted "service or notice to anyone" for "notice" in subsection (a); substituted "that has not" for "which as not" in the second sentence of subsection (b); and added ", either to the superior court under subsection (a) of Code Section 5-3-2 or to the Supreme Court or the Court of Appeals under subsection (a) of Code Section 15-9-123" to the end of subsection (c).

Law reviews. — For article surveying wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982).

COMMENT

This section carries forward the substance of former OCGA Sec. 53-6-34. This section adds that the executor of a purported will is given preference when a temporary administrator is appointed, although the probate court has discretion to appoint as temporary administrator whoever serves the best interests of the estate. See Code Sec. 53-1-2 for the definition of "temporary administrator". For other provisions relating to the powers of temporary administrators, see Code Secs. 53-7-4 and 53-8-10(b).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-1207, and former O.C.G.A. §§ 53-6-34 and 53-6-35 are included in the annotations for this Code section.

Authority to appoint temporary administrator. — Under O.C.G.A. § 53-6-30(a), a probate court did not lack subject matter jurisdiction, nor did the court act in excess of the court's authority in appointing a temporary administrator for an estate when, since the former administrator was removed, the administrator's authority to act for the estate was suspended, and, thus, the estate was unrepresented while the appeal of the removal order was pending; the former administrator's petition for a writ of prohibition against the judge and the successor administrator was properly denied. Ray v. Jolles, 280 Ga. 452, 629 S.E.2d 250 (2006).

Powers granted. — Former statute empowered a temporary administrator to collect and take care of effects of deceased until permanent letters of administration are granted. Kelly v. Citizens & S. Nat'l Bank, 160 Ga. App. 405, 287 S.E.2d 343 (1981) (decided under former Code 1933, § 113-1207).

Statutory consistency. — There is no inconsistency between O.C.G.A. § 44-12-151, requiring selection of remedies, and former O.C.G.A. §§ 53-6-34 and 53-7-93, requiring collection and preservation of assets of an estate and just and timely payment of the debts of an estate. Howard v. Parker, 163 Ga. App. 159, 293 S.E.2d 548 (1982) (decided under former O.C.G.A. § 53-6-34).

Attorney's fees. — Temporary administrator's right to attorney fees may not extend beyond fees for such services as may have been necessary to assist the administrator in the securing of temporary letters of administration and the collection and preservation of the assets of the estate. Hudson v. Abercrombie, 258 Ga. 729, 374 S.E.2d 83 (1988) (decided under former O.C.G.A. § 53-6-34).

Cited in Guyett v. Guyett, 160 Ga. App. 622, 287 S.E.2d 632 (1981); Deller v. Smith, 250 Ga. 157, 296 S.E.2d 49 (1982); Smith v. Watts, 181 Ga. App. 524, 352 S.E.2d 840 (1987).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 10A Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 864.

53-6-31. Power of administrator.

(a) A temporary administrator may bring an action for the collection of debts or for personal property of the decedent. If a personal representative is appointed pending such action, the personal representative may be substituted for the temporary administrator as a party in the manner provided by Article 4 of Chapter 11 of Title 9.

(b) A temporary administrator may bring, support, or oppose an action to approve a settlement agreement under Code Section 53-5-25. If a personal representative is appointed pending such action, the personal representative may be substituted for the temporary administrator as a party in the manner provided by Article 4 of Chapter 11 of Title 9.

(c) A temporary administrator shall have the power to collect and preserve the assets of the estate and to expend funds for this purpose if approved by the judge of the probate court after such notice as the judge deems necessary; provided, however, that nothing in this subsection shall limit or reduce the notice requirements imposed by Code Sections 53-6-64 and 53-7-4.

(d) A temporary administrator appointed pursuant to Code Section 53-3-21 shall have the power to perform the duties of a personal representative under subsection (b) of Code Section 53-3-7 or under subsection (b) of Code Section 53-3-12, as ordered by the judge of the probate court.

History. — Code 1981, § 53-6-31, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 24; Ga. L. 2020, p. 377, § 1-33/HB 865.

The 2020 amendment, effective January 1, 2021, designated the first two sentences of the previously existing provisions as subsection (a) and, in the second sentence of subsection (a), substituted "such action" for "the action" near the middle, and substituted "substituted for the temporary administrator as a party in the manner provided by Article 4 of Chapter 11 of Title 9" for "made a party in lieu of the temporary administrator" at the end; added subsection (b); designated the last sentence of the previously existing provisions as subsection (c) and, in subsection (c), added the proviso at the end; and added subsection (d).

COMMENT

This section carries forward former OCGA Sec. 53-7-103. See Code Sec. 53-1-2 for the definitions of "temporary administrator" and "personal representative". (As these definitions indicate, a temporary administrator is not included in the definition of "personal representative".) For other provisions relating to the powers of temporary administrators, see Code Secs. 53-7-4 and 53-8-10(b).

JUDICIAL DECISIONS

Standing of temporary administrator. — Temporary administrator, who was also the wife of the decedent landowner, had standing as a party to the action for the recovery of just compensation for land taken by the Department of Transportation in a condemnation proceeding. DOT v. Foster, 262 Ga. App. 524, 586 S.E.2d 64 (2003).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 864.

53-6-32. Oath or affirmation of temporary administrator.

(a) Every temporary administrator, upon qualification (which qualification may be done at any time), shall take and subscribe an oath or affirmation in substantially the following form:

> "I do solemnly swear (or affirm) that _____, deceased, died (testate) (intestate) and with an estate that is currently unrepresented, so far as I know or believe, and that I will well and truly administer on all the estate of the Deceased and discharge to the best of my ability all my duties as Temporary Administrator. So help me God."

(b) The oath or affirmation of a temporary administrator as provided in subsection (a) of this Code section may be subscribed before the judge or clerk of any probate court of this state. The probate court appointing the temporary administrator shall have the authority to grant a commission to a judge or clerk of any court of record of any state to administer the oath or affirmation.

History. — Code 1981, § 53-6-32, enacted by Ga. L. 2020, p. 377, § 1-34/HB 865.

Effective date. — This Code section became effective January 1, 2021.

ARTICLE 5

COUNTY ADMINISTRATORS

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former O.C.G.A.T. 53, C. 6, A. 4 are included in the annotations for this article.

County administrator not entitled to collect compensation from county. — County administrator, including superior court clerk holding that position under law, is not entitled to collect compensation from the county for duties of the county administrator, but may collect, from estates administered those applicable commissions, fees, and expenses au-

thorized by statute. 1981 Op. Att'y Gen. No. U81-53 (decided under former O.C.G.A. Art. 4, Ch. 6, T. 53).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, § 1095 et seq.

Am. Jur. Pleading and Practice Forms. — Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 895 et seq.

53-6-35. Appointment.

(a) The probate court of each county shall appoint a county administrator whose duty shall be to take charge of all estates unrepresented and not likely to be represented.

(b) In all counties of this state the probate court is authorized to appoint, in the same manner as the county administrator is appointed, one or more additional county administrators who shall have the same powers, duties, and authority and be subject to the same laws, including Chapter 8 of Title 29, relating to county guardians, as county administrators.

(c) The order appointing the county administrator shall be entered on the minutes of the probate court and the original shall be placed in the possession of the county administrator.

History. — Code 1981, § 53-6-35, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 15; Ga. L. 2004, p. 161, § 8.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, a comma was inserted after "duties" in subsection (b).

Editor's notes. — Ga. L. 2004, p. 161, § 16, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2005, and all appointments of guardians of the person or property made pursuant to former Title 29 shall continue in effect and shall thereafter be governed by the provisions of this Act."

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

COMMENT

Subsections (a) and (b) carry forward former OCGA Sec. 53-6-90 and replaces the term "assistant county administrators" with the term "additional county administrators". See Code Sec. 53-1-2 for the definition of "county administrator". Subsection (c) carries forward former OCGA Sec. 53-6-94.

JUDICIAL DECISIONS

Cited in Myers v. Myers, 297 Ga. 490, 775 S.E.2d 145 (2015).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 10A Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 896.

53-6-36. Qualifications and compensation.

(a)(1) Except as provided in paragraph (2) of this subsection, the county administrator shall have attained the age of 21 years and shall have been for at least one year a domiciliary of the county of appointment.

(2) If the individual to be appointed as county administrator is an active member in good standing of the State Bar of Georgia, such individual need not be a domiciliary of the county but only a domiciliary of this state.

(b) If the county governing authority consents, county administrators and ex officio county guardians may be paid an annual fee for so serving. The amount of any such fee shall be established by agreement of the county governing authority, the probate court, and the individual so serving. Any such fee shall be in addition to commissions authorized under other provisions of law.

History. — Code 1981, § 53-6-36, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward the substance of former OCGA Sec. 53-6-91. The provision of former OCGA Sec. 53-6-91(b), relating to the eligibility of the clerk of the superior court to serve as county administrator, is repealed as unnecessary in light of the provisions of Code Sec. 53-6-39.

53-6-37. Term; vacancies; discharge of duties after expiration of term or removal from office; resignation.

(a) The term of office of a county administrator shall be four years and shall expire on the first Monday in March or when a successor is appointed and qualified. All vacancies in the office, whether by death, resignation, removal from the county, or removal from office, shall be filled by the probate court for the unexpired term.

(b) When the term of a county administrator has expired or when a county administrator has been removed from office, the county administrator shall nevertheless continue to discharge the duties of administrator of all estates remaining in the administrator's hands unless the letters of administration are revoked.

(c) A county administrator may resign the office as other administrators are allowed by law to do so.

History. — Code 1981, § 53-6-37, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

Subsection (a) carries forward former OCGA Sec. 53-6-92.
Subsection (b) carries forward former OCGA Sec. 53-6-101.
Subsection (c) carries forward former OCGA Sec. 53-6-100.

53-6-38. Administration of unrepresented estate by county administrator.

If for any reason an estate is unrepresented and not likely to be represented, the probate court shall vest the administration of the estate in the county administrator, with notice given as provided for in Code Section 53-6-22. If, however, the estate does not exceed in value the sum set aside to the spouse and children of the decedent as year's support, no administration shall be necessary, but the probate court shall by order set apart the same to the spouse and children, as provided by law.

History. — Code 1981, § 53-6-38, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For survey article on wills, trusts, guardianships, and fiduciary administration for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003).

COMMENT

This section carries forward the provisions of former OCGA Sec. 53-6-95, with a cross-reference to the notice requirements for the appointment of an administrator.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-6-95 are included in the annotations for this Code section.

Cited in McClinton v. Sullivan, 263 Ga. 711, 438 S.E.2d 71 (1994).

53-6-39. Administration or unrepresented estate by clerk of superior court.

If for any reason a county has no county administrator and there is an unrepresented estate that is not likely to be represented, it shall be the duty of the probate court of any such county to vest the administration of the estate in the clerk of the superior court of the county.

History. — Code 1981, § 53-6-39, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-6-96.

53-6-40. Separate letters of administration; governing law; appointment for sole purpose of commencing or continuing lawsuit against estate.

(a) The probate court shall grant to the county administrator separate letters of administration upon each estate placed in the county administrator's hands. Except as provided in subsection (b) of this Code section, the county administrator shall be governed and controlled by the law provided for other administrators.

(b) If a petition is made for the appointment of a county administrator as the administrator of an unrepresented estate for the sole purpose of making it possible to commence or continue a lawsuit against the estate and the granting of such petition is otherwise proper under applicable law, the probate court may appoint the county administrator as administrator of such estate. The probate court shall relieve the county administrator from all liabilities, duties, and obligations otherwise imposed on the administrator of an estate, including but not limited to the marshaling of assets, the publication of notice to creditors, the filing of an inventory, the filing of returns, and the posting of a separate bond, except for those duties and obligations directly related to the acceptance of service of process and qualification as administrator and other duties directly related to the lawsuit. Additionally, the probate court may provide for the payment of reasonable compensation to the county administrator by the petitioner sufficient to cover the time devoted to and expenses incurred by the county administrator in the performance of the duties and obligations with respect to the estate, such compensation to be determined by the probate court in the same manner that the amount of any extra compensation claimed by the administrator is to be determined.

History. — Code 1981, § 53-6-40, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

Subsection (a) carries forward former OCGA Sec. 53-6-97.

Subsection (b) adds new provisions for the appointment of a county administrator for the sole purpose of commencing or continuing a lawsuit against the estate.

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former O.C.G.A. § 53-6-97 are included in the annotations for this Code section.

County administrator not entitled

to collect compensation from county. — County administrator, including superior court clerk holding that position, is not entitled to collect compensation from county for duties of county administrator, but may collect, from estates administered those applicable commissions, fees, and expenses authorized by law. 1981 Op. Att'y Gen. No. U81-53, (decided under former O.C.G.A. § 53-6-97).

53-6-41. Bond.

Each county administrator shall give bond, with good security to be judged by the probate court, in the sum of $5,000.00. The bond shall be payable to the probate court for the benefit of all concerned. It shall be attested by the judge or clerk of the probate court and shall be conditioned upon the faithful discharge of the county administrator's duty as such, as required by law. Actions on the bond may be brought by any person aggrieved by the misconduct of the county administrator, as provided by law for actions on the bonds of other administrators.

History. — Code 1981, § 53-6-41, enacted by Ga. L. 1996, p. 504, § 10.

Cross references. — Official bonds generally, T. 45, C. 4.

COMMENT

This section carries forward former OCGA Sec. 53-6-93.

53-6-42. Power of court to revoke letters of administration, require additional security, or pass other order.

The probate court may, for good cause shown, as provided in Code Sections 29-3-82, 29-5-92, and 53-7-14, revoke the letters of administration of the county administrator or letters of guardianship of the county administrator, require additional security on the county administrator's bond, or pass such other order as is expedient and necessary for the good of any particular estate in the hands of any county administrator.

History. — Code 1981, § 53-6-42, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2004, p. 161, § 9.

Editor's notes. — Ga. L. 2004, p. 161, § 16, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2005, and all appointments of guardians of the person or property made pursuant to former Title 29 shall continue in effect and shall thereafter be governed by the provisions of this Act."

COMMENT

This section carries forward the provisions of former OCGA Sec. 53-6-98.

53-6-43. Proceedings to require additional security.

(a) If, in the opinion of the probate court or upon the petition of an heir, it shall become necessary for the good of any estate placed or about

to be placed in the hands of the county administrator for the administrator to give additional security on the bond or to give additional bond with security, the probate court shall have the authority to fix the amount of the bond and shall cite the county administrator to appear at a regular term of the court and show cause, if any, why the additional bond or additional security should not be given.

(b) If, upon the hearing, the county administrator fails to show good cause why the additional bond or additional security should not be given, the probate court shall pass an order fixing the amount of the bond and directing the county administrator to give additional security on or before a day named, which day shall be within 30 days of the date of the order.

(c) Should the county administrator fail, refuse, or neglect to give additional bond or additional security on or before the day fixed in the order of the probate court and fail to show good cause why further time should be allowed, it shall be the duty of the probate court to remove the county administrator and to appoint another for the unexpired term of office. The order of removal shall be recorded as provided for the order of appointment.

History. — Code 1981, § 53-6-43, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward the provisions of former OCGA Sec. 53-6-99.

53-6-44. Settlement of estate without administration.

Nothing in this article shall be construed to require the probate court to vest administration in the county administrator or any other person when the heirs agree to settle the estate without administration.

History. — Code 1981, § 53-6-44, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward the provisions of former OCGA Sec. 53-6-102. Former OCGA Secs. 53-6-50 through 53-6-54, relating to substitutions for personal representatives and guardians engaged in war service, are repealed.

ARTICLE 6

BOND

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, § 312 et seq.

Am. Jur. Pleading and Practice Forms. — Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 249 et seq.

53-6-50. Persons required to give.

(a) Unless otherwise provided in this Code section, any person who seeks to qualify to serve as the personal representative of an intestate estate or as a temporary administrator shall be required to give bond with good and sufficient security.

(b) A national banking association or a bank or trust company organized under the laws of this state that seeks to qualify as a personal representative of an intestate estate or temporary administrator shall not be required to give bond for the faithful performance of its duties unless its combined capital, surplus, and undivided profits are less than $400,000.00 as reflected in its last statement filed with the comptroller of the currency of the United States or the commissioner of banking and finance or unless the instrument under which it seeks to qualify expressly provides that it shall give bond.

(c) A person petitioning to qualify as a personal representative of an intestate estate may be relieved from the requirement for giving bond by the unanimous consent of the heirs of the estate. With respect to any heir who is not sui juris, consent may be given by the guardian of the individual. The personal representative of a deceased heir is authorized to consent for that heir. In no case may consent on behalf of an heir who is not sui juris be effective if the person consenting is the person petitioning to serve as personal representative.

(d) The provisions of this Code section shall not apply to bonds described in Code Section 53-6-41 and Code Section 53-6-53.

History. — Code 1981, § 53-6-50, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 25.

Cross references. — Provisions regarding exemption of financial institutions from fiduciary bond or security requirements, § 7-1-311.

Law reviews. — For article surveying wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982).

COMMENT

Subsection (a) of this section replaces portions of former OCGA Secs. 53-6-22 and 53-6-26. Subsection (a) requires all personal representatives of intestate estates and temporary administrators to give bond unless otherwise relieved by this Code section. Subsection (b) carries forward former OCGA Sec. 53-7-33, which relieves

banks and trust companies from giving bond. Subsection (c) replaces portions of former OCGA Secs. 53-6-22 and 53-6-26 and allows for the waiver of bond by the unanimous consent of the heirs of an intestate estate. This waiver is available only to personal representatives and thus is not available in the case of temporary administrators. (As indicated by the definition of "personal representative" that appears in Code Section 53-1-2, a temporary administrator is not included in that category.) Subsection (d) provides that this Code section does not override the requirement that County Administrators give bond and those provisions that allow the judge to impose bond where cause for such is shown.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-6-36 are included in the annotations for this Code section.

Temporary administrator is required to give good and sufficient bond with security for double the amount of the personal property of the estate. Kelly v. Citizens & S. Nat'l Bank, 160 Ga. App. 405, 287 S.E.2d 343 (1981) (decided under former O.C.G.A. § 53-6-36).

Cited in Deller v. Smith, 250 Ga. 157, 296 S.E.2d 49 (1982).

RESEARCH REFERENCES

ALR. — Who is resident within meaning of statute prohibiting appointment of nonresident executor or administrator, 9 A.L.R.4th 1223.

53-6-51. Requisites.

(a) The bond of a personal representative or temporary administrator shall be secured by an individual who is a domiciliary of this state or by a licensed commercial surety authorized to transact business in this state, shall be payable to the probate court for the benefit of all concerned, shall be conditioned upon the faithful discharge of the personal representative's or temporary administrator's duty as such as required by law, and shall be attested by the judge of the probate court or the clerk of the probate court.

(b) Whenever a personal representative or temporary administrator is required to give bond, the probate court may order the personal representative or temporary administrator to post such bond for a period of time greater than one year, as may be appropriate in the circumstances. A surety on the bond posted pursuant to this Code section shall not be relieved of liability merely because of the expiration of the term of the bond but shall be subject to the provisions of law for the discharge of a surety applicable to other bonds.

(c) The bond shall be in a sum equal to double the value of the estate to be administered; provided, however, that the bond shall be in an amount equal to the value of the estate if secured by a licensed commercial surety authorized to transact business in this state. The value of the estate for purposes of the bond shall be determined without regard to the value of any real property or improvements thereon held

by the personal representative or temporary administrator as fiduciary but, upon the conversion of the real property into personalty, a bond shall be given based upon the value of the estate, including the value of the personalty into which the real property was converted.

(d) Substantial compliance with these requisites for the bond shall be deemed sufficient; and no bond shall be declared invalid by reason of any variation from these requisites as to payee, amount, or condition, where the manifest intention was to give bond as personal representative or temporary administrator and a breach of the fiduciary's duty as such has been proved.

History. — Code 1981, § 53-6-51, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 26.

Law reviews. — For article surveying wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982).

COMMENT

This Code section replaces all or portions of former OCGA Secs. 53-6-23, 53-6-26, 53-7-3, 53-7-32.1, 53-7-34, and 53-7-35.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-7-30 are included in the annotations for this Code section.

Approval of application not required. — Statute does not require probate court approval of an administrator's bond application. Fowler v. Smith, 243 Ga. App. 469, 533 S.E.2d 739 (2000) (decided under former O.C.G.A. § 53-7-30).

Cited in Deller v. Smith, 250 Ga. 157, 296 S.E.2d 49 (1982).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 10 Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 250.

53-6-52. Reduction.

If the value of an estate decreases, the probate court may permit a corresponding reduction in the amount of the bond, but this reduction does not affect the liability of the surety for prior waste or misconduct by the personal representative or temporary administrator.

History. — Code 1981, § 53-6-52, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-7-36.

53-6-53. Personal representative qualified to serve without, or not otherwise legally required to give, bond.

When a personal representative has qualified to serve without bond or is not otherwise required by law to give bond, the probate court, on its own motion or on the representation of any party in interest that the personal representative is mismanaging the estate, shall order the personal representative to appear and show cause as to why bond should not be given or the personal representative's letters revoked. The order shall be served in person on the personal representative at least ten days prior to the hearing. Failure to show cause shall authorize the court to require bond or to revoke the letters or to take any other action as may be necessary under the circumstances.

History. — Code 1981, § 53-6-53, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section replaces former OCGA Secs. 53-7-32 and 53-7-37.

53-6-54. Recordation and custody.

The clerk of the probate court shall record bonds in a book kept for that purpose and shall retain custody of the bonds.

History. — Code 1981, § 53-6-54, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-7-31.

ARTICLE 7

COMPENSATION

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, § 836 et seq.
Am. Jur. Pleading and Practice Forms. — Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 995 et seq.

53-6-60. Amount.

(a) Personal representatives shall be compensated as specified in either the will or any written agreement entered into prior to the decedent's death or a written agreement signed by all the beneficiaries of a testate estate or all the heirs of an intestate estate. A written agreement between a testator and a personal representative shall be

valid and binding upon the estate of the testator as fully and completely as if set forth in and made a part of the will.

(b) If the personal representative's compensation is not specified in the will or any separate written agreement, the personal representative for services rendered shall be entitled to compensation equal to:

(1) Two and one-half percent commission on all sums of money received by the personal representative on account of the estate, except on money loaned by and repaid to the personal representative, and 2 1/2 percent commission on all sums paid out by the personal representative, either for debts, legacies, or distributive shares;

(2) Ten percent commission on the amount of interest made if, during the course of administration, the personal representative shall receive interest on money loaned by the personal representative in that capacity and shall include the same on the return to the probate court so as to become chargeable therewith as a part of the corpus of the estate;

(3) Reasonable compensation, as determined in the discretion of the probate court and after such notice, if any, as the court shall direct, for the delivery over of property in kind, not exceeding 3 percent of the appraised value and, in cases where there has been no appraisal, not over 3 percent of the fair value as found by the judge, irrespective of whether delivery over in kind is made pursuant to proceedings for that purpose in the probate court and irrespective of whether the property, except money, is tangible or intangible, personal or real; and

(4) In the discretion of the probate court, compensation for working land for the benefit of the parties in interest in no case exceeding 10 percent of the annual income of the property so managed.

(c) Whenever any portion of the dividends, interest, or rents payable to a personal representative is required by law of the United States or other governmental unit to be withheld by the person paying the same for income tax purposes, the amount so withheld shall be deemed to have been collected by the personal representative.

(d) Unless the will or written agreement specifies otherwise, where some or all of the estate passes through the hands of several personal representatives by reason of the death, removal, or resignation of the first qualified personal representative, or otherwise, the estate shall not be subject to diminution by charges of commission of each successive personal representative holding and receiving in the same right but rather commissions for receiving the estate shall be paid to the first personal representative who receives the property for the benefit of the estate or that person's representative, and commissions for paying out

shall be paid to the personal representative who actually distributes the fund, and no commissions shall be paid for handing over the fund to a successor personal representative. If there is more than one personal representative serving simultaneously, the division of the compensation allowed them shall be according to the services rendered by each.

(e) Unless the will or written agreement specifies otherwise, a personal representative is entitled to receive commissions on debts, legacies, and distributive shares paid to that personal representative in the same manner as commissions to which the personal representative would be entitled under the terms of the will or written agreement or applicable law on such items paid to others; provided, however, a personal representative shall not be entitled to any commissions for any sums paid to any personal representative of the estate as commissions or other compensation.

(f) Personal representatives who fail to make annual returns as required by law shall forfeit all commissions for transactions during the year within which no return is made unless the probate court, upon cause shown, shall by special order entered on the minutes relieve them from the forfeiture.

(g) A personal representative may renounce the right to all or any part of the compensation to which the personal representative is entitled under this Code section.

History. — Code 1981, § 53-6-60, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 17; Ga. L. 1998, p. 1586, § 27.

Law reviews. — For article on the problems and benefits of multiple fiduciaries in estate planning, see 33 Mercer L. Rev. 355 (1981). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

COMMENT

This section consolidates the provisions of former OCGA Sec. 53-6-1(b) and Secs. 53-6-140 through -146. Subsection (a) of this Code section mirrors the provisions for compensation of trustees set forth in OCGA Sec. 53-12-173 and repeals the requirement of former Sec. 53-6-1(b) that the compensation not exceed the legal rate unless the personal representative has a regular, published schedule of fees. This subsection also clarifies that a testator may specify compensation in the will, that any individual may enter into an agreement as to compensation prior to death, and that beneficiaries or heirs may enter into an agreement after the death of the decedent. Subsection (b) provides for the specific commissions and compensation allowed under the former law.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-1101 and former O.C.G.A. §§ 53-6-140, 53-6-142, and 53-6-143 are included in the annotations for this Code section.

Statutory commissions. — Under O.C.G.A. § 53-6-60(b), the executor's com-

mission is 2.5 percent of all funds received by the estate and 2.5 percent of all funds paid out of the estate; such commission on the amounts flowing through the estate are the executor's as a matter of statutory right. In re Estate of Sims, 259 Ga. App. 786, 578 S.E.2d 498 (2003).

Compensation set by statute. — As the probate court appointed an administrator to serve as such over the sister's estate, the administrator's compensation was controlled by O.C.G.A. § 53-6-60 (b), and thus, the appeals court was not persuaded otherwise by the administrator's claims that the decedent's will mandated hourly compensation and that a prior administrator was compensated on an hourly basis. Ray v. Nat'l Health Investors, Inc., 280 Ga. App. 44, 633 S.E.2d 388 (2006).

Waiver of executor's commission permitted. — Executor may waive the executor's statutory commission under O.C.G.A. § 53-6-60(g), but a mere statement that the executor's commissions are waived is not sufficient to waive the statutory right; to bind the executor to a waiver of the executor's rights to a commission, there must be a binding contract with consideration. In re Estate of Sims, 259 Ga. App. 786, 578 S.E.2d 498 (2003).

Commission on prior commission not authorized. — An administrator was not entitled to the payment of a commission on a previously paid commission. Sams v. Leskanic, 220 Ga. App. 202, 469 S.E.2d 703 (1996) (decided under former O.C.G.A. § 53-6-140).

Commission on extra compensation authorized. — Administrator was entitled to a commission on a sum disbursed to the administrator as extra compensation. Sams v. Leskanic, 220 Ga. App. 202, 469 S.E.2d 703 (1996) (decided under former O.C.G.A. § 53-6-140).

Commission related to transferred property not authorized. — Co-executor's participation in a prior settlement which resulted in a transfer of real property to beneficiaries, in the co-executor's individual capacity as a beneficiary, was conduct which showed the co-executor's assent by presumption or implication to the decree of title to the property in the beneficiaries; thus, the co-executor was not entitled to a commission for subsequent actions related to the property. Baggett v. Baggett, 270 Ga. App. 619, 608 S.E.2d 688 (2004) (decided under former O.C.G.A. § 53-6-140).

Guardian's claim for commission upon final distribution of deceased ward's estate was not barred by the application of O.C.G.A. § 29-2-43, applying to situations where a guardian has resigned, died, or been removed, or by former O.C.G.A. § 53-6-142 which does not apply to guardians. In re Estate of Donald, 222 Ga. App. 355, 474 S.E.2d 251 (1996) (decided under former O.C.G.A. §§ 53-6-140, 53-6-142).

Issues of fact existed as to excessiveness of fee. — Trial court correctly concluded that questions of fact remained as to whether a trustee collected excessive executor's fees under O.C.G.A. § 53-6-60 because the record showed that the $425,000 the trustee collected in executor's fees for the administration of the estate was based on calculations by accountants; however, the beneficiary presented evidence that the trustee may have miscalculated the earned commission under § 53-6-60 in excess of $184,307. Hasty v. Castleberry, 293 Ga. 727, 749 S.E.2d 676 (2013).

Executor's breach of fiduciary duty. — Probate court order removing an executor for cause was affirmed because the executor violated the executor's fiduciary duty in numerous ways by failing to dissolve the estate business, using estate property and funds for the executor's own benefit and to pay personal bills, overpaying executor's fees, and having a conflict of interest by continuing to operate the business despite the estate losing money but personally benefiting by using the business property rent free. Myers v. Myers, 297 Ga. 490, 775 S.E.2d 145 (2015).

Procedure on appeal. — In an appeal from an order of the probate court denying an executor's petition for compensation under former O.C.G.A. § 53-6-143, the superior court's judgment holding that the commission allow as compensation two and one half percent of the value of the property delivered in kind but not setting forth the property's value, was not final, as no final award of compensation was

made, and the executor was required to follow interlocutory appeal procedures. Clark v. Davis, 242 Ga. App. 425, 530 S.E.2d 49 (2000) (decided under former O.C.G.A. § 53-6-143).

Cited in DuBose v. Box, 246 Ga. 660, 273 S.E.2d 101 (1980); In re Estate of Dasher, 259 Ga. App. 201, 575 S.E.2d 921 (2002).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former O.C.G.A. §§ 53-6-140 and 53-6-141 are included in the annotations for this Code section.

Commission on interest from loans. — Commission authorized by former O.C.G.A. § 53-6-140 was not in addition to the ten percent commission that an administrator or an executor was entitled to under former O.C.G.A. § 53-6-141 on money loaned by the decedent or by one as administrator or executor because former O.C.G.A. § 53-6-140 exempted a commission on money loaned by and repaid to an administrator, executor, trustee, or guardian. 1987 Op. Att'y Gen. No. U87-26 (decided under former O.C.G.A. § 53-6-140).

"Money loaned". — Municipal bonds and certificates of deposit, but not stocks, constitute "money loaned" within the meaning of former O.C.G.A. § 53-6-141. 1987 Op. Att'y Gen. No. U87-26 (decided under former O.C.G.A. § 53-6-141).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 10 Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 364.

53-6-61. Expenses.

Personal representatives shall be allowed reasonable expenses incurred in the administration of the estate, including without limitation expenses for travel, the expenses and premiums incurred in securing a bond, and the expenses of counsel and other agents. Such reasonable expenses shall be determined after such notice, if any, as the court shall direct.

History. — Code 1981, § 53-6-61, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 28.

COMMENT

This section replaces former OCGA Secs. 53-6-147 through 53-6-149 (which enumerated various expenses that were allowed) with a general provision allowing the personal representative those reasonable expenses that are incurred in the course of the administration of the estate.

JUDICIAL DECISIONS

Expenses related to bond. — When an administrator became subject to certain expenses related to the administrator's bond, namely the bonding company's litigation costs due to actions by the heirs of the estate, such expense fell within the scope of O.C.G.A. § 53-6-61 as a necessary cost of administration. Fowler v. Smith, 243 Ga. App. 469, 533 S.E.2d 739 (2000).

Attorney fees proper. — Probate

court did not err in failing to order a decedent's son to reimburse the estate for attorney fees because the executor testified that the bills for attorney fees were for services rendered on behalf of settlement of the estate, and not for defending the son on a daughter's motion to have the son removed as executor. In re Estate of Long, 307 Ga. App. 896, 706 S.E.2d 704 (2011).

53-6-62. Extra compensation.

(a) A personal representative may petition the probate court for compensation that is greater than that allowed under Code Section 53-6-60. Service of notice of the petition for extra compensation shall be made on all the heirs of an intestate decedent or on any affected beneficiaries under the will of a testate decedent. Service of notice shall be made in the manner provided by Chapter 11 of this title and shall direct the parties served to file any written objections to the extra compensation with the probate court within 30 days.

(b) After hearing any objection filed by the heirs or beneficiaries of the estate, the probate court shall allow such extra compensation as the court deems reasonable; provided, however, that if no such objection is filed or any such objection is dismissed or withdrawn, the court, in its discretion, may enter an order allowing such extra compensation as the court deems reasonable without a hearing. The allowance of extra compensation shall be conclusive as to all parties in interest.

(c) If the amount of compensation that is specified in a testator's will is less than the amount allowed under Code Section 53-6-60, the personal representative may petition for greater compensation in the manner provided in subsection (a) of this Code section.

History. — Code 1981, § 53-6-62, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 18; Ga. L. 2020, p. 377, § 1-35/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (a), substituted "on" for "to" twice in the second sentence, and, in the last sentence, substituted "Service of notice shall be made in the manner provided by" for "Service shall be made in the manner described in" at the beginning, and substituted "30 days" for "ten days" at the end; added the proviso at the end of the first sentence in subsection (b); and substituted "provided in subsection (a) of this Code section" for "described in this Code section" at the end of subsection (c).

Law reviews. — For article on the problems and benefits of multiple fiduciaries in estate planning, see 33 Mercer L. Rev. 355 (1981). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

COMMENT

This section replaces former OCGA Sec. 53-6-150. This section gives the probate court discretion to award extra compensation where reasonable. Heirs of an intestate decedent or beneficiaries under the will of a testate decedent are served with the petition for extra compensation and have the right to file any objections. The court, after hearing any objections, has the discretion to allow any extra compensation the court deems reasonable. The allowance of extra compensation is then conclusive upon all parties in interest to the estate. In allowing extra

compensation, factors that may be considered include whether the estate administration involved unusually greater time or effort, whether the personal representative had responsibilities with respect to assets that were not subject to the jurisdiction of the probate court, whether the estate involved significant tax issues, whether the personal representative also performed legal services for the estate, and whether the personal representative continued or liquidated a business enterprise of the estate. Subsection (c) clarifies that greater compensation may be requested even in those cases in which an amount is specified in the will, unless that amount is equal to the statutory fee that is described in Code Sec. 53-6-60.

JUDICIAL DECISIONS

Additional compensation upheld. — Estate distribution plan providing for $50,000 in extra compensation to the estate administrator was upheld as the challenging sibling did not show that the payment varied the terms of the will, which was not in the record, and the administrator was permitted to petition the probate court for such additional compensation. After hearing any objections, the probate court allowed such extra compensation as the court deemed reasonable in consideration of the years of contentious litigation that was involved. In re Estate of Nesbit, 299 Ga. App. 496, 682 S.E.2d 641 (2009).

53-6-63. Compensation from business enterprise.

(a) Any executor who is a domiciliary of this state may receive compensation for services, as specified in this subsection, from a corporation or other business enterprise where the estate of the decedent owns an interest in the corporation or other business enterprise, provided that:

(1) The services provided by the executor to the corporation or other business enterprise are of a managerial, executive, or business advisory nature;

(2) The compensation received for the services is reasonable; and

(3) The services are performed and the executor is paid pursuant to a contract executed by the executor and the corporation or business enterprise, which contract is approved by a majority of those members of the board of directors or other similar governing authority of the corporation or business enterprise who are not officers or employees of the executor and are not related to the executor and provided the contract is approved by the probate court of the county in which the administration proceeding is pending.

(b) Any executor receiving compensation from a corporation or other business enterprise for services to it as described in subsection (a) of this Code section shall not receive extra compensation in respect to such services as provided in Code Section 53-6-62; provided, however, that nothing in this Code section shall prohibit the receipt by the executor of extra compensation for services rendered in respect to other assets or matters involving the estate.

(c) Nothing in this Code section shall prohibit the receipt by executors of normal commissions and compensation for the usual services performed by executors pursuant to law or pursuant to any fee agreement executed by the testator.

(d) The purpose of this Code section is to enable additional compensation to be paid to executors for business management and advisory services to corporations and business enterprises pursuant to contract, without the necessity of petitioning for extra compensation pursuant to Code Section 53-6-62.

History. — Code 1981, § 53-6-63, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article surveying developments in Georgia concerning partnerships and corporations from mid-1980 through mid-1981, see 33 Mercer L. Rev. 19 (1981).

COMMENT

This section carries forward the provisions of former OCGA Sec. 53-6-151 as they relate to executors. The provisions relating to trustees are moved to Chapter 12 of this Title.

53-6-64. Compensation to temporary administrator.

A temporary administrator may apply to the court for reasonable compensation after notice to interested parties in compliance with Chapter 11 of this title. The court shall award reasonable compensation to a temporary administrator. For good cause, including but not limited to services performed and compensation awarded to a temporary administrator, the court may reduce the compensation due the personal representative under other provisions of this article.

History. — Code 1981, § 53-6-64, enacted by Ga. L. 1997, p. 1352, § 19.

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

CHAPTER 7

ADMINISTRATION OF ESTATES GENERALLY

Article 1

Powers and Duties Generally

Sec.
53-7-1. General powers and duties of personal representative; additional powers.
53-7-2. Administration of entire estate; distribution of residuum.
53-7-3. Powers and immunities of administrator with will annexed.
53-7-4. Powers of temporary administrators pending appointment of personal representative and executors pending litigation of caveats to wills.
53-7-5. Powers, duties, and liabilities if more than one personal representative; safe deposit boxes or receptacles.
53-7-6. Power to borrow money, make and fulfill contracts, provide legal counsel, continue decedent's business, and perform other acts.
53-7-7. Disposition of income received during administration.
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Article 2

Actions Against Personal Representatives

53-7-10. Allowable defenses; generally.
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53-7-12. Survival of action.
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53-7-20. Action on bond upon liability of decedent and return of execution marked nulla bona.
53-7-21. Against what property judgment levied.
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Inventory

53-7-30. Filing and contents.
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Article 4

Claims Against or In Favor of Estate

53-7-40. Liability of estate; priority of claims.
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53-7-43. Compelling heirs or beneficiaries to contribute to payment of debt.
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Article 5

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53-7-50. Petition by personal representative for discharge; citation and publication; hearing; subsequently discovered estate.
53-7-51. Discharge when funds unclaimed.
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Article 6

Settlement of Accounts

PART 1

GENERAL PROVISIONS

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53-7-70. Examination and recordation of returns and vouchers; evidentiary effect.
53-7-71. Return of nonresident or deceased personal representative.
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53-7-73. Filing and contents of intermediate report; notice to heirs and beneficiaries.
53-7-74. Filing of objections to intermediate report; continuation of hearing; appeal.
53-7-75. Construction of will by superior court.
53-7-76. Judgment surcharging fiduciary.
53-7-77. Conclusiveness of order on intermediate report.
53-7-78. Taxing of costs.

Cross references. — Jurisdiction of judge of probate court to grant administration on estates generally, § 15-9-31.

Editor's notes. — This chapter was effective January 1, 1998, to the extent that no vested rights of title, year's support, succession, or inheritance are impaired, as provided by the version of Code Section 53-1-1 enacted by Ga. L. 1996, p. 504, § 10, as amended by Ga. L. 1997, p. 1352, § 1.

Ga. L. 1996, p. 504, § 10, effective January 1, 1998, repealed the Code sections formerly codified at this chapter, and enacted the current chapter. The former chapter consisted of §§ 53-7-1 through 53-7-191, and was based on Laws 1764, Cobb's 1851 Digest, pp. 301-303; Laws 1791, Cobb's 1851 Digest, p. 309; Laws 1792, Cobb's 1851 Digest, pp. 287, 288, 307, 309; Laws 1799, Cobb's 1851 Digest, pp. 288, 310, 312, 472; Laws 1804, Cobb's

1851 Digest, p. 291; Laws 1805, Cobb's 1851 Digest, p. 314; Laws 1810, Cobb's 1851 Digest, pp. 316, 317; Laws 1812, Cobb's 1851 Digest, p. 318; Laws 1815, Cobb's 1851 Digest, p. 319; Laws 1820, Cobb's 1851 Digest, p. 484; Laws 1821, Cobb's 1851 Digest, pp. 293, 321; Laws 1828, Cobb's 1851 Digest, pp. 326, 327; Laws 1829, Cobb's 1851 Digest, p. 327; Laws 1840, Cobb's 1851 Digest, p. 332; Laws 1843, Cobb's 1851 Digest, pp. 333, 474; Laws 1845, Cobb's 1851 Digest, p. 335; Laws 1847, Cobb's 1851 Digest, p. 336; Laws 1850, Cobb's 1851 Digest, pp. 338, 339, 340; Ga. L. 1851-52, p. 91, §§ 16, 17; Ga. L. 1851-52, p. 235, §§ 1, 3-5; Ga. L. 1853-54, p. 36, § 1; Ga. L. 1853-54, p. 70, § 1; Ga. L. 1855-56, p. 145, §§ 1, 2; Ga. L. 1855-56, p. 147, § 1; Ga. L. 1855-56, p. 152, § 1; Ga. L. 1857, p. 60, §§ 1, 2; Ga. L. 1857, p. 61, § 1; Ga. L. 1857, p. 102, § 1; Ga. L. 1858, p. 58, § 1; Ga. L. 1860, p. 33, § 1; Ga. L. 1861, p. 33, § 1; Ga. L. 1862-63, p. 138, § 1; Orig. Code 1863, §§ 2389, 2407, 2409, 2414, 2415, 2417, 2463, 2468-2486, 2490-2502, 2504, 2506-2512, 2556-2558, 2561-2570, 3295, 3296, 3298-3300, 3372, 3373, 3404, 3405, 3492; Ga. L. 1863-64, p. 47, § 1; Ga. L. 1863-64, p. 49, §§ 1-4; Ga. L. 1865-66, p. 84, §§ 1-3; Ga. L. 1865-66, p. 87, § 2; Ga. L. 1866, p. 23, § 1; Ga. L. 1866, p. 66, § 1; Ga. L. 1866, p. 67, §§ 1, 2; Code 1868, §§ 2385, 2403, 2405, 2410, 2411, 2413, 2460, 2466-2484, 2488-2502, 2504-2512, 2557-2559, 2561, 2563-2572, 3307, 3308, 3310-3312, 3391, 3392, 3423, 3424, 3515; Ga. L. 1868, p. 15, § 1; Ga. L. 1872, p. 31, § 1; Code 1873, §§ 2420, 2438, 2440, 2445, 2447, 2449, 2499, 2505-2523, 2527-2540, 2542, 2543, 2545-2553, 2598-2600, 2602, 2604-2613, 3383, 3384, 3386-3388, 3439, 3440, 3473, 3474, 3573; Ga. L. 1877, p. 19, § 1; Code 1882, §§ 2420, 2438, 2440, 2445, 2447, 2449, 2499, 2505-2523, 2527-2540, 2542, 2543, 2545-2553, 2598-2600, 2602, 2604-2613, 3383, 3384, 3386-3388, 3439, 3440, 3473, 3474, 3573; Ga. L. 1882-83, p. 75, §§ 1, 2; Ga. L. 1884-85, p. 140, §§ 1-3; Ga. L. 1884-85, p. 142, § 1; Civil Code 1895, §§ 3278, 3307, 3309, 3313, 3315, 3317, 3361, 3370, 3373-3375, 3396-3414, 3418-3431, 3433, 3434, 3436-3444, 3493-3497, 3499-3513, 3515-3520, 5036, 5037; Ga. L. 1899, p. 34, § 1; Ga. L. 1900, p. 51, § 1; Ga. L. 1901, p. 40, § 1; Civil Code 1910, §§ 3852, 3883, 3885, 3889, 3891, 3893, 3937, 3946, 3949-3951, 3972-3990, 3994-4007, 4009, 4010, 4012-4020, 4073-4075, 4077, 4079-4093, 4095-4100, 5619, 5618; Ga. L. 1920, p. 79, § 1; Code 1933, §§ 3-502, 3-503, 113-1216 through 113-1220, 113-1222 through 113-1226, 113-1229 through 113-1231, 113-1401 through 113-1408, 113-1411 through 113-1414, 113-1501 through 113-1516, 113-1521 through 113-1526, 113-1528, 113-1601 through 113-1605, 113-1901 through 113-1905, 113-2101 through 113-2105, 113-2107 through 113-2110, 113-2201 through 113-2209, 113-2301 through 113-2312; Ga. L. 1935, p. 326, § 1; Ga. L. 1943, p. 409, §§ 1-3, 5-11; Ga. L. 1947, p. 861, § 1; Ga. L. 1951, p. 823, § 1; Ga. L. 1953, p. 451, § 1; Ga. L. 1957, p. 502, § 1; Ga. L. 1958, p. 657, §§ 12, 15-18, 24; Ga. L. 1959, p. 99, § 1; Ga. L. 1959, p. 136, § 6; Ga. L. 1964, p. 211, § 1; Ga. L. 1964, p. 269, §§ 1-3; Ga. L. 1967, p. 438, § 1; Ga. L. 1968, p. 474, § 1; Ga. L. 1970, p. 164, §§ 1, 2; Ga. L. 1971, p. 430, § 1; Ga. L. 1971, p. 433, §§ 2, 3; Ga. L. 1971, p. 633, § 1; Ga. L. 1972, p. 447, § 1; Ga. L. 1972, p. 455, §§ 1, 2; Ga. L. 1972, p. 558, § 3; Ga. L. 1973, p. 826, § 1; Ga. L. 1973, p. 830, § 2; Ga. L. 1973, p. 1191, § 1; Ga. L. 1975, p. 711, § 1; Ga. L. 1979, p. 1325, §§ 3, 4; Ga. L. 1982, p. 3, § 53; Ga. L. 1983, p. 884, § 4-1; Ga. L. 1984, p. 22, § 53; Ga. L. 1984, p. 937, § 5; Ga. L. 1985, p. 149, § 53; Ga. L. 1986, p. 982, §§ 21, 22; Ga. L. 1988, p. 347, § 1; Ga. L. 1988, p. 881, §§ 1-4; Ga. L. 1990, p. 294, § 1; Ga. L. 1990, p. 350, § 4; Ga. L. 1994, p. 1173, § 4.

Law reviews. — For annual survey of law of wills, trusts, and administration of estates, see 40 Mercer L. Rev. 471 (1988). For annual survey of wills, trusts, and administration of estates, see 42 Mercer L. Rev. 491 (1990). For annual survey article on law of wills, trusts, and administration of estates, see 45 Mercer L. Rev. 475 (1993).

RESEARCH REFERENCES

ALR. — Testamentary option to purchase estate property as surviving optionee's death, 18 A.L.R.4th 578.

ARTICLE 1

POWERS AND DUTIES GENERALLY

53-7-1. General powers and duties of personal representative; additional powers.

(a) The duties and powers of the personal representative commence upon qualification. Such powers relate back to give acts performed by the personal representative prior to qualification that are beneficial to the estate the same effect as those acts performed after qualification. The personal representative may ratify and accept on behalf of the estate acts that are done by others that would have been proper acts for the personal representative. A personal representative is a fiduciary who, in addition to the specific duties imposed by law, is under a general duty to settle the estate as expeditiously and with as little sacrifice of value as is reasonable under all of the circumstances. The personal representative shall use the authority and powers conferred by law, by the terms of any will under which the personal representative is acting, by any order of court in proceedings to which the personal representative is a party, and by the rules generally applicable to fiduciaries to act in the best interests of all persons who are interested in the estate and with due regard for their respective rights.

(b)(1) As part of the petition for letters testamentary, letters of administration with the will annexed, or letters of administration or by separate petition, the beneficiaries of a testate estate or the heirs of an intestate estate may, by unanimous consent, authorize but not require the probate court to grant to the personal representative any of the powers contained in Code Section 53-12-261; provided, however, that the grant by the probate court of the powers provided by paragraph (1) of subsection (b) of Code Section 53-12-261 shall not authorize the personal representative to bind the estate by any warranty in any conveyance or contract in violation of subsection (a) of Code Section 53-8-14.

(2) With respect to any beneficiary of a testate estate or heir of an intestate estate who is not sui juris, the consent required by paragraph (1) of this subsection may be given by such beneficiary's or heir's duly acting conservator or guardian. The personal representative of a deceased beneficiary or heir shall be authorized to consent on behalf of such deceased beneficiary or heir.

(3) The grant of powers provided for in paragraph (1) of this subsection shall be ordered only after publication of a citation in the official newspaper of the county in which the petition is made and only after the time for filing objections has elapsed either without any objection being timely filed, or if any such objection is timely filed, upon each such objection being dismissed or withdrawn. The citation shall be sufficient if it states generally that the petition requests that powers contained in Code Section 53-12-261 be granted.

History. — Code 1981, § 53-7-1, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 29; Ga. L. 2010, p. 579, § 18/SB 131; Ga. L. 2020, p. 377, § 1-36/HB 865.

The 2020 amendment, effective January 1, 2021, rewrote subsection (b), which read: "(b) As part of the petition for letters testamentary or letters of administration or by separate petition, the beneficiaries of a testate estate or the heirs of an intestate estate may, by unanimous consent, authorize but not require the probate court to grant to the personal representative any of the powers contained in Code Section 53-12-261. With respect to any beneficiary or heir who is not sui juris, the consent may be given by the guardian. The personal representative of a deceased beneficiary or heir shall be authorized to consent on behalf of that beneficiary or heir. The grant of powers shall only be ordered after publication of a citation and without any objection being filed. The citation shall be sufficient if it states generally that the petition requests that powers contained in Code Section 53-12-261 be granted."

Law reviews. — For article surveying wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982). For survey article on wills, trusts, guardianships, and fiduciary administration for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003).

COMMENT

Subsection (a) had no counterpart in former OCGA Title 53. This subsection gives broad direction to the personal representative to pursue those acts necessary for an expeditious administration of the estate. Subsection (b) carries forward the provisions of former OCGA Sec. 53-6-26(b), allowing the beneficiaries of a testate estate or the heirs of an intestate estate to authorize the probate court to grant the fiduciary powers that are delineated for trustees in OCGA Sec. 53-12-232. This subsection modifies former law by allowing a guardian ad litem to consent on behalf of a beneficiary or heir who is not sui juris. (Former OCGA Sec. 53-6-26(b) did not include a guardian ad litem in the list of those who would consent on behalf of an individual who is not sui juris.) (For general provisions relating to guardians, see OCGA Sec. 53-11-2.) The subsection also allows the personal representative of a deceased beneficiary or heir to consent for that individual. See Code Sec. 53-1-2 for definitions of "beneficiary," "heir," and "personal representative".

JUDICIAL DECISIONS

Distribution improper. — Trial court erred in holding that a distribution proposed by an executor did not violate the terms of the decedent's will, as in manipulating the distribution so that the executor did not gain control of the family company, the executor was elevating the executor's own interests over that of the beneficiary in violation of the executor's duty under O.C.G.A. § 53- 7-1(a). Harp v. Pryor, 276 Ga. 478, 578 S.E.2d 424 (2003).

Removal of executor upheld. — Probate court order removing an executor from an estate and ordering the executor to forfeit $79,000 in commissions and fees received and costs incurred as executor

and attorney for the estate was upheld on appeal because: (1) the record showed that the attorney filed a purported estate accounting six inches thick, which was prepared by the staff and which the attorney showed little familiarity with; (2) the attorney delayed a distribution to a beneficiary by trying to force the beneficiary to create a trust, which was not required by the decedent's will; (3) the attorney filed an erroneous tax return that had to be amended as well as took a deduction the attorney knew was improper; and (4) the attorney incurred unnecessary expenses and fees by showing the decedent's house when the sale of the house was not required by the will. In re Estate of Arnsdorff, 273 Ga. App. 612, 615 S.E.2d 758 (2005).

Failure to carry out duties. — Trial court did not abuse the court's discretion under O.C.G.A. § 53-7-55(1) in removing the executor as executor of the decedent's estate, as the executor did not carry out the duties under O.C.G.A. § 53-7-1(a); the executor did not take control of assets of the estate, the executor commingled estate funds with the executor's own funds, and the executor sold the decedent's house without obtaining an appraisal or attempting to realize the best price on the open market. In re Estate of Zeigler, 273 Ga. App. 269, 614 S.E.2d 799 (2005).

Executor's breach of fiduciary duty. — In circumstances in which an estate executor used a power of attorney before the executor's mother's death to add the executor's name to bank accounts and a certificate of deposit, eventually taking all of the money from those accounts for the executor's own without reporting that money as part of the estate, a probate court was authorized to order the executor to turn over that money to the estate; after the executor was appointed to handle the estate, the executor knew that the executor possessed money that should have been in the estate, knowledge the executor gained by being the person who removed it from the estate, and the executor's retention of those funds promoted the executor's own interest to injury of beneficiaries of the estate, and thus was a breach of the executor's fiduciary duty. Greenway v. Hamilton, 280 Ga. 652, 631 S.E.2d 689 (2006).

Probate court order removing an executor for cause was affirmed because the executor violated the executor's fiduciary duty in numerous ways by failing to dissolve the estate business, using estate property and funds for the executor's own benefit and to pay personal bills, overpaying executor's fees, and having a conflict of interest by continuing to operate the business despite the estate losing money but personally benefiting by using the business property rent free. Myers v. Myers, 297 Ga. 490, 775 S.E.2d 145 (2015).

When the parties entered into a High-Low settlement agreement that was silent as to how the funds should be allocated between the wrongful death claim and the claims of the decedent's estate, the decedent's wife, who was also the administrator of the decedent's estate, acted in contravention of the wife's fiduciary duties to the children by arguing that none of the settlement funds should be allocated to the wrongful death claim, and the trial court erred by failing to allocate any of the settlement funds to the wrongful death claim because the trial court was not allowed to consider the decedent's wishes in apportioning the claims as the children had an absolute right to share in any recovery on that claim. Leanhart v. Knox, 351 Ga. App. 268, 830 S.E.2d 545 (2019).

Fulfillment of fiduciary duties. — Finding that an executor fulfilled the executor's fiduciary duties pursuant to O.C.G.A. § 53-7-1(a) was not clearly erroneous because the executor was timely in the executor's distributions and properly distributed assets. In re Estate of Long, 307 Ga. App. 896, 706 S.E.2d 704 (2011).

Administrator's deed proper. — In a purchaser's quiet title action against the executor of a testator's estate, the trial court did not err in adopting the report of a special master and in decreeing that fee simple title to the land was vested in the purchaser because it was the clear intent of the testator to give to the testator's nephew a limited fee to the property based on the contingency that the nephew live on the property, and if the nephew did not, the property was to revert to the estate; the executor was obligated to give effect to the clear intent of the testator to convey

only a limited fee to the nephew, and upon a nonoccurrence of the contingency stated in the will, the property automatically reverted to the estate, and the administrator's deed from the executor to the nephew referenced the testator's will and perfected the limited estate. Mann v. Blalock, 286 Ga. 541, 690 S.E.2d 375 (2010).

No authority existed for administratrix to sign arbitration agreement on behalf of disabled child. — Order compelling arbitration was reversed because the administratrix of an adult child, who was an incapacitated person, had no authority to sign the arbitration agreement as the child did not personally assent and there was no evidence that the administratrix had actual authority as there existed no power of attorney or any other document authorizing the administratrix to sign the arbitration agreement or to take any action on the child's behalf. Lynn v. Lowndes County Health Servs., LLC, 354 Ga. App. 242, 840 S.E.2d 623 (2020), cert. denied, 2020 Ga. LEXIS 712 (Ga. 2020).

Appellate court applies an abuse of discretion standard in reviewing a probate court's order removing an executor; the relevant question in reviewing a removal order regarding an executor is whether the trial court had grounds to conclude that there was good cause for the removal. In re Estate of Arnsdorff, 273 Ga. App. 612, 615 S.E.2d 758 (2005).

Trustee's/executor's powers did not entitle trustee to ignore purpose of trust or commit waste. — Trial court erred in concluding that a widow's considerable powers of control over two testamentary trusts as trustee and executor entitled her to summary judgment on two of the children's/beneficiaries' claims against the trust created for the purpose of supporting them during their lifetimes; she was required to diligently and in good faith ascertain whether they required support, and her powers over the assets did not entitle her to commit waste. Peterson v. Peterson, 303 Ga. 211, 811 S.E.2d 309 (2018).

53-7-2. Administration of entire estate; distribution of residuum.

The personal representative shall be entitled to possess and administer the entire estate. If, after payment of debts and satisfaction of testamentary gifts, there are assets not given under the will, such assets shall be distributed to the heirs of the decedent as if the decedent had died intestate.

History. — Code 1981, § 53-7-2, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For note, "Not Just For Kids: Why Georgia's Statutory Disinheritance of Deadbeat Parents Should Extend to Intestate Adults," see 43 Ga. L. Rev. 867 (2009).

COMMENT

This section replaces former OCGA Sec. 53-7-2 and applies the provisions of that section to all personal representatives, rather than just to executors and administrators with the will annexed. (See Code Sec. 53-1-2 for the definition of "personal representative".) Former OCGA Sec. 53-7-1, relating to the powers of an executor upon probate of a will in common form, is repealed.

JUDICIAL DECISIONS

Beneficiaries of estate had standing to bring claim. — Trial court's denial of a sister's motion to dismiss an action by siblings, seeking to set aside quitclaim

deeds that the parties' father had executed in favor of the sister, was proper because the siblings, as heirs at law and beneficiaries of the estate, were proper parties to have brought the action pursuant to O.C.G.A. §§ 53-7-2 and 53-7-5(a) when it was clear that the co-executors, one of whom was the sister, were not going to bring the claim; there was no abandonment of the claim against the property despite the signing by the co-executors of a federal estate tax return under O.C.G.A. § 53-7-45, as the tax return was due and any changes based on rights to the property could have been set forth in an amended return. Field v. Mednikow, 279 Ga. App. 380, 631 S.E.2d 395 (2006).

Estate administrator had right to inspect. — Order granting an estate administrator of a deceased shareholder the right to inspect the defendant's corporate books and denying the defendant's motions to compel and stay pending arbitration was affirmed because the statutes governing the transfer of stock to the estate vested ownership of the shares in the administrator of the estate and the probate court's order granted the adminstrator trustee's powers over those shares. Regal Nissan, Inc. v. Scott, 348 Ga. App. 91, 821 S.E.2d 561 (2018).

53-7-3. Powers and immunities of administrator with will annexed.

An administrator with the will annexed shall have all rights, powers, privileges, exemptions, and immunities of the executor, including the dispensation by the testator of the necessity of making inventory and returns.

History. — Code 1981, § 53-7-3, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-7-3, but omits the reference to bonds that appeared in that section. The reference is omitted because, whether or not relieved by the will, executors are generally not required to give bond unless the probate court so decrees. See Article 6 of Chapter 6 for provisions on bonds of personal representatives. See Code Sec. 53-1-2 for the definitions of "administrator with the will annexed" and "executor".

53-7-4. Powers of temporary administrators pending appointment of personal representative and executors pending litigation of caveats to wills.

Temporary administrators, pending the appointment of a personal representative, and executors, pending litigation of caveats to wills, are authorized to carry out existing contracts of the decedent, carry on the business of the decedent, and do such acts as are necessary for the protection and preservation of the estate provided proper orders are secured from the probate court after due notice to all parties in interest.

History. — Code 1981, § 53-7-4, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-7-4 and deletes the reference in that former Code section to acts required by a receiver of the superior court. See Code Sec. 53-1-2 for definitions of "executor" and "temporary administrator". For general provisions relating to temporary administrators, see Article 4 of Chapter 6.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-7-4 are included in the annotations for this Code section.

Cited in Kelly v. Citizens & S. Nat'l Bank, 160 Ga. App. 405, 287 S.E.2d 343 (1981); Deller v. Smith, 250 Ga. 157, 296 S.E.2d 49 (1982); Resseau v. Bland, 268 Ga. 634, 491 S.E.2d 809 (1997).

53-7-5. Powers, duties, and liabilities if more than one personal representative; safe deposit boxes or receptacles.

(a) If more than one personal representative is qualified and unless the will provides otherwise:

(1) The personal representatives must act by their unanimous action; provided, however, that while a personal representative is unable to act because of inaccessibility, illness, or other incapacity, or when a vacancy occurs for any other reason, the remaining personal representatives may act as if they were the only personal representatives if necessary to administer the estate; and

(2) The personal representatives may delegate in writing to one or more of them the authority to act for all of them; provided, however, that such delegation must satisfy the requirements of Code Sections 10-6B-5 and 10-6B-40, and that all the personal representatives remain liable for the actions of the personal representative who is authorized to act.

(b) If more than one personal representative is qualified and unless the will provides otherwise, a personal representative is liable for a breach committed by another personal representative:

(1) By participating in a breach of fiduciary duty committed by the other personal representative;

(2) By approving, knowingly acquiescing in, or concealing a breach of fiduciary duty committed by the other personal representative;

(3) By negligently enabling the other personal representative to commit a breach of fiduciary duty; or

(4) By neglecting to take reasonable steps to compel the other personal representative to redress a breach of fiduciary duty in a case where the personal representative knows or reasonably should have known of the breach of trust.

(c) When safe-deposit boxes or receptacles are leased or rented to fiduciaries, including executors, administrators, guardians, trustees, custodians, receivers, and the like, the fiduciary or fiduciaries, as lessee or renter, may authorize the entering of the box or receptacle by one or fewer than all of them or by any other person without the presence or consent of the fiduciary or fiduciaries. Upon receipt of the written authorization, the bank or lessor may without liability authorize access to the box or receptacle in accordance with such authorization. Upon cancellation of the authorization, the bank or lessor may require the presence of all lessees or renters for access.

History. — Code 1981, § 53-7-5, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-37/HB 865.

The 2020 amendment, effective January 1, 2021, inserted "such delegation must satisfy the requirements of Code Sections 10-6B-5 and 10-6B-40, and that" in paragraph (a)(2); and substituted "safe-deposit" for "safe deposit" in subsection (c).

Cross references. — Procedure for opening safe-deposit box when depositor dies or becomes incompetent, § 7-1-356.

Law reviews. — For article on the problems and benefits of multiple fiduciaries in estate planning, see 33 Mercer L. Rev. 355 (1981).

COMMENT

Subsections (a) and (b) replace former OCGA Secs. 53-7-5 and 53-7-6 and change the law by requiring that personal representatives act unanimously unless the personal representative is acting under a will that indicates otherwise. These subsections are modeled after two sections of Title 53 dealing with the actions of cotrustees: OCGA Secs. 53-12-172 and 53-12-196. Because it conflicts with this new requirement of unanimous action, former OCGA Sec. 53-2-110 is repealed. Subsection (c) carries forward former OCGA Sec. 53-6-2.

JUDICIAL DECISIONS

Beneficiaries of estate had standing to bring claim. — Trial court's denial of a sister's motion to dismiss an action by siblings, seeking to set aside quitclaim deeds that the parties' father had executed in favor of the sister, was proper because the siblings, as heirs at law and beneficiaries of the estate, were proper parties to have brought the action pursuant to O.C.G.A. §§ 53-7-2 and 53-7-5(a) when it was clear that the co-executors, one of whom was the sister, were not going to bring the claim; there was no abandonment of the claim against the property despite the signing by the co-executors of a federal estate tax return under O.C.G.A. § 53-7-45, as the tax return was due and any changes based on rights to the property could have been set forth in an amended return. Field v. Mednikow, 279 Ga. App. 380, 631 S.E.2d 395 (2006).

Liability imposed against co-executor. — Under O.C.G.A. § 53-7-5(b), the probate court was not prohibited from holding one of multiple executors who committed or individually benefitted from the breach of a duty to a devisee primarily liable for the breach. LaFavor v. LaFavor, 282 Ga. App. 753, 639 S.E.2d 633 (2006).

Cited in In re Estate of Wade, 331 Ga. App. 535, 771 S.E.2d 214 (2015).

53-7-6. Power to borrow money, make and fulfill contracts, provide legal counsel, continue decedent's business, and perform other acts.

(a) Except as otherwise provided in the will or ordered by the probate court, a personal representative is authorized:

(1) To borrow money and to bind the estate by the execution of a promissory note for money borrowed and to pledge any or all the property of the estate for the payment of such a promissory note by mortgage, trust deed, deed to secure debt, or other security instrument, for the purpose of paying any gift, estate, inheritance, income, sales, or ad valorem taxes due the United States, the state, or any municipality or county of the state that constitute a claim or demand against the estate; provided, however, that a personal representative who desires to borrow money shall file a petition with the probate court, setting forth the facts and specifying the amount to be borrowed, the purpose for which the same shall be used, the rate of interest to be paid, the property to be pledged as security and the period of time over which the loan is to be repaid and, upon service of notice of the petition, an order granting leave to borrow the money and encumber the estate shall be entered and such order shall be binding, final, and conclusive as to all interested parties;

(2) To make contracts for labor or service for the benefit of the estate upon such terms as the personal representative deems best and all such contracts made in good faith shall be a charge upon and bind the estate whenever such contracts are approved by the probate court after service of notice;

(3) To fulfill, as far as possible, the executory contracts and comply with the executed contracts of the decedent, including contracts for the sale of land or bonds to make title to land, and shall have a corresponding right to demand the same of parties contracted with; provided, however, that if the personal skill of the decedent entered into the consideration of the contract and the decedent's death renders execution impossible, the contract, though entire, shall be considered divisible and closed at the decedent's death and any partial execution by the decedent shall authorize and require a corresponding compliance by the other contracting party;

(4) To provide competent legal counsel for the estate according to the needs of the estate and, in such cases, either the personal representative or the attorney employed may, by petition to the probate court and citation served on the other, obtain a judgment fixing the attorney's fees and expenses;

(5) To continue the business of the decedent for the 12 months following qualification of the personal representative, after which the

personal representative may petition for permission to continue the business under such terms and conditions as the probate court may specify after service of notice; and

(6) To petition the probate court for permission to perform such other acts as may be in the best interests of the estate after service of notice.

(b) Service of notice of any petition to the probate court under subsection (a) of this Code section shall be made in the manner provided by Chapter 11 of this title. The probate court, in its discretion, may, but shall not be required to, conduct a hearing on any such petition.

History. — Code 1981, § 53-7-6, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-38/HB 865.

The 2020 amendment, effective January 1, 2021, designated the previously existing provisions as subsection (a); in subsection (a), inserted "or ordered by the probate court" in the introductory language, substituted "that" for "which" and "service of notice" for "notice and hearing" in paragraph (a)(1), added "after service of notice" at the end of paragraph (a)(2), substituted "and citation" for "duly" in paragraph (a)(4), and inserted "after service of notice" in paragraphs (a)(5) and (a)(6); and added subsection (b).

Cross references. — Substitution of parties to contract generally, § 13-4-20. Impossibility as excuse from performance, § 13-4-21.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, a comma was inserted after "final" near the end of paragraph (1).

COMMENT

This section carries forward former OCGA Secs. 53-7-7 through 53-7-11. Paragraph (3) also includes an authorization for the personal representative to fulfill the decedent's contracts and bond as to real property, as is contemplated by OCGA Sec. 53-7-96. Paragraph (5) modifies the rule of former OCGA Sec. 53-7-11 by allowing the personal representative to continue the decedent's business for twelve months (rather than "until the expiration of the current year" as provided in the former law) and then petition the probate court for permission to continue further upon conditions set up by the probate court (rather than having to petition from year to year, as required by the old law). New paragraph (6) allows the personal representative to petition the court to perform acts other than those enumerated in the Code section. For general provisions regarding the filing and hearing of petitions in the probate court and notice, see Chapter 11.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. §§ 53-7-8, 53-7-9, and 53-7-10 are included in the annotations for this Code section.

Payment of attorney's fees. — Given a widow's commission of undue influence in procuring a conveyance of beach property to herself and her son, it was not the decedent's intent in including an in terrorem clause to wholly immunize her from the entire amount of attorney's fees incurred by the estate in the undue influence litigation. Her share of the estate, like all the bequests, would be reduced in value after payment of the fees under O.C.G.A. § 53-7-6(4). Pate v. Wilson, 286 Ga. 133, 686 S.E.2d 88 (2009).

Noncompetition agreement alone not personal service contract. — While a noncompetition agreement joined with affirmative promises is a personal

services contract which terminates upon the death of the promisor, a noncompetition agreement standing alone, with no affirmative promises, is not. Mail & Media, Inc. v. Rotenberry, 213 Ga. App. 826, 446 S.E.2d 517 (1994) (decided under former O.C.G.A. § 53-7-8).

Attorney's fees. — Good faith is necessary for the administrator as well as the executor who seeks to bind the estate for attorney fees. Hudson v. Abercrombie, 258 Ga. 729, 374 S.E.2d 83 (1988) (decided under former O.C.G.A. § 53-7-10).

Temporary administrator's right to attorney fees may not extend beyond fees for such services as may have been necessary to assist the administrator in the securing of temporary letters of administration and the collection and preservation of the assets of the estate. Hudson v. Abercrombie, 258 Ga. 729, 374 S.E.2d 83 (1988) (decided under former O.C.G.A. § 53-7-10).

Coexecutor was not entitled to attorney's fees when it was found that the fees the coexecutor claimed were unrelated to the administration of the estate. Nesmith v. Pierce, 226 Ga. App. 851, 487 S.E.2d 687 (1997) (decided under former O.C.G.A. § 53-7-10).

Cited in Citizens & S. Trust Co. v. Hicks, 216 Ga. App. 338, 454 S.E.2d 207 (1995); Ray v. Nat'l Health Investors, Inc., 280 Ga. App. 44, 633 S.E.2d 388 (2006).

ADVISORY OPINIONS OF THE STATE BAR

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former O.C.G.A. § 53-7-10 are included in the annotations for this Code section.

Attorney as executor or trustee in will or trust prepared by attorney. — It is not ethically improper for a lawyer to be named executor or trustee in a will or trust he or she has prepared, so long as the lawyer does not consciously influence the client in the decision to name him or her executor or trustee, and he or she obtains the client's written consent in some form or gives the client written notice in some form after a full disclosure of all the possible conflicts of interest. In addition, the total combined attorney's fee and executor or trustee fee or commission must be reasonable and procedures used in obtaining this fee are in accord with Georgia law. Adv. Op. No. 91-1 (Sept. 13, 1991).

53-7-7. Disposition of income received during administration.

Except as otherwise provided in the will, income received by an executor during the period of administration from property that is used to pay debts, taxes, expenses of administration, general testamentary gifts, and other expenses chargeable to corpus shall be paid to the income beneficiaries of the residuum of the estate; provided, however, that nothing contained in this Code section shall alter or repeal Code Section 53-4-60.

History. — Code 1981, § 53-7-7, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-7-12.

53-7-8. Support and education of minor heirs and beneficiaries without conservators.

Whenever a personal representative has paid all the debts of the decedent and all claims against the estate, and property due minor heirs or beneficiaries for whom no one applies to be conservator is left in the personal representative's hands, the personal representative may, under the direction of the probate court, apply so much of the minor's share of the decedent's estate as may be necessary for support and education as conservators are allowed by law to do.

History. — Code 1981, § 53-7-8, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-39/HB 865.

The 2020 amendment, effective January 1, 2021, substituted "conservator" for "guardian" and "conservators" for "guardians" in this Code section.

COMMENT

This section carries forward the substance of former OCGA Sec. 53-7-13.

ARTICLE 2

ACTIONS AGAINST PERSONAL REPRESENTATIVES

53-7-10. Allowable defenses; generally.

(a) For purposes of this article, the term "personal representative" includes temporary administrators.

(b) When an action is brought against a personal representative in that person's representative capacity, the personal representative may make the following defenses:

(1) That person does not occupy the position of personal representative, as alleged;

(2) That no assets have come into the hands of the personal representative;

(3) That all assets coming into the hands of the personal representative have been fully administered;

(4) That all assets coming into the hands of the personal representative have been fully administered except those necessary to satisfy debts of a greater priority;

(5) That the personal representative has fully administered the assets that came into the personal representative's hands; or

(6) That, pending the action, the letters testamentary or of administration have been revoked and the administration committed to

another to whom all the assets that came into the personal representative's hands have been delivered.

History. — Code 1981, § 53-7-10, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward the substance of former OCGA Sec. 53-7-48. Although temporary administrators are not included in the term "personal representative" as it is defined in Code Section 53-1-2, subsection (b) provides that temporary administrators are subject to this Article.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-7-48 are included in the annotations for this Code section.

Defense properly raised. — Stepparent was entitled to raise in an appeal the question of whether a homeplace came into the stepparent's hands as the personal representative of a decedent' mother's estate in the course of asserting the defense that the stepparent had in fact administered the estate properly because the probate court made a finding of fact that the stepparent, as the personal representative of the mother's estate, had transferred marital property, specifically the homeplace, to the stepparent individually. In re Estate of Thornton, 275 Ga. App. 202, 620 S.E.2d 410 (2005).

Full administration of assets. — Award of decedent's entire estate to his widow as year's support constituted full administration of decedent's estate, and executor's defense of plene administravit against bank's action on note should have been sustained since the bank had proper notice of the year's support proceedings in the probate court and filed no caveat thereto. Goldberg v. National Bank, 165 Ga. App. 106, 299 S.E.2d 163 (1983) (decided under former O.C.G.A. § 53-7-48).

53-7-11. Allowable defenses; action originating in lifetime of decedent.

When the cause of action originated in the lifetime of the decedent, a personal representative may make any defense or pleading that the decedent could have made if alive.

History. — Code 1981, § 53-7-11, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-40/HB 865.

The 2020 amendment, effective January 1, 2021, substituted "pleading that" for "pleading which" in this Code section.

COMMENT

This section carries forward former OCGA Sec. 53-7-49.

53-7-12. Survival of action.

An action against joint personal representatives shall not abate by the death of one but shall proceed against the survivor or survivors.

History. — Code 1981, § 53-7-12, enacted by Ga. L. 1996, p. 504, § 10.

Cross references. — Substitution of parties by reason of death, § 9-11-25.

COMMENT

This section carries forward former OCGA Sec. 53-7-43.

53-7-13. Service of notice, writ, or process.

(a) In any action or proceeding brought pursuant to this article, service of any notice, writ, or process shall be made in the manner provided by Chapter 11 of this title if Chapter 11 of this title is applicable under Code Section 53-11-1. If Chapter 11 of this title is not applicable to such action or proceeding under Code Section 53-11-1, such service shall be made in the manner provided by Chapter 11 of Title 9 unless Chapter 11 of said title is not applicable to such action or proceeding under Code Section 9-11-81.

(b) In all cases where there are two or more personal representatives and one or more of them remove beyond the limits of this state, service of any notice, writ, or process upon those remaining in the state shall be as effectual and complete, for all purposes whatever, as though such service had been made upon all of the personal representatives.

History. — Code 1981, § 53-7-13, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-41/HB 865; Ga. L. 2021, p. 922, § 53/HB 497.

The 2020 amendment, effective January 1, 2021, added subsection (a); designated the existing provisions as subsection (b); and, in subsection (b), substituted "notice, writ, or process" for "writ or process" and inserted "such".

The 2021 amendment, effective May 10, 2021, part of an Act to revise, modernize, and correct the Code, substituted "remove" for "removes" in the middle of subsection (b).

COMMENT

This section carries forward former OCGA Sec. 53-7-42.

53-7-14. Action against removed personal administrator.

(a) When letters testamentary or letters of administration are revoked, no action by or against the removed personal representative shall abate. The newly appointed personal representative may be made a party plaintiff or defendant in place of the removed personal representative.

(b) The revocation of letters of administration shall not abate any action pending for or against the personal representative, but the newly appointed personal representative shall be made a party in proper cases as in the death of a party.

History. — Code 1981, § 53-7-14, enacted by Ga. L. 1996, p. 504, § 10.

Cross references. — Substitution of parties by reason of death, § 9-11-25.

COMMENT

This section carries forward former OCGA Sec. 53-7-44.

53-7-15. Applicability of provisions relating to sureties on guardians' or conservators' bonds.

The provisions of law governing the situation in which the surety on a guardian's or conservator's bond dies, becomes insolvent, removes beyond the limits of this state, from other cause becomes insufficient, or desires to be relieved as surety shall be applicable to sureties on personal representatives' bonds.

History. — Code 1981, § 53-7-15, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-42/HB 865.

The 2020 amendment, effective January 1, 2021, inserted "or conservator's" in this Code section.

COMMENT

This section carries forward former OCGA Sec. 53-7-38.

53-7-16. Joint and several liability of personal representative and sureties.

The personal representative and sureties shall be held and deemed joint and several obligors and may be subjected jointly and severally to liability in the same action. When a personal representative removes beyond the limits of this state, dies and leaves an unrepresented estate, or is in such a position that an attachment may be issued as against a debtor, any party in interest or any person having demands against that personal representative in the personal representative's representative capacity may institute an action against the sureties or any one or more of them upon the bond of the personal representative in the first instance, without first obtaining a judgment against the personal representative in that person's representative capacity. No prior judgment establishing the liability of the personal representative or a devastavit by the personal representative shall be necessary before an action is brought against the sureties on the bond.

History. — Code 1981, § 53-7-16, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section combines the provisions of former OCGA Secs. 53-7-39 and 53-7-46.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-7-39 are included in the annotations for this Code section.

Litigation costs paid from estate assets. — Following an unsuccessful claim for estate mismanagement brought by beneficiaries of an estate against the administrator and the administrator's bonding company, litigation costs incurred by the company, pursuant to an indemnity clause in the bond application of the administrator, should be paid from estate assets. Fowler v. Smith, 243 Ga. App. 469, 533 S.E.2d 739 (2000) (decided under former O.C.G.A. § 53-7-39).

53-7-17. Liability on common bond of two or more personal representatives.

If two or more personal representatives unite in a common bond, all the sureties shall be bound for the acts of each personal representative and the personal representatives themselves shall be mutual sureties for each other's conduct.

History. — Code 1981, § 53-7-17, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-7-40.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 10 Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 672.

53-7-18. Liability of sureties on bond of removed personal representative.

In all cases of removal of a personal representative for any cause, the sureties on that personal representative's bond shall be liable for the personal representative's acts in connection with the estate up to the time of settlement with another personal representative or the distributees of the estate.

History. — Code 1981, § 53-7-18, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-7-41.

53-7-19. Action on bond for failure to settle and account with heir or beneficiary.

When any personal representative fails to settle and account with any heir or beneficiary of the estate, the heir or beneficiary may bring an action on the bond of the personal representative in the first instance and may recover judgment against the principal and the principal's sureties without first bringing an action against the personal representative in that person's representative capacity.

History. — Code 1981, § 53-7-19, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-7-45.

53-7-20. Action on bond upon liability of decedent and return of execution marked nulla bona.

Upon the rendition of a judgment against a personal representative upon any liability of the decedent and a return of writ of execution marked nulla bona, the plaintiff may at once bring an action on the bond of the personal representative and may recover judgment against the principal and the sureties in the same action. If the principal has removed beyond the limits of this state or has died and has no legal representative, the plaintiff may bring an action against the sureties on the bond alone, without joining the principal.

History. — Code 1981, § 53-7-20, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-7-47.

53-7-21. Against what property judgment levied.

In an action against a personal representative in that person's representative capacity, the judgment shall generally be de bonis testatoris. However, when the personal representative unsuccessfully makes any of the defenses described in Code Section 53-7-10 or a release, the judgment shall be that the plaintiff recover both the debt and costs, to be first levied on the property of the decedent, if found, and if such property is not found, then to be levied on the property of the defendant personal representative.

History. — Code 1981, § 53-7-21, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-7-52.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-7-52 are included in the annotations for this Code section.

Full administration of assets. — When defendant executor pleads plene administravit, plaintiff creditor may pray to have judgment of assets quando acciderint; such judgment is an admission that the representative has administered fully all the assets of the estate coming into the representative's hands up to that time and should only be rendered against assets of the estate which may thereafter come into the hands of the representative. Goldberg v. National Bank, 165 Ga. App. 106, 299 S.E.2d 163 (1983) (decided under former O.C.G.A. § 53-7-52).

53-7-22. Levy upon property; entering of judgment and issuance of execution.

(a) When a judgment has been obtained against the principal and surety or sureties on the bond of a personal representative, guardian, or other fiduciary, a levy may be made upon any property of any defendant in fi. fa.

(b) The probate court shall be authorized to enter a judgment and to issue a writ of execution against the principal and surety or sureties on the bond of a personal representative, guardian, or other fiduciary and shall be further authorized to grant judgment and execution in favor of the surety or sureties against the principal upon payment of the judgment by the surety or sureties.

History. — Code 1981, § 53-7-22, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-7-50.

53-7-23. Property upon which execution levied.

In all cases of judgments recovered against a personal representative and the sureties of a personal representative, the execution shall first be levied on the property of the sureties, and no levy shall be made on the property of the principal until there is a return of nulla bona as to the sureties.

History. — Code 1981, § 53-7-23, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section amends former OCGA Sec. 53-7-51 by requiring the execution first to be levied on the property of the sureties of a personal representative rather than on the property of the personal representative.

ARTICLE 3

INVENTORY

53-7-30. Filing and contents.

Unless otherwise provided by will or relieved under Code Section 53-7-32 or 53-7-33, the personal representative shall prepare an inventory of all the property of the decedent. The personal representative shall file the inventory with the probate court and shall deliver a copy of the inventory to the beneficiaries of a testate estate or the heirs of an intestate estate by first-class mail within six months after the qualification of the personal representative. It shall not be necessary to mail a copy of the inventory to any beneficiary or heir who is not sui juris or for the court to appoint a guardian for such person. The time for filing the inventory may be extended by the probate court for good cause shown. The inventory shall state that it contains a true statement of all the property of the decedent within the knowledge of the personal representative and shall be verified in the same manner as a petition filed in the probate court. The inventory shall state that the inventory has been mailed to all beneficiaries or heirs who are entitled to receive the inventory and shall provide the name of any beneficiary or heir who has waived the right to receive the inventory, as provided in Code Section 53-7-32.

History. — Code 1981, § 53-7-30, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 20; Ga. L. 1998, p. 1586, § 30.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, "Section" was substituted for "Sections" prior to "53-7-32" in the first sentence of subsection (a).

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

COMMENT

This section replaces former OCGA Sec. 53-7-75. The new law extends the inventory requirement to cover all property of the decedent whereas the former law limited the requirement as to real property to that real property that is located within the county and any other real property lying outside the county that has come to the knowledge of the personal representative. The new law requires the inventory to be filed within six months rather than four months of qualification not only with the probate court but also with the beneficiaries of a testate estate or the heirs of an intestate estate. (For provisions relating to the relief or waiver of the right to receive the inventory, see OCGA Sec. 53-7-32.) The new law requires that the inventory be verified. (For general provisions as to verification of petitions filed in the probate court, see OCGA Sec. 53-11-8). The new law requires a supplemental

inventory when additional property comes into the personal representative's hands. Former OCGA Secs. 53-7-70 through 53-7-74, relating to appraisements, are repealed.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-1402, are included in the annotations for this Code section.

Inventory as admission. — Inventory required by law to be made and returned by an administrator is an admission, though not a conclusive one, of possession of such assets of an intestate as are therein described. Ellis v. McWilliams, 70 Ga. App. 195, 27 S.E.2d 886 (1943) (decided under former Code 1933, § 113-1402).

Administrator may explain any mistake or error in the inventory, or may show that the administrator's intestate had no title to the property inventoried. The administrator's inventory of assets as belonging to the administrator's intestate puts the burden on the administrator to show its incorrectness. Ellis v. McWilliams, 70 Ga. App. 195, 27 S.E.2d 886 (1943) (decided under former Code 1933, § 113-1402).

Exemption from filing inventory. — Because an estate's executors were exempted by the terms of the testator's will from the duty to file an accounting or inventory, a creditor of the estate was not entitled to compel the executors to file such reports. O.C.G.A. §§ 53-7-33 and 53-7-69 did not provide for a cause of action but simply noted that the executors were not unaccountable for injury based on the exemption. In re Estate of Willis, 310 Ga. App. 377, 713 S.E.2d 464 (2011).

Prima facie proof of ownership by estate. — Inventory and appraisement, when properly filed and recorded in the office of the court of ordinary (now probate court), is prima facie proof as to the property owned by the deceased at the time of death, and an estimate of the value thereof. If not a true inventory and appraisal, the burden is upon the removed administrator to prove that it is not correct, and account to the ordinary (now probate judge) for the items which the administrator listed and submitted to the appraisers, and which the administrator verified as correct. Ellis v. McWilliams, 70 Ga. App. 195, 27 S.E.2d 886 (1943) (decided under former Code 1933, § 113-1402).

Cited in Harris v. Seals, 29 Ga. 585 (1859); Holsenbeck v. Arnold, 75 Ga. App. 311, 43 S.E.2d 348 (1947); Spradley v. St. Paul Fire & Marine Ins. Co., 108 Ga. App. 865, 134 S.E.2d 850 (1964).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, § 488 et seq.

C.J.S. — 34 C.J.S., Executors and Administrators, § 174 et seq.

ALR. — Renewal of copyright where author is dead, 19 A.L.R. 295.

53-7-31. Making of inventory jointly by all personal representatives; proof of joint possession of assets.

The inventory provided for in Code Section 53-7-30 shall be made jointly by all the personal representatives but shall not be conclusive proof of joint possession of the assets.

History. — Code 1981, § 53-7-31, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-7-76. Former OCGA Secs. 53-7-77 (relating to inclusion of personal representative's debts and of partnership interests in the inventory) and 53-7-78 (relating to removal of a personal representative for failure to file the inventory) are repealed.

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 992, 993, 997, 1000, 1001.

Am. Jur. Pleading and Practice Forms. — 10 Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 298.

53-7-32. Waiver of right to receive; relieving personal representative of duty to make.

(a) Any beneficiary of a testate estate or heir of an intestate estate may waive individually the right to receive the inventory from the personal representative. Such waiver shall be made in a signed writing that is delivered to the personal representative and may be revoked in writing by the beneficiary or heir at any time.

(b) By unanimous written consent, the beneficiaries of a testate estate or the heirs of an intestate estate may authorize the probate court to relieve the personal representative of the duty to make inventory in the same manner as described in subsection (b) of Code Section 53-7-1. Any such unanimous written consent, regardless of the date of execution, which relieves the personal representative from making inventory shall also relieve the personal representative from sending a copy of the inventory to the heirs or beneficiaries.

History. — Code 1981, § 53-7-32, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 31.

Law reviews. — For article surveying wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982).

COMMENT

This section allows any individual beneficiary or heir to waive the right to receive the inventory and also allows all the beneficiaries or heirs to consent unanimously to have the personal representative relieved of the duty to make inventory. Code Section 53-7-1(b) describes ways in which the consent of individuals who are not sui juris or who are dead may be given.

53-7-33. Power of testator to dispense with making inventory.

A testator may, by will, dispense with the necessity of the personal representative's making an inventory to the probate court or the beneficiaries or both, provided the same does not work any injury to creditors or persons other than beneficiaries under the will. If a will was executed in another state and the will is valid in this state and under

the laws of the state where the will was executed the personal representative would not have been required to file inventories or if the will otherwise expresses an intent to relieve the personal representative from all reporting requirements, such a will shall be construed as dispensing with the necessity of inventories in Georgia, provided the same does not work any injury to creditors or parties other than beneficiaries under the will. In all wills, regardless of the date of execution, relief from making inventory with the court shall also relieve the personal representative from sending a copy of the inventory to the beneficiaries.

History. — Code 1981, § 53-7-33, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 32.

Law reviews. — For article discussing methods of simplifying the administration of estates by excusing the executors from certain obligations, see 6 Ga. L. Rev. 74 (1971).

COMMENT

This section carries forward the provisions of former OCGA Sec. 53-7-79 that relate to the duty to make inventory. See OCGA Sec. 53-7-69 for provisions allowing the testator to relieve the personal representative from the duty to make returns.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-1414, are included in the annotations for this Code section.

Statute did not provide cause of action to creditor of the estate. — Because an estate's executors were exempted by the terms of the testator's will from the duty to file an accounting or inventory, a creditor of the estate was not entitled to compel the executors to file such reports. O.C.G.A. §§ 53-7-33 and 53-7-69 did not provide for a cause of action but simply noted that the executors were not unaccountable for injury based on the exemption. In re Estate of Willis, 310 Ga. App. 377, 713 S.E.2d 464 (2011).

Cited in Chapalas v. Papachristos, 185 Ga. 544, 195 S.E. 737 (1937).

53-7-34. Failure to return a correct inventory.

Unless the inventory is waived pursuant to Code Section 53-7-32 or a testator by will dispenses with the necessity of having a personal representative make an inventory pursuant to Code Section 53-7-33, the failure of a personal representative to return a correct inventory shall be sufficient grounds for removal.

History. — Code 1981, § 53-7-34, enacted by Ga. L. 1997, p. 1352, § 21.

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

ARTICLE 4

CLAIMS AGAINST OR IN FAVOR OF ESTATE

Law reviews. — For annual survey on wills, trusts, guardianships, and fiduciary administration, see 61 Mercer L. Rev. 385 (2009).

RESEARCH REFERENCES

ALR. — What constitutes rejection of claim against estate to commence running of statute of limitations applicable to rejected claims, 36 A.L.R.4th 684.

53-7-40. Liability of estate; priority of claims.

Unless otherwise provided by law, all property of the estate, both real and personal, shall be liable for the payment of claims against the estate in the following order:

(1) Year's support for the family;

(2) Funeral expenses, whether or not the decedent leaves a surviving spouse, in an amount which corresponds with the circumstances of the decedent in life. If the estate is solvent, the personal representative is authorized to provide a suitable protection for the grave;

(3) Other necessary expenses of administration;

(4) Reasonable expenses of the decedent's last illness;

(5) Unpaid taxes or other debts due the state or the United States;

(6) Judgments, secured interests, and other liens created during the lifetime of the decedent, to be paid according to their priority of lien. Secured interests and other liens on specific property shall be preferred only to the extent of such property; and

(7) All other claims.

History. — Code 1981, § 53-7-40, enacted by Ga. L. 1996, p. 504, § 10.

Cross references. — Action against representative of joint obligor of a note, bill, bond, or other obligation in writing, § 9-2-27. Priority of tax liens generally, § 48-2-56.

Administrative rules and regulations. — Recovery of assistance; no estate, Official Compilation of the Rules and Regulations of the State of Georgia, Estate Recovery, Department of Community Health, Medical Assistance, Estate Recovery, Sec. 111-3-8-.06.

Law reviews. — For article, "The Time Gap in Wills: Shifting Assets and Shrinking Estates — Obsolescence and Testamentary Planning in Georgia," see 6 Ga. L. Rev. 649 (1972).

For comment on King v. Dalton, 85 Ga. App. 641, 69 S.E.2d 907 (1952), see 15 Ga. B.J. 211 (1952).

COMMENT

This section replaces former OCGA Secs. 53-7-90 and 53-7-91. Most of the language of OCGA Sec. 53-7-90 is not reflected in this new Code section as similar provisions appear in Code Sec. 53-4-63, relating to abatement. The order of priority of claims is changed from the former law in the following ways: funeral expenses are in a category that is separate from and superior to the expenses of the decedent's last illness; expenses relating to the last illness now fall in the category immediately below the expenses of administration; debts due the state or the United States and judgments, mortgages, and liens are retained as priorities but other claims described specifically in former OCGA Sec. 53-7-91(5), (7), (8), and (9) are subsumed into a final category of "all other claims."

JUDICIAL DECISIONS

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Funeral Expenses
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Taxes or Debts Due State or United States
Personal Debts

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 2494, former Code 1882, § 2533, former Civil Code 1895, § 3424, former Civil Code 1910, §§ 4000 and 4001, former Code 1933, §§ 113-1508 and 113-1509, and former O.C.G.A. § 53-7-91 are included in the annotations for this Code section.

No preference within designated priority. — Though at common law, the administrator might select among creditors of equal degree, and one of them might get a priority over the others by getting a judgment, under this statute, debts have their dignity fixed at the death of the intestate. The administrator has no right to pay one creditor of equal dignity to the detriment of another, nor can one creditor, in case of a deficiency of assets, get the preference of another by getting a prior judgment. Green v. Allen, 45 Ga. 205 (1872) (decided under former Code 1868, § 2494).

Priority of debts against an estate is controlled by this statute and no preference among those within a designated priority may be given by an administrator or executor. Cannon v. Tant, 229 Ga. 771, 195 S.E.2d 15 (1972) (decided under former Code 1933, § 113-1508).

When an administrator pays debts of an inferior rank, the administrator's liability may be enforced only in favor of a creditor having a superior claim and injured by the making of such payment. Gwinn v. Trotter, 112 Ga. 703, 38 S.E. 49 (1901) (decided under former Civil Code 1895, § 3424).

Former Code 1933, § 113-1010 affected property rights and must be strictly construed, and under such a construction it does not amend former Code 1933, § 113-1508 except as to the particular therein stated and provided for, which is to make a year's support for the family of a deceased person inferior to the lien or claim of a vendor for the purchase money of land. King v. Dalton, 85 Ga. App.

General Consideration (Cont'd)

641, 69 S.E.2d 907 (1952), for comment, see 15 Ga. B.J. 211 (1952) (decided under former Code 1933, § 113-1508).

Former Code 1933, § 113-1010 did not attempt or purport to regulate or change the general law as to the priority of the payment of the debts of a deceased person as set forth in former Code 1933, § 113-1508. King v. Dalton, 85 Ga. App. 641, 69 S.E.2d 907 (1952), for comment, see 15 Ga. B.J. 211 (1952) (decided under former Code 1933, § 113-1508).

Fixation at death. — Priorities of creditors are fixed at the time of the death of the intestate, and this status of creditors cannot be changed by any action of an individual creditor, but each is entitled to the payment of each claim against the estate according to its priority as fixed at the time of the intestate's death. Auld v. Schmelz, 201 Ga. 42, 39 S.E.2d 39 (1946) (decided under former Code 1933, § 113-1508).

In the lifetime of the decedent, judgments are ranked according to seniority. But after death the rendition of a judgment against an administrator would not confer any priority on the claim which formed its basis, or changed its rank. Cannon v. Tant, 229 Ga. 771, 195 S.E.2d 15 (1972) (decided under former Code 1933, § 113-1508).

Debts and legacies stand on precisely the same footing in regard to priority and one can no more be diminished by the payment of commissions than the other. The expenses of administration, among which are the commissions of the representative, must first be paid whether enough be left to satisfy debts and legacies, or not. Alston v. United States, 228 F. Supp. 216 (N.D. Ga. 1964), aff'd; 349 F.2d 87 (5th Cir. 1965) (decided under former Code 1933, § 113-1508).

Creditor cannot get a preferred lien on the assets of an estate as against other creditors of equal degree by getting the first judgment against the administrator. Auld v. Schmelz, 201 Ga. 42, 39 S.E.2d 39 (1946) (decided under former Code 1933, § 113-1508).

Superiority of rights of creditors. — Rights of creditors must always be superior to the testamentary devises. Charles Broadway Rouss, Inc. v. First Nat'l Bank, 180 Ga. 244, 178 S.E. 732 (1935) (decided under former Code 1933, § 113-1509).

Judgments obtained against the administrator after the death of the intestate rank no higher than the demands on which they are founded. Cannon v. Tant, 229 Ga. 771, 195 S.E.2d 15 (1972) (decided under former Code 1933, § 113-1508).

Garnishment would vitiate the priority set forth in statute. — To permit a judgment creditor to proceed to collect a judgment by garnishment, during the time permitted by law for the executor to marshal the assets of the estate and determine the claims against the estate, would be to vitiate the priority set forth in this statute. Professional Disct. Corp. v. Fulton Nat'l Bank, 223 Ga. 424, 156 S.E.2d 80 (1967) (decided under former Code 1933, § 113-1508).

Judgment based on a verdict against an executor, in a suit for specific performance brought originally against the testator, under a prayer for damages in lieu of specific performance, on the ground that the defendant was not in a position to specifically perform an agreement, is based on an unliquidated demand within the meaning of this statute governing priority in the payment of claims against the estate of a decedent. Benfield v. McMillan, 188 Ga. 52, 2 S.E.2d 600 (1939) (decided under former Code 1933, § 113-1508).

Assent to legacy presumed proper. — Although the trustee had not lost or dissipated by mismanagement the fund which the trustee held in a fiduciary capacity as guardian, and although in allowing this fund to remain on deposit, until the trustee's death, in a bank and while it was a solvent institution, the trustee may have exercised the care required of the trustee as a fiduciary, the trustee's estate, after the trustee's death, nevertheless, became liable to the owner or beneficiary of the fund in accordance with the priorities established by law for the payment of the debts of a decedent. Steed's Adm'x v. Steed, 40 Ga. App. 380, 149 S.E. 918 (1929) (decided under former Civil Code 1910, § 4001).

Since there is a presumption of law that executors act legally rather than illegally and do the things that they should do rather than those that they should not do, an assent by an executor to a legacy, in derogation of the rights of creditors, will not be presumed or implied, in the absence of plain and unequivocal facts upon which such an implied assent is based. Wilson v. Aldenderfer, 183 Ga. 760, 189 S.E. 907 (1937) (decided under former Code 1933, § 113-1509).

An assent once given to a devise is irrevocable as a general rule and perfects the inchoate title to the property in the devisee, if the assets of the estate may prove insufficient to pay the debts, in which case the remedy of an unpaid creditor is, generally, not to have the devised land subjected to a sale under an order of the ordinary (now probate judge), or under a judgment against the executor, but to follow the property into the hands of the devisee and there subject it at law or equity to the payment of the claim. Wilson v. Aldenderfer, 183 Ga. 760, 189 S.E. 907 (1937) (decided under former Code 1933, § 113-1509).

Check may in a proper action be used as evidence in support of the payee's claim of indebtedness against the decedent but not as evidence of the indebtedness itself; and when the check was merely a gift or otherwise without consideration, the payee would have no valid claim against the estate. Lambeth v. Lewis, 114 Ga. App. 191, 150 S.E.2d 462 (1966) (decided under former Code 1933, § 113-1508).

Being a mere order to pay which has been revoked by the death of the drawer, a check in the hands of the original payee does not constitute a debt under this statute for which the decedent's estate would be liable so as to authorize a suit on the check itself; but the payee "is remitted to any underlying claim he may have against the decedent." Lambeth v. Lewis, 114 Ga. App. 191, 150 S.E.2d 462 (1966) (decided under former Code 1933, § 113-1508).

Statutory liability on bank stock cannot fall under either former Civil Code 1910, § 3765 or former Civil Code 1910, § 4000. State Banking Co. v. Hinton, 178 Ga. 68, 172 S.E. 42 (1933) (decided under former Code 1933, § 113-1508).

Abatement of specific devises. — As between the devisee of property on which there is a mortgage lien, and a devisee of other property, both being specific devises, the mortgage debt should be borne by the devisees of the mortgaged property. Raines v. Shipley, 197 Ga. 448, 29 S.E.2d 588 (1944) (decided under former Code 1933, § 113-1509).

Bequest for the support and maintenance of a near relative is given priority over other bequests of the same class when no other provision is made for the near relative's support. DuBose v. Box, 246 Ga. 660, 273 S.E.2d 101 (1980) (decided under former Code 1933, § 113-1509).

Cited in Reese v. Burts, 39 Ga. 565 (1869); King v. Morris, 40 Ga. 63 (1869); Murphy v. Vaughan, 55 Ga. 361 (1875); Newsom v. Carlton, 59 Ga. 516 (1877); Mapp v. Long, 62 Ga. 568 (1879); Boynton v. Westbrook, 74 Ga. 68 (1884); Livingston v. Langley, 79 Ga. 169, 3 S.E. 909 (1887); Fullbright v. Boardman, 159 Ga. 162, 125 S.E. 44, 37 A.L.R. 532 (1924); Eason v. Kicklighter, 167 Ga. 63, 144 S.E. 770 (1928); Almond v. Mobley, 40 Ga. App. 305, 149 S.E. 293 (1929); Steed's Adm'x v. Steed, 40 Ga. App. 380, 149 S.E. 918 (1929); Baggett v. Mobley, 171 Ga. 268, 155 S.E. 334 (1930); Whitmire v. Thompson, 173 Ga. 35, 159 S.E. 859 (1931); Mobley v. Personius, 172 Ga. 261, 157 S.E. 294 (1931); Real Estate Loan Co. v. Union City, 177 Ga. 55, 169 S.E. 301 (1933); Brantley v. Hicks, 177 Ga. 812, 171 S.E. 451 (1933); Georgia Refinancing & Loan Co. v. City of Marietta, 178 Ga. 761, 174 S.E. 346 (1934); Colyer v. Huntley, 179 Ga. 332, 175 S.E. 901 (1934); Edwards v. Addison, 187 Ga. 756, 2 S.E.2d 77 (1939); Clarkson v. Clarkson, 64 Ga. App. 1, 12 S.E.2d 468 (1940); Hines v. Farkas, 109 F.2d 289 (5th Cir. 1940); Harrell v. Burch, 195 Ga. 96, 23 S.E.2d 434 (1942); Cox v. Stowers, 204 Ga. 595, 50 S.E.2d 339 (1948); Marks v. Henry, 85 Ga. App. 275, 68 S.E.2d 923 (1952); Harry v. Griffin, 210 Ga. 133, 78 S.E.2d 37 (1953); Sanders v. Fulton County, 111 Ga. App. 434, 142 S.E.2d 293 (1965); Campbell v. U.S. Fire Ins. Co., 122 Ga. App. 430, 177 S.E.2d 265

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(1970); Stancill v. McKenzie Tank Lines, 497 F.2d 529 (5th Cir. 1974); Killingsworth v. First Nat'l Bank, 237 Ga. 544, 228 S.E.2d 901 (1976); Anderson v. Groover, 242 Ga. 50, 247 S.E.2d 851 (1978); Odom v. Odom, 148 Ga. App. 456, 251 S.E.2d 371 (1978); Moore v. Lindsey, 662 F.2d 354 (5th Cir. 1981); Amoco Oil Co. v. G. Sims & Assocs., 162 Ga. App. 307, 291 S.E.2d 128 (1982); Deller v. Smith, 250 Ga. 157, 296 S.E.2d 49 (1982).

Year's Support

1. In General

Section to be liberally construed. — Former Code 1933, §§ 113-1002 and 113-1508 providing for a year's support and fixing its priority are to be construed liberally in favor of the dependents. Olmstead v. Clark, 181 Ga. 478, 182 S.E. 513 (1935) (decided under former Code 1933, § 113-1508).

Statute manifests clearly a fixed legislative intent that, wherever brought into competition with each other, a year's support must have priority over a previous judgment against the deceased. Farmers Fertilizer Co. v. J.R. Watkins Co., 199 Ga. 49, 33 S.E.2d 294 (1945) (decided under former Code 1933, § 113-1508).

A year's support ranks first among the claims against an estate, standing ahead of funeral expenses and all other general debts. McLean v. McLean, 51 Ga. App. 751, 181 S.E. 707 (1935) (decided under former Code 1933, § 113-1508).

As provided by statute the year's support, when allowed, is to be preferred before all other debts against the estate, including burial expenses and expenses of the last illness. Livingston v. Langley, 79 Ga. 169, 3 S.E. 909 (1887) (decided under former Code 1882, § 2533); Aiken v. Davidson, 146 Ga. 252, 91 S.E. 34 (1916) (decided under former Civil Code 1910, § 4000).

Support for the family ranks first against the estate of a decedent. It is ahead of taxes. It is ahead of liens, judgments, and mortgages. It is likewise ahead of debts due by the deceased, as trustee. House v. House, 191 Ga. 678, 13 S.E.2d 817 (1941) (decided under former Code 1933, § 113-1508).

Year's support for the family of the deceased has first claim on the deceased's property. In order for the relinquishment of a widow's right to claim a year's support to be binding on her, it must be made with knowledge of her rights and of the condition of the estate. Hubbard v. Hubbard, 218 Ga. 617, 129 S.E.2d 862 (1963) (decided under former Code 1933, § 113-1508).

Year's support is on the same footing as expenses of administration, and is not subject to the law of distribution of estates or to debts against an estate, or liens against the property, except when it is made so by law. Tomlinson v. City of Adel, 169 Ga. 758, 151 S.E. 482 (1930) (decided under former Civil Code 1910, § 4000).

Year's support is superior to liens created by the decedent, or liens arising by operation of law during the decedent's ownership, except for purchase money. Tomlinson v. City of Adel, 169 Ga. 758, 151 S.E. 482 (1930) (decided under former Civil Code 1910, § 4000).

Payment of purchase money required. — When the purchaser of land under a bond for title or other executory contract of sale agrees therein to pay the purchase money thereof and the taxes thereon, and the purchaser is put in possession of the land, and the equitable interest of the purchaser is set apart as a year's support to his widow and minor children, the widow would have to pay off the purchase-money debt, including the taxes which accrued on the property, before she would be entitled to enjoy such equitable interest against the claim of the state and county for taxes due on the land. Beaton v. Ware County, 171 Ga. 798, 156 S.E. 672 (1931) (decided under former Civil Code 1910, § 4000).

Year's support does not supersede a bill of sale passing title to the property to secure debt, executed by the deceased and duly recorded in the deceased's lifetime. Philpot v. Ramsey & Hogan, 47 Ga. App. 635, 171 S.E. 204 (1933) (decided under former Code 1933, § 113-1508).

Widow's right to a year's support in personal property is not superior to the

right of a creditor of the deceased in the property where it has been conveyed to him by the deceased under a bill of sale to secure debt, although the bill of sale was never recorded. Philpot v. Ramsey & Hogan, 47 Ga. App. 635, 171 S.E. 204 (1933) (decided under former Code 1933, § 113-1508).

When a factor occupied, as to the landlord, the position of a bona fide acquisitor of a mortgage lien on the property, for value and without notice, and, so far as was there held, possessed only a lien upon the property for the advancements made, such lien, when no title passed, had no priority over the lien given by statute on the property of the deceased at the time of his death to the widow and minor children for a year's support. Philpot v. Ramsey & Hogan, 47 Ga. App. 635, 171 S.E. 204 (1933) (decided under former Code 1933, § 113-1508).

When, after the death of the grantor in three security deeds, the equity of redemption was set apart to his widow and minor child, and thereafter the property was sold at public sale under an execution in favor of the first security-deed holder who announced that all liens against the property would be settled from the proceeds, and all lienholders and claimants were made parties to and asserted their liens against the fund produced at such sale in a suit to determine the order of distribution, after the payment of the costs of sale the year's support claim was entitled to the full amount of the equity of redemption. Tax claims which had attached to the property before the setting apart of the year's support were entitled to preference over the security-deed holders to the extent that the tax claims were in excess of the portion of the taxes that could and should have been paid from the equity of redemption in the absence of a year's support, and the security-deed holders were entitled to the full amount of their secured debt, less the taxes in excess of the equity. Minchew v. Juniata College, 188 Ga. 517, 4 S.E.2d 212 (1939) (decided under former Code 1933, § 113-1508).

Widow holding property set apart to her as a year's support subject to an outstanding debt and mortgage of her deceased husband may convey the same to secure the payment of the outstanding encumbrance and to prevent its foreclosure, and will be bound by such conveyance. Lunsford v. Kersey, 191 Ga. 738, 13 S.E.2d 803 (1941) (decided under former Code 1933, § 113-1508).

In a case where a widow has made application for year's support, the appraisers have filed their return, and citation has been published, and a creditor of the deceased husband appears at the proper time and place for the purpose of filing objections on appropriate grounds, and upon agreement of counsel that if objections are not filed the creditor's claim may, by judgment of the ordinary (now probate judge) on the return, be placed in superior rank by reducing the estate awarded the widow, under principles of estoppel pleaded against her she may not thereafter in an equitable proceeding question the validity of such judgment. Lunsford v. Kersey, 191 Ga. 738, 13 S.E.2d 803 (1941) (decided under former Code 1933, § 113-1508).

Death of grantee with obligation to grantor. — When a grantee takes title to real property conveyed by a deed upon consideration that the grantee will furnish a home to the grantor and her husband as long as they live, and the grantee dies, with the grantor and her husband surviving, and the grantee has until the grantee's death performed the obligation so cast upon the grantee, but the grantee's estate is insolvent, the grantee's widow may claim the property conveyed as a year's support, as against the effort of the grantor to have the conveyance rescinded in equity. House v. House, 191 Ga. 678, 13 S.E.2d 817 (1941) (decided under former Code 1933, § 113-1508).

Executors are presumed to have knowledge of the condition of the estate; it is their duty to have such knowledge; it was no defense to the year's support proceeding that claims against the estate inferior in rank to a year's support had been paid. McLean v. McLean, 51 Ga. App. 751, 181 S.E. 707 (1935) (decided under former Code 1933, § 113-1508).

2. Enforceability

Year's support unenforceable unless manifested in judgment. — Al-

Year's Support (Cont'd)
2. Enforceability (Cont'd)

though a judgment for year's support would have ranked ahead of payment of debts, the mere fact that plaintiffs by relationship occupied a position which would entitle them to apply for and obtain such a judgment, would not entitle them, without having it allowed in the only way provided by law, to have a recovery against the administrator and the administrator's surety. A year's support to be enforceable must be manifest in a judgment. It is not in existence as such until such judgment. Howard v. Davis, 192 Ga. 505, 15 S.E.2d 865 (1941) (decided under former Code 1933, § 113-1508).

3. Executory Contracts

Executory contract of sale superior to year's support. — Year's support is not superior to the claim of a creditor of the decedent, who holds title to the land as vendor thereof under an executory contract of sale, or under a deed to secure debt. So, when the vendor conveys the property to another, and takes a mortgage to secure the purchase money, the claim of the vendor is superior to a year's support. Beaton v. Ware County, 171 Ga. 798, 156 S.E. 672 (1931) (decided under former Civil Code 1910, § 4000).

4. Judgment Claims

Interest of year's support superior to judgment claim. — Giving effect to this statute means that a judgment claim may not be asserted in whole or in part so long as the interest of a year's support is involved. Farmers Fertilizer Co. v. J.R. Watkins Co., 199 Ga. 49, 33 S.E.2d 294 (1945) (decided under former Code 1933, § 113-1508).

5. Prior Liens

Year's support inferior to prior liens. — While it is true that, except as to conveyances of title to secure debt, a year's support is superior to liens created by a decedent, or liens arising by operation of law during his ownership, and the widow thus takes the interest of the decedent stripped of all such inferior claims, the title of the widow to the property set apart as a year's support is not superior to liens which had already adhered against the property before the decedent husband acquired it. Paulk v. City of Ocilla, 188 Ga. 69, 2 S.E.2d 642 (1939) (decided under former Code 1933, § 113-1508).

When the record establishes that although the husband died several years before the assessments were made, his estate was still in process of administration, and the lots were still held by his executors for the purpose of administration, at the time the liens arose, and that the application for year's support was not filed until after the assessments had thus been made against the property as a part of the estate of the decedent; in these circumstances, the assessments and executions would constitute "claims against the estate". The year's support was therefore entitled to priority, insofar as accrual of the liens after the husband's death is concerned. Johnson v. City of Blackshear, 196 Ga. 652, 27 S.E.2d 316 (1943) (decided under former Code 1933, § 113-1508).

Perfected security interest required. — In the absence of evidence that defendants had a perfected security interest in corporate stock prior to the death of the owner, when the stock had been set aside as a year's support for the owner's wife by order of the probate court, defendant's interest in the stock was extinguished at the time the year's support award was made. Auto Alignment Servs., Inc. v. Bray, 214 Ga. App. 53, 446 S.E.2d 753 (1994) (decided under former O.C.G.A. § 53-7-91).

Legacy accepted by a widow under a will in lieu of other marital rights will not abate with other legacies to pay debts. Daniel v. Denham, 223 Ga. 544, 156 S.E.2d 906 (1967) (decided under former Code 1933, § 113-1509).

Bequest accepted by a widow in lieu of year's support (or, previously, dower) has a priority over other bequests insofar as abatement is concerned. DuBose v. Box, 246 Ga. 660, 273 S.E.2d 101 (1980) (decided under former Code 1933, § 113-1509).

6. Contest

Heirs may contest widow's right to year's support. — Only heirs, their priv-

ies and creditors may contest with a widow and minor children their right to a year's support out of the estate of the deceased husband and father. Gross v. Shankle, 97 Ga. App. 631, 104 S.E.2d 145 (1958) (decided under former Code 1933, § 113-1508).

Tort claimant whose suit is not filed on the claimant's claim is not entitled to file a caveat to a year's support. A year's support is a favored child of the law. Gross v. Shankle, 97 Ga. App. 631, 104 S.E.2d 145 (1958) (decided under former Code 1933, § 113-1508).

7. Acceptance of Property in Lieu of Year's Support

Contract to accept property in lieu of year's support not binding. — When a widow, who is under the law entitled to a year's support, enters into a contract with the executors of her husband's estate, in which she agrees to accept certain property in lieu of a year's support, the contract is not binding on her unless it is free from fraud and is made by her with knowledge of her rights or of the condition of the estate. McLean v. McLean, 51 Ga. App. 751, 181 S.E. 707 (1935) (decided under former Code 1933, § 113-1508).

Funeral Expenses

Close relative who personally pays funeral expenses is entitled to recover those expenses out of the assets of the estate. Hillburn v. Georgia Farm Bureau Mut. Ins. Co., 125 Ga. App. 18, 186 S.E.2d 350 (1971) (decided under former Code 1933, § 113-1508).

Expense of Administration

Cost of administration constitutes debt. — Commissions due the administrator, or personal representative of an estate, are considered as part of the costs, and fall under the head of "necessary expenses of administration." It necessarily follows that the commissions earned by the administrator have priority over the claim of the heir to heir's distributive share, and every part thereof, in the estate. Lester v. Toole, 20 Ga. App. 381, 93 S.E. 55 (1917) (decided under former Civil Code 1910, § 4000); Floyd v. Thomason, 148 Ga. 208, 96 S.E. 175 (1918) (decided under former Civil Code 1910, § 4000).

Purpose of the General Assembly is to treat the costs of the administration of the estate as much as a debt of the decedent as any other obligation to which the decedent order may be subject. Woodall v. First Nat'l Bank, 118 Ga. App. 440, 164 S.E.2d 361 (1968) (decided under former Code 1933, § 113-1508).

Paid from general funds. — If the realty of a decedent can be sold to pay the debts created by the decedent's personal representative after the death of the decedent, a fortiori the necessary expenses of administration, as provided by statute should not be of lower dignity. Colyer v. Huntley, 179 Ga. 332, 175 S.E. 901 (1934) (decided under former Code 1933, § 113-1508).

Necessary expenses of the administration shall be paid out of the general funds of the estate. Alston v. United States, 228 F. Supp. 216 (N.D. Ga. 1964), aff'd; 349 F.2d 87 (5th Cir. 1965) (decided under former Code 1933, § 113-1508).

Assignment not permitted. — Executor has no power to assign property of a probate estate to a lower claim in derogation of claims of higher priority under O.C.G.A. § 53-7-40; a judgment obtained by the creditor against a probate estate and any security interest it obtained from the estate placed such claims lower in priority than claims for commissions as an expense of the administration of the estate under O.C.G.A. § 53-7-40(3). In re Estate of Sims, 259 Ga. App. 786, 578 S.E.2d 498 (2003).

Executor precluded from administering to oneself as against other creditors. — An exception to the general rule that assent to a devise is irrevocable even if the assets of the estate prove insufficient to pay debts in that an executor is precluded from administering to oneself as against the rights of creditors of whose claims one has notice. Wilson v. Aldenderfer, 183 Ga. 760, 189 S.E. 907 (1937) (decided under former Code 1933, § 113-1509).

Taxes or Debts Due State or United States

Tax lien relegated to lower position upon death of landowner. — Statutory

Taxes or Debts Due State or United States (Cont'd)

first or superior lien on real estate for taxes as provided by O.C.G.A. 48-2-56 is relegated to a lower position by former O.C.G.A. § 53-7-91 when death of the landowner intervenes. State Revenue Comm'r v. Fleming, 172 Ga. App. 887, 324 S.E.2d 821 (1984) (decided under former O.C.G.A. § 53-7-91).

Year's support takes precedence even of taxes due the state. Tomlinson v. City of Adel, 169 Ga. 758, 151 S.E. 482 (1930) (decided under former Civil Code 1910, § 4000).

When the entire interest in land of the decedent is set apart to his widow and minor children as a year's support, such land is not liable to state and county taxes due by the deceased husband. Beaton v. Ware County, 171 Ga. 798, 156 S.E. 672 (1931) (decided under former Code 1933, § 113-1508).

Prior state ad valorem taxes against the very property set apart as a year's support are inferior to the rights of the widow in that property. Birdsong v. Davis, 176 F. Supp. 134 (M.D. Ga. 1959), rev'd on other grounds, 275 F.2d 113 (5th Cir. 1960) (decided under former Code 1933, § 113-1508).

Claim of a widow to property set apart to her as a year's support is superior to a lien for previously accrued taxes. Olmstead v. Clark, 181 Ga. 478, 182 S.E. 513 (1935) (decided under former Code 1933, § 113-1508).

Property which has been set aside as a year's support is exempt from all taxation when the tax accrued against the property prior to the setting aside of the year's support, and the tax has not been paid. City of Waycross v. Cottingham, 60 Ga. App. 463, 4 S.E.2d 67 (1939) (decided under former Code 1933, § 113-1508).

Year's support set apart to a widow and minor children takes precedence, not only over debts due by the decedent, but even of taxes which are due the state; and this is based upon a sound public policy looking to the protection of widows and children out of the estate of a decedent for the space of 12 months, and until such time as they may provide support for the future. Tomlinson v. City of Adel, 169 Ga. 758, 151 S.E. 482 (1930) (decided under former Civil Code 1910, § 4000).

When a return of appraisers setting apart a year's support to a widow was made on May 10, 1932, but when, as the result of objections filed, the return was not admitted to record or made the judgment of the court of ordinary (now probate court) until November 5, 1934, and in the meantime the widow was deprived of the use and enjoyment of the property, being supported by a son, the property as finally set apart was not liable for taxes accruing against the estate during the years 1933 and 1934. Olmstead v. Clark, 181 Ga. 478, 182 S.E. 513 (1935) (decided under former Code 1933, § 113-1508).

Whether, as against one indebted on a chose in action set apart as a year's support, and whether even for some other purposes the title to the property set apart may be considered as vested in the beneficiary from the time the return of the appraisers is filed with the court of ordinary (now probate court), yet when the claim is suspended by the filing of objections, with the result that the possession and use of the year's support are deferred pending trial, the property, after final judgment disallowing the objections and admitting the return to record, is not liable for taxes accruing against the estate of the decedent in the meantime. Olmstead v. Clark, 181 Ga. 478, 182 S.E. 513 (1935) (decided under former Code 1933, § 113-1508).

When, after the death of the grantor in a security deed, the equity of redemption is set apart as year's support to his widow and minor children, such equitable interest is not liable for any part of the taxes which have previously accrued. Minchew v. Juniata College, 188 Ga. 517, 4 S.E.2d 212 (1939) (decided under former Code 1933, § 113-1508).

Land set apart as year's support. — When an equitable interest in land of a decedent is set apart as a year's support for his widow and minor children, generally such equitable interest would not be liable to state and county taxes. Beaton v. Ware County, 171 Ga. 798, 156 S.E. 672 (1931) (decided under former Civil Code 1910, § 4000).

Year's support inferior to subsequently accrued taxes. — Property set aside for a year's support to the widow and minor children is not exempt from taxes including taxation by a municipality, accruing against the property after it has been so set aside for a year's support. City of Waycross v. Cottingham, 60 Ga. App. 463, 4 S.E.2d 67 (1939) (decided under former Code 1933, § 113-1508).

Lien arising by operation of law after one's death could hardly be a "debt" within the purview of former Code 1933, § 113-1002, but it may be a "claim against the estate" within the meaning of former Code 1933, § 113-1508. Johnson v. City of Blackshear, 196 Ga. 652, 27 S.E.2d 316 (1943) (decided under former Code 1933, § 113-1508).

Personal Debts

Debt in its general sense is a specific sum of money which is due or owing from one person to another, and denotes not only the obligation of one person to pay, but the right of the other party to receive and enforce payment by judicial action. Woodall v. First Nat'l Bank, 118 Ga. App. 440, 164 S.E.2d 361 (1968) (decided under former Code 1933, § 113-1508).

Year's support property subject to sale for personal debts. — When a widow was awarded her deceased husband's real property as a year's support, the property was subject to sheriff's sale for the widow's personal debts. Martin v. Jones, 266 Ga. 156, 465 S.E.2d 274 (1996) (decided under former O.C.G.A. § 53-7-91).

Taxes due a county or municipality come within the generally accepted meaning of personal debts, the collection of which is enforceable by appropriate judicial action. Woodall v. First Nat'l Bank, 118 Ga. App. 440, 164 S.E.2d 361 (1968) (decided under former Code 1933, § 113-1508).

Pavement assessment lien. — When the decedent husband, under a foreclosure of his security deed, acquired title to the property subsequently set apart to his widow as a year's support, after the lien of a paving assessment had attached thereto, her title was subordinate to such lien of the city, and the court did not err in so holding. Paulk v. City of Ocilla, 188 Ga. 69, 2 S.E.2d 642 (1939) (decided under former Code 1933, § 113-1508).

Power of co-executor to withhold devisee's share for debt. — Co-executor was not authorized under O.C.G.A. § 53-4-70 to withhold the devisee's share of the estate to satisfy a judgment entered against the devisee as O.C.G.A. § 53-7-40 provided that property of the estate was liable for payment of claims against the estate, and the co-executor's claim was against a devisee of the estate and not the estate itself. LaFavor v. LaFavor, 282 Ga. App. 753, 639 S.E.2d 633 (2006).

Estate's obligation to pay decedent's mortgage. — In a dispute between two siblings and their brother's widow, arising out of the brother's purchase and mortgage of a home for a fourth sibling, the title of which was in the names of the two siblings and the brother, the trial court erred in ruling that the siblings were not entitled to cancellation or satisfaction of the loan documents after the widow paid the amounts due on the mortgage because the estate had a duty to pay the amount due as the brother was the only obligor on the mortgage. Roberts v. Smith, 341 Ga. App. 823, 801 S.E.2d 915 (2017).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 463, 464, 466, 469, 535, 649, 650, 651, 659. 80 Am. Jur. 2d, Wills, § 1487.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 579, 596, 659.

ALR. — Filing as claim against decedent's estate as an unsecured claim, as a waiver of a mortgage or other lien, 2 A.L.R. 1132.

Death of judgment debtor as affecting running of statute of limitations against judgment, 2 A.L.R. 1706.

What amounts to an ademption or

abatement of a legacy of a business or professional practice, 13 A.L.R. 173; 16 A.L.R.2d 1404.

When funeral expenses deemed ordered on personal credit rather than on credit of estate, 30 A.L.R. 444.

Preferences among general legacies as regards abatement, 34 A.L.R. 1247.

Expense of removing and reinterring remains as a funeral expense, 40 A.L.R. 1459.

Decree of foreclosure which ascertains amount of mortgage debt or other claim as judgment within statute relating to rank of claims against decedent's estate, 57 A.L.R. 489.

Necessity of presenting, probating, or prosecuting claims for allowance as affected by provision of will directing payment of debts, 65 A.L.R. 861.

Allowance out of decedent's estate for costs and attorneys' fees incurred by parties interested in granting or revoking of letters of administration or letters testamentary, 90 A.L.R. 101.

State's prerogative right of preference at common law, 90 A.L.R. 184; 167 A.L.R. 640.

Rank or preference of claim against estate in respect of superadded liability on corporate stock owned by decedent whose estate is insolvent, 92 A.L.R. 1040.

Necessity of filing claim under Workmen's Compensation Act against estate of deceased employer, 94 A.L.R. 889.

Construction and effect of provisions of will regarding abatement of legacies or devises in event of insufficiency of assets to pay all in full, 101 A.L.R. 704.

Bank deposit to credit of decedent or other indebtedness to him as subject to widow's or family allowance or other estate exemption, as affected by right of bank to apply deposit, or of other debtor to assert counterclaim or setoff, 108 A.L.R. 773.

Right of retainer in respect of indebtedness of heir, legatee, or distributee, 110 A.L.R. 1384; 164 A.L.R. 717.

Labor or services performed by one while inmate of a government institution as basis of deduction or setoff in respect of the liability of his estate or his relatives, 114 A.L.R. 981.

Duty of executor or administrator of insolvent estate to sell real estate to pay debts, or duty of probate court to order such sale, as affected by mortgage or other encumbrances thereon, 116 A.L.R. 910.

Preference as regards life interest created by will as carrying similar preference in respect of remainder interest, 117 A.L.R. 1339.

Filing claim against estate of decedent as affecting or precluding other remedies against estate, 120 A.L.R. 1225.

Rank of creditor's claim against decedent's estate or his rights in respect of property of estate as affected by reduction of his claim to judgment against executor or administrator, or levy of attachment or execution, 121 A.L.R. 656.

Tombstone or monument as a proper charge against estate of decedent, 121 A.L.R. 1103.

Jurisdiction and power of equity to subject legacy, devise, or distributive share in estate to claim of creditor of legatee, devisee, or distributee, 123 A.L.R. 1293.

Law of domicil or of place of ancillary administration as governing rights and priorities of creditors of decedent in respect of assets in ancillary jurisdiction, 124 A.L.R. 1281.

Priority received by creditors as regards ancillary assets of receivership or decedent's estate as justification for reducing their claims or dividends upon distribution in the primary or domiciliary jurisdiction so as to effect ultimate equality among creditors as regards total assets, 127 A.L.R. 504.

Personal liability of executor, administrator, or trustee for succession tax, 128 A.L.R. 123.

Rank of foreign judgment, or judgment of sister state, rendered in lifetime of debtor in settlement of debtor's estate after his death, 128 A.L.R. 1400.

Burden of debts and cost of administration as between residuary legatees, and heirs or next of kin who take lapsed, adeemed, or invalid legacies, 144 A.L.R. 476.

Disregarding corporate entity, or charging a specific legacy of stock of close corporation, in order to pay general legacy for which assets of estate are otherwise insufficient, 144 A.L.R. 546.

Duty or right of executor or administra-

tor to pay tax on real estate of his decedent, 163 A.L.R. 724.

Basis of distribution among decedent's unsecured creditors, of ancillary assets where entire estate or ancillary estate is insolvent, 164 A.L.R. 765.

Amount of funeral expenses allowable against decedent's estate, 4 A.L.R.2d 995.

Right of devisee or heir and duty of personal representative with respect to completion of improvements, 5 A.L.R.2d 1250.

Propriety of payment of funeral expenses of life beneficiary or life tenant out of corpus or estate under instrument providing for invasion of corpus or estate for support of such person, 18 A.L.R.2d 1236.

Right of beneficiary as against estate of insured who borrowed on the policy, 31 A.L.R.2d 979.

Subrogation or reimbursement, from decedent's estate, of persons other than personal representative or surviving spouse paying funeral expenses, 35 A.L.R.2d 1399.

Construction and effect of provisions of will relied upon as affecting the burden of taxation, 37 A.L.R.2d 7; 70 A.L.R.3d 630.

Liability for debts and expenses as between personalty generally bequeathed and realty passing by the residuary clause or left undisposed of, 74 A.L.R.2d 553.

Liability for funeral expenses of married women, 82 A.L.R.2d 873.

Preference or priority of claims arising out of continuation of decedent's business by personal representative, 83 A.L.R.2d 1406.

Bank's right to apply or set off deposit against debt of depositor not due at time of his death, 7 A.L.R.3d 908.

Executors and administrators: rent or its equivalent accruing after lessee's death as expense of administration of his estate, 22 A.L.R.3d 814.

Amount of claim filed against decedent's estate as limiting amount recoverable in action against estate, 25 A.L.R.3d 1356.

Presentation of claim to executor or administrator as prerequisite of its availability as counterclaim or setoff, 36 A.L.R.3d 693.

Construction and application of statutes apportioning or prorating estate taxes, 37 A.L.R.3d 199.

Liability of executor, administrator, trustee, or his counsel, for interest, penalty, or extra taxes assessed against estate because of tax law violations, 47 A.L.R.3d 507.

Executors and administrators: construction of statutory provision giving priority on distribution to claims for wages of servants, employees, or the like, 52 A.L.R.3d 940.

Devise or bequest pursuant to testator's contractual obligation as subject to estate, succession, or inheritance tax, 59 A.L.R.3d 969.

Construction and effect of will provisions expressly relating to the burden of estate or inheritance taxes, 69 A.L.R.3d 122.

Construction and effect of will provisions not expressly mentioning payment of death taxes but relied on as affecting the estate or inheritance taxes, 70 A.L.R.3d 630.

Validity of claims against estate filed prior to publication of notice to creditors, 70 A.L.R.3d 784.

Liability of estate for tort of executor, administrator, or trustee, 82 A.L.R.3d 892.

Claims for expenses of last sickness or for funeral expenses as within contemplation of statute requiring presentation of claims against decedent's estate, or limiting time for bringing action thereon, 17 A.L.R.4th 530.

Death of obligor parent as affecting decree for support of child, 14 A.L.R.5th 557.

53-7-41. Notice for creditors to render accounts; notification of creditors' claims; requirement of reasonable additional proof or accounting; failure of creditors to give notice of claims.

(a) The personal representative shall be allowed six months from the date of the qualification of the first personal representative to serve in which to ascertain the condition of the estate.

(b) Every personal representative shall, within 60 days from the date of qualification, publish a notice directed generally to all of the creditors of the estate to notify the personal representative of their claims and render an account of their demands for payment thereon. The personal representative's notice shall be published once a week for four weeks in the official newspaper of the county in which the personal representative qualified. No particular form shall be required for creditors to notify the personal representative of their claims, and such notification of a creditor's claim shall be sufficient for purposes of this Code section if given in writing, providing an account number or other identifying information or itemization adequate to establish the indebtedness as an obligation of the estate, and stating the principal balance and any applicable interest or other additional charges lawfully owed. An invoice or account statement satisfying the requirements of the preceding sentence of this subsection and generated by a creditor in the ordinary course of such creditor's business shall constitute sufficient notification to the personal representative of such creditor's claim if the personal representative actually receives such notification of the claim or if such creditor files such notification with the probate court having jurisdiction over the decedent's estate or sends such notification of the claim by electronic transmission, other form of wire or wireless communication, or by first-class mail or private carrier to the address of the decedent, the personal representative, or the attorney representing the personal representative; provided, however, that a notification of a claim sent by a creditor by electronic communication to an account for which the decedent is the user shall constitute sufficient notification to the personal representative of such creditor's claim only if the content of such electronic communication lawfully is disclosed to the personal representative pursuant to Chapter 13 of this title. As used in this subsection, the terms "account", "content of an electronic communication", "electronic communication", and "user" shall have the meaning provided by Code Section 53-13-2.

(c) After receiving sufficient notification of a creditor's claim under subsection (b) of this Code section, the personal representative may require reasonable additional proof or accounting from such creditor prior to paying such creditor's claim, but such requirement by the personal representative shall not affect adversely the timeliness of such

creditor's notification to the personal representative of the creditor's claims.

(d) Creditors who fail to notify the personal representative of their claims in the manner provided by subsection (b) of this Code section within three months from the date of publication of the personal representative's last notice shall lose all rights to an equal participation with creditors of equal priority to whom distribution is made before sufficient notification of such claims is given to the personal representative, and they may not hold the personal representative liable for a misappropriation of the funds. If, however, there are assets in the hands of the personal representative sufficient to pay such debts and if no claims of greater priority are unpaid, the assets shall be thus appropriated notwithstanding failure of such creditors to timely notify the personal representative of their claims.

History. — Code 1981, § 53-7-41, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 33; Ga. L. 2020, p. 377, § 1-43/HB 865; Ga. L. 2021, p. 922, § 53/HB 497.

The 2020 amendment, effective January 1, 2021, rewrote this Code section, which read: "The personal representative shall be allowed six months from the date of the qualification of the first personal representative to serve in which to ascertain the condition of the estate. Every personal representative shall, within 60 days from the date of qualification, publish a notice directed generally to all of the creditors of the estate to render an account of their demands. The notice shall be published once a week for four weeks in the official newspaper of the county in which the personal representative qualified. Creditors who fail to give notice of claims within three months from the date of publication of the personal representative's last notice shall lose all rights to an equal participation with creditors of equal priority to whom distribution is made before notice of such claims is brought to the personal representative, and they may not hold the personal representative liable for a misappropriation of the funds. If, however, there are assets in the hands of the personal representative sufficient to pay such debts and if no claims of greater priority are unpaid, the assets shall be thus appropriated notwithstanding failure to give notice."

The 2021 amendment, effective May 10, 2021, part of an Act to revise, modernize, and correct the Code, substituted "to timely notify" for "timely to notify" near the end of the last sentence of subsection (d).

COMMENT

This section carries forward former OCGA Sec. 53-7-92. The use of the word "personal representative" in the first sentence indicates that the six-month term does not begin to run if a temporary administrator is appointed. See Code Sec. 53-1-2 for the definitions of "personal representative" and "temporary administrator".

JUDICIAL DECISIONS

Analysis

General Consideration
Penalty for Delay in Filing Creditor Claim
Liability of Administrator
Statute of Limitations

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-1505, and former O.C.G.A. § 53-7-92 are included in the annotations for this Code section.

Distinction between a "claim" or a "demand" and a "debt" not all valid "claims" are "debts," nor are all valid "demands" debts; "the assets of such estate" of a deceased person "are only bound for the debts contracted by the testator during life." State Banking Co. v. Hinton, 178 Ga. 68, 172 S.E. 42 (1933) (decided under former Code 1933, § 113-1505).

Cited in Almond v. Mobley, 40 Ga. App. 305, 149 S.E. 293 (1929); Agricultural Fin. Corp. v. Bates, 171 Ga. 230, 155 S.E. 32 (1930); Collier v. Georgia Sec. Co., 57 Ga. App. 485, 195 S.E. 920 (1938); Sublusky v. Fudge, 121 Ga. App. 674, 175 S.E.2d 100 (1970); Fleming v. Citizens & S. Nat'l Bank, 243 Ga. 144, 253 S.E.2d 76 (1979); DuBose v. Box, 246 Ga. 660, 273 S.E.2d 101 (1980); Deller v. Smith, 250 Ga. 157, 296 S.E.2d 49 (1982).

Penalty for Delay in Filing Creditor Claim

Penalty for delay in presentation of claims against an estate is loss of priority not loss of any part of the debt, principal, or interest. Trustees of Jesse Parker Williams Hosp. v. Nisbet, 191 Ga. 821, 14 S.E.2d 64 (1941) (decided under former Code 1933, § 113-1505).

Publication of notice of limitation of time to file claims. — In general, when an order is given for the publication of a notice of a limitation of the time to file claims, and such notice is duly published, claims not filed within the time specified in the notice are precluded in that proceeding from sharing in the assets. This result is held to follow, however, only when there has been, in the meantime, a final distribution of the funds in the hands of the receiver, based upon claims proven, unless injustice would otherwise be done. Gainesville Nat'l Bank ex rel. Com. Union Assurance Co. v. Martin, 187 Ga. 559, 1 S.E.2d 636 (1939) (decided under former Code 1933, § 113-1505).

Liability of Administrator

Suit on bond of administrator. — When bond has been given by an administrator in the usual course of administration proceedings, as required by statute, the ordinary remedy of a creditor of the estate, after failure by the administrator to pay the obligation in due course, and after compliance by the creditor with preliminary statutory procedure, is a suit upon the bond. Such a suit against the administrator and the securities on the bond usually affording an adequate remedy at law, it is generally unnecessary to resort to equity for the collection or protection of the claim. Butler v. Floyd, 184 Ga. 447, 191 S.E. 460 (1937) (decided under former Code 1933, § 113-1505).

Plaintiff would not be relieved from liability, although plaintiff may have given notice to creditors in pursuance of law and the present claim for taxes was not asserted, or brought to the attention of the plaintiff by any taxing official until after distribution, if the plaintiff, as administrator, had knowledge of such tax liability, and the plaintiff distributed the estate at the plaintiff's peril; and it is immaterial that the claim for taxes was not asserted within the time fixed by law after notice by the administrator to creditors, or before such distribution. Hardin v. Reynolds, 189 Ga. 534, 6 S.E.2d 328 (1939) (decided under former Code 1933, § 113-1505).

Statute of Limitations

When period does not run. — Statute of limitations does not run during the 12- (now six) month period referred to in the statute. Cannon v. Tant, 229 Ga. 771, 195 S.E.2d 15 (1972) (decided under former Code 1933, § 113-1505).

Tolling of statute of limitations for survival actions. — Former O.C.G.A. § 53-7-92 did not toll the statute of limitations for survival actions accruing at or before the decedent's death. Dowling v. Lopez, 211 Ga. App. 578, 440 S.E.2d 205 (1993) (decided under former Code O.C.G.A. § 53-7-92).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 564, 571, 600, 604, 605, 608, 620, 623, 649, 650, 659.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 527, 534, 540.

ALR. — Effect of conduct of personal representative preventing filing of claim against estate within time allowed by the statute of nonclaims, 11 A.L.R. 246; 66 A.L.R. 1415.

Applicability of nonclaim statutes to claims arising under contract executory at the time of death, 41 A.L.R. 144; 47 A.L.R. 896.

Applicability of statute of nonclaim to superadded liability of stockholders, 41 A.L.R. 180; 51 A.L.R. 772; 87 A.L.R. 494.

Failure to present claim against estate of deceased principal as releasing surety, 50 A.L.R. 1214.

Necessity of presenting, probating, or prosecuting claims for allowance as affected by provision of will directing payment of debts, 65 A.L.R. 861.

Construction and application of statutory provisions excusing under certain conditions compliance with requirement as to filing claim against decedent's estate, 71 A.L.R. 940.

Remedies of creditors of insolvent decedent's estate where other creditors have received excessive payments, 77 A.L.R. 981.

Nonclaim statute as applied to real estate mortgage or mortgage debt, 78 A.L.R. 1126.

Priority received by creditors as regards ancillary assets of receivership or decedent's estate as justification for reducing their claims or dividends upon distribution in the primary or domiciliary jurisdiction so as to effect ultimate equality among creditors as regards total assets, 92 A.L.R. 596; 127 A.L.R. 504.

Claim on decedent's contract of guaranty, suretyship, or endorsement as contingent within statute of nonclaim, 94 A.L.R. 1155.

Necessity of presenting claim against decedent's estate as affected by executor's or administrator's personal duty or obligation to claimant, 103 A.L.R. 337.

Right of creditor of decedent, before perfecting his claim or after loss of recourse against decedent's estate, to pursue remedy against property conveyed by the decedent in fraud of his creditors, 103 A.L.R. 555.

Right of nonresident creditor of decedent's estate to file claim in ancillary administration, 106 A.L.R. 893.

Claims for taxes as within contemplation of statute requiring presentation of claims against decedents' estates, 109 A.L.R. 1370.

Nonclaim statute as governing claim barred, subsequent to death of obligor, by general statute of limitations, 112 A.L.R. 289.

Filing claim against estate of decedent as affecting or precluding other remedies against estate, 120 A.L.R. 1225.

Claim of government or subdivision thereof as within provision of nonclaim statute, 34 A.L.R.2d 1003.

Failure of personal representative to file proof of publication of notice of appointment or notice to creditors within specified time as tolling statute of nonclaim, 42 A.L.R.2d 1218.

Exclusiveness of grounds enumerated in statute providing, under specified circumstances, extension of time for filing claims against decedent's estate, 57 A.L.R.2d 1304.

Necessity of presenting spouse's claim under separation agreement to personal representative of other spouse's estate, 58 A.L.R.2d 1283.

Appealability of order, of court possessing probate jurisdiction, allowing or denying tardy presentation of claim to personal representative, 66 A.L.R.2d 659.

Asserted right to rescission or cancellation of contract with decedent as claim which must be presented to his personal representative, 73 A.L.R.2d 883.

Tort claimant against decedent's estate as person or party interested, or as creditor, entitled to object to account or report of personal representative, 87 A.L.R.2d 1231.

Application of nonclaim statute to claim for unmatured payments under land contract, 99 A.L.R.2d 275.

Tort claim as within nonclaim statutes, 22 A.L.R.3d 493.

Amount of claim filed against decedent's estate as limiting amount recoverable in action against estate, 25 A.L.R.3d 1356.

Executors and administrators: construction of statutory provision giving priority on distribution to claims for wages of servants, employees, or the like, 52 A.L.R.3d 940.

Validity of claims against estate filed prior to publication of notice to creditors, 70 A.L.R.3d 784.

Validity of nonclaim statute or rule provision for notice by publication to claimants against estate—Post-1950 cases, 56 A.L.R.4th 458.

53-7-42. Time for payment of debts; time for commencing action to recover debt.

(a) The personal representative shall not be required to pay the debts of the estate, wholly or in part, until six months from the date of qualification of the first personal representative to serve. If partial payment shall be made, it shall be pro rata on debts of equal priority, including debts due the personal representative, and shall continue pro rata until the debts of the estate shall be paid out. Successive dividends to creditors shall be made at the end of every year until the estate shall be paid out.

(b) No action to recover a debt due by the decedent shall be commenced against the personal representative until the expiration of six months from the date of qualification of the first personal representative to serve.

History. — Code 1981, § 53-7-42, enacted by Ga. L. 1996, p. 504, § 10.

Administrative rules and regulations. — Recovery of assistance; probate, Official Compilation of the Rules and Regulations of the State of Georgia, Estate Recovery, Department of Community Health, Medical Assistance, Estate Recovery, Sec. 111-3-8-.05

Law reviews. — For article surveying developments in Georgia wills, trusts, and administration of estates law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 307 (1981). For article surveying torts law, see 34 Mercer L. Rev. 271 (1982). For article, "Defending the Lawsuit: A First-Round Checklist," see 22 Ga. St. B.J. 24 (1985).

COMMENT

Subsection (a) of this section replaces former OCGA Sec. 53-7-93. The first sentence clarifies that the personal representative is not required to pay any debts of the estate within the first six months of administration of the estate. The use of the word "personal representative" indicates that the six-month period does not begin to run when a temporary administrator is appointed. (See Code Sec. 53-1-2 for the definitions of "personal representative" and "temporary administrator".) The final sentence of the former Code section is merged into the second sentence of this subsection. Former OCGA Sec. 53-7-94, dealing with the revival of claims barred by the statute of limitations, is repealed. Subsection (b) replaces former OCGA Sec. 53-7-102.

JUDICIAL DECISIONS

Analysis

General Consideration
Scope of Section
1. Protection of Legal Representative
2. Applicability
3. Limitations
Waiver of Statutory Exemption
Statute of Limitations

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 2507, former Code 1868, § 2507, former Code 1873, § 2548, former Code 1882, § 2548, former Civil Code 1895, § 3439, former Civil Code 1910, §§ 3999 and 4015, former Code 1933, §§ 113-1507 and 113-1526, and former O.C.G.A. §§ 53-7-93 and 53-7-102 are included in the annotations for this Code section.

Legislative intent. — Legislature did not intend by Ga. L. 1971, p. 433, § 2 to reduce the exemption period for executors from 12 months to six months to be retroactive. Montaquila v. Cranford, 129 Ga. App. 787, 201 S.E.2d 335 (1973) (decided under former Code 1933, § 113-1526).

Temporary administrator. — Six-month exemption period applies to permanent administrators only and not to temporary administrators. Deller v. Smith, 250 Ga. 157, 296 S.E.2d 49 (1982) (overruling Hayes v. Strickland, 112 Ga. App. 567, 145 S.E.2d 728 (1965) on this point) (decided under former O.C.G.A. § 53-7-102).

Word "debt", as used in this section, should be understood in its ordinary signification, and not in a technical sense. Almond v. Mobley, 40 Ga. App. 305, 149 S.E. 293 (1929) (decided under former Civil Code 1910, § 4015); Jones v. Womack, 53 Ga. App. 741, 187 S.E. 285 (1936) (decided under former Code 1933, § 113-1526).

There is no inconsistency between O.C.G.A. § 44-12-151, requiring selection of remedies, and O.C.G.A. § 53-6-34 and 53-7-93, requiring collection and preservation of assets of estate and just and timely payment of debts of estate. Howard v. Parker, 163 Ga. App. 159, 293 S.E.2d 548 (1982) (decided under former O.C.G.A. § 53-7-93).

Tort claim as debt. — Tort claim against executor for death caused by decedent's negligent operation of an automobile was a "debt" within the meaning of this statute. Jones v. Womack, 53 Ga. App. 741, 187 S.E. 285 (1936) (decided under former Code 1933, § 113-1526).

Claim for unliquidated damages in a tort action is "a debt due by the decedent." Giddens v. Sumner, 115 Ga. App. 382, 154 S.E.2d 891 (1967) (decided under former Code 1933, § 113-1526).

Because a claim for unliquidated damages in a tort action is a debt within the meaning of this statute, a defendant in a tort action cannot bring in the administrator of an estate as an involuntary plaintiff for the purposes of asserting a counterclaim before the expiration of the waiting period. Andrews v. Pollard, 121 Ga. App. 69, 172 S.E.2d 857 (1970) (decided under former Code 1933, § 113-1526).

Discharge of administrator within six month exemption period violates public policy. — Discharge by the court of ordinary (now probate court) of the administrators within the 12- (now six) month exemption period would have the effect of permanently barring the right of action of the plaintiff tort claimants against the administrators for damages for injuries allegedly caused by the decedent's negligence — a result clearly against public policy, and would constitute an irregularity sufficient to demand the re-opening of the estate, even if the discharge was obtained in accordance with all the requirements of law as to notice, hearing, etc., a showing of fraud not being essential. Giddens v. Sumner, 115 Ga. App. 382, 154 S.E.2d 891 (1967) (decided

General Consideration (Cont'd)

under former Code 1933, § 113-1526).

Fact that petitioner was appointed administrator of the estate did not preclude the petitioner from being a creditor; it merely required that the petitioner share with other creditors of equal priority pursuant to O.C.G.A. § 53-7-42(a). Allen v. Edge, 262 Ga. App. 82, 584 S.E.2d 686 (2003).

Premature claim. — Because a sister's claim of title to a mobile home was properly transferred to a superior court pursuant to Uniform Probate Ct. R. 16, the sister was not required under O.C.G.A. § 53-7-42(b) to wait six months before asserting the claim; consequently, the superior court erred in dismissing the claim as premature. Cunningham v. Estate of Cunningham, 304 Ga. App. 608, 697 S.E.2d 280 (2010).

Cited in Womack v. Greenwood, 6 Ga. 299 (1849); Cunningham v. Schley, 34 Ga. 395 (1866); Beckham v. Beckham, 113 Ga. 381, 38 S.E. 817 (1901); Hendricks v. Citizens & S. Nat'l Bank, 43 Ga. App. 408, 158 S.E. 915 (1931); Telford v. Quillian, 45 Ga. App. 257, 164 S.E. 228 (1932); Carmichael v. Mobley, 50 Ga. App. 574, 178 S.E. 418 (1934); Butler v. Floyd, 184 Ga. 447, 191 S.E. 460 (1937); Benton v. Turk, 188 Ga. 710, 4 S.E.2d 580 (1939); Bleckley v. Bleckley, 189 Ga. 47, 5 S.E.2d 206 (1939); Hines v. Farkas, 109 F.2d 289 (5th Cir. 1940); Rowland v. Rowland, 204 Ga. 603, 50 S.E.2d 343 (1948); Chambers v. Schall, 209 Ga. 18, 70 S.E.2d 463 (1952); Screven Oil Mill v. Hudmon, 214 Ga. 414, 105 S.E.2d 328 (1958); Hayes v. Strickland, 112 Ga. App. 567, 145 S.E.2d 728 (1965); Sublusky v. Fudge, 121 Ga. App. 674, 175 S.E.2d 100 (1970); Brooks v. Jones, 227 Ga. 566, 181 S.E.2d 861 (1971); Drake v. Chesser, 230 Ga. 148, 196 S.E.2d 137 (1973); Montaquila v. Cranford, 230 Ga. 442, 197 S.E.2d 357 (1973); Montaquila v. Cranford, 129 Ga. App. 787, 201 S.E.2d 335 (1973); Deller v. Smith, 250 Ga. 157, 296 S.E.2d 49 (1982); Atlanta Professional Ass'n for Thoracic & Cardiovascular Surgery, P.C. v. Allen, 163 Ga. App. 400, 294 S.E.2d 647 (1982).

Scope of Section

1. Protection of Legal Representative

Executor is allowed 12 (now six) months to wind up estate. — An executor or administrator is allowed a period of 12 (now six) months in which to receive notice of debts and to wind up the estate; pending this, the executor is protected from suits against the estate. National City Bank v. Welch, 53 Ga. App. 528, 186 S.E. 596 (1936) (decided under former Code 1933, § 113-1526).

Executor has 12 (now 6) months to wind up estate. — An executor or administrator is allowed a period of 12 (now six) months in which to receive notice of debts and to wind up the estate; pending this, the executor or administrator is protected from suits against the estate. National City Bank v. Welch, 53 Ga. App. 528, 186 S.E. 596 (1936) (decided under former Code 1933, § 113-1507).

Statute provides security for the representative and not for the benefit of others, and if the representative suffers a judgment thereon its validity thereafter cannot be brought into question. English v. Shivers, 220 Ga. 737, 141 S.E.2d 443 (1965) (decided under former Code 1933, § 113-1526).

When the case is one in which the personal representative of an estate could request a continuance or abatement on the ground that no suit to recover a debt due by decedent shall be commenced against the legal representatives until the expiration of six months, and no such request has been made, the estate is bound by the action of the representative. English v. Shivers, 220 Ga. 737, 141 S.E.2d 443 (1965) (decided under former Code 1933, § 113-1526).

If a legal representative suffers a judgment to be rendered against the representative during the six month period, a claimant of property against which such judgment is sought to be enforced cannot bring into question the validity thereof, since its rendition within that period can in no way have operated to the representative's prejudice. Cannon v. Tant, 229 Ga.

771, 195 S.E.2d 15 (1972) (decided under former Code 1933, § 113-1526).

Statutory provision that no suit to recover a debt due by a decedent shall be commenced against one's legal representative until the expiration of 12 (now six) months from one's qualification is for the security of such representative, to protect the representative from suit until the representative can ascertain the condition of the estate. Cannon v. Tant, 229 Ga. 771, 195 S.E.2d 15 (1972) (decided under former Code 1933, § 113-1526).

Presumed knowledge of executors. — Executors are presumed to have knowledge of the condition of the estate; it is the executors' duty to have such knowledge; it was no defense to the year's support proceeding that claims against the estate inferior in rank to a year's support had been paid. McLean v. McLean, 51 Ga. App. 751, 181 S.E. 707 (1935) (decided under former Code 1933, § 113-1507).

2. Applicability

When amount sought to be recovered not alleged. — When a plaintiff not only seeks to recover certain personalty as belonging to her and of which the deceased had possession when she died, but seeks in the trover action to recover a money judgment against the defendant, as administrator, for hire for the use of the personal property sought, the provisions of this statute become applicable, and when such a proceeding was brought within seven days after the appointment and qualification of the defendant as permanent administrator of the estate of the deceased, the trial court properly dismissed the proceeding. Byrd v. Riggs, 87 Ga. App. 7, 73 S.E.2d 35 (1952) (decided under former Code 1933, § 113-1526).

Statute has been held applicable in situations where the amount sought to be recovered was not alleged and was dependent upon an accounting prayed for. This exemption is not made inapplicable when the petition sought injunctive relief in addition to a monetary judgment. Fuller v. Fuller, 217 Ga. 691, 124 S.E.2d 741 (1962) (decided under former Code 1933, § 113-1526).

Sale at expiration of administration year. — It is not an absolute requirement of law that an administrator sell all land of an estate at expiration of administration year and that the land shall be sold only for the payment of debts or distribution. Patterson v. Fidelity & Deposit Co., 181 Ga. 61, 181 S.E. 776 (1935) (decided under former Code 1933, § 113-1507).

An administrator is not under any duty immediately to sell real property of the intestate after the expiration of the administration year; but, before the real property can be sold, it must distinctly be shown to the ordinary (now probate judge) that it is necessary to sell the land to satisfy one of the conditions referred to by statute. Patterson v. Fidelity & Deposit Co., 181 Ga. 61, 181 S.E. 776 (1935) (decided under former Code 1933, § 113-1507).

Allegation that the real property was not sold promptly or at the expiration of the administration year did not show a breach of the bond of the administrators as there is no requirement of the law that an administrator shall sell the real estate promptly after qualification, nor does the law require that an administrator sell the real property at the expiration of the year. Patterson v. Fidelity & Deposit Co., 181 Ga. 61, 181 S.E. 776 (1935) (decided under former Code 1933, § 113-1507).

3. Limitations

Rule generally adopted by courts in construing statutes which give such an exemption from suit is that, when the suit does not seek to fix or establish a liability against the estate, the suit does not come within the statute. Chapman v. Hamilton Nat'l Bank, 51 Ga. App. 74, 179 S.E. 650 (1935) (decided under former Code 1933, § 113-1526).

Statute is inapplicable in a suit to recover on a debt against an administrator in a representative capacity, and establish and fasten such liability against the estate. Butler v. Floyd, 184 Ga. 447, 191 S.E. 460 (1937) (decided under former Code 1933, § 113-1526).

Statute only comprehends suits to recover debts due by the decedent. It does not prevent a party from seeking an injunction against the administrator within the six months; nor to a suit seek-

Scope of Section (Cont'd)
3. Limitations (Cont'd)

ing cancellation of a deed to an intestate. Terry v. Fickett, 199 Ga. 30, 33 S.E.2d 163 (1945) (decided under former Code 1933, § 113-1526).

Code section inapplicable to continuations of actions. — O.C.G.A. § 53-7-102 applies only to the commencement of actions against an executor within six months of the executor's qualification, not to continuations of actions pending at the time of the decedent's death. Turtle Creek Nat'l Bank v. Gretz, 690 F. Supp. 1020 (N.D. Ga. 1988) (decided under former O.C.G.A. § 53-7-102).

Action of trover. — Exemption does not apply to a suit which only asks that a judgment be obtained for the purpose of subjecting the property, the title to which is already in the plaintiff, to a sale under an execution for the purpose of paying the amount of the plaintiff's claim. Chapman v. Hamilton Nat'l Bank, 51 Ga. App. 74, 179 S.E. 650 (1935) (decided under former Code 1933, § 113-1526).

The exemption as to administrators from suit for a period of 12 (now six) months subsequent to their qualification does not apply to suits for injunction and garnishment proceedings, nor to a suit to cancel a deed, it not being a suit to recover a debt, nor does it apply to a suit on a contract for specific performance; nor does it apply to a suit in trover for an article when damages are waived; nor does it apply in case of the exercise of the power of sale given in a security deed, such a proceeding being no suit at all. Chapman v. Hamilton Nat'l Bank, 51 Ga. App. 74, 179 S.E. 650 (1935) (decided under former Code 1933, § 113-1526).

Statute precluding suits against administrators to recover on debts due by decedents until the expiration of 12 (now six) months from the qualification of such representatives, unless this provision is expressly or impliedly waived by the representative, has no application to a suit for injunction. Butler v. Floyd, 184 Ga. 447, 191 S.E. 460 (1937) (decided under former Code 1933, § 113-1526).

An action in trover against an administrator, wherein a recovery for the hire and value of the property involved is expressly waived, and recovery of the property itself is sought, is not covered by this statute, providing that no suit to recover a debt due by the decedent shall be commenced against the administrator until the expiration of 12 (now six) months from the administrator's qualification. Atkinson v. Universal Credit Co., 51 Ga. App. 517, 180 S.E. 926 (1935) (decided under former Code 1933, § 113-1526).

Statute providing no suit to recover a debt due by the decedent shall be commenced against the administrator until the expiration of six months from the administrator's qualification does not apply to trover action wherein recovery for hire and value of property involved is expressly waived, and recovery of property itself is sought within the six months period. Commercial Bank v. Pharr, 75 Ga. App. 364, 43 S.E.2d 439 (1947) (decided under former Code 1933, § 113-1526).

Plaintiff, in a proper case, may institute an action of trover against an administrator, if the administrator wrongfully withholds property belonging to the plaintiff, before the expiration of 12 (now six) months. Byrd v. Riggs, 87 Ga. App. 7, 73 S.E.2d 35 (1952) (decided under former Code 1933, § 113-1526).

While under this statute no suit to recover a debt due by the decedent shall be commenced against the administrator until the expiration of 12 (now six) months from the administrator's qualification, a suit brought against an administrator for the purpose of canceling deeds made to the intestate is not a suit to recover a debt due by the decedent, and may be brought before the expiration of 12 (now six) months from the qualification of the administrator. Sutton v. McMillan, 213 Ga. 90, 97 S.E.2d 139 (1957) (decided under former Code 1933, § 113-1526).

An action for specific performance is not subject to the limitation of this statute on which exempts the administration of an estate from suits to recover debts for 12 (now six) months. Liberty Nat'l Bank & Trust Co. v. Diamond, 227 Ga. 200, 179 S.E.2d 761 (1971) (decided under former Code 1933, § 113-1526).

Waiver of Statutory Exemption

Exemption from suit afforded an administrator may be waived and once such a waiver has been made the exemption may not be revoked even if no consideration was received for the waiver. Hader v. Eastman, 124 Ga. App. 548, 184 S.E.2d 478 (1971) (decided under former Code 1933, § 113-1526).

Statute of Limitations

Statute of limitations does not run during the 12 (now six) month period referred to in this statute. Cannon v. Tant, 229 Ga. 771, 195 S.E.2d 15 (1972) (decided under former Code 1933, § 113-1526); Smith v. Deller, 161 Ga. App. 112, 288 S.E.2d 825, aff'd, 250 Ga. 157, 296 S.E.2d 49 (1982) (decided under former Code O.C.G.A. § 53-7-102).

Debts of estate presumed paid after 20 years. — In the absence of anything to the contrary, after the lapse of 20 years from the qualification of an executor, there is a presumption that all the debts of the estate have been paid, and that the executor has assented to the legacies. Cozart v. Mobley, 43 Ga. App. 630, 159 S.E. 749 (1931) (decided under former Civil Code 1910, § 3999).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 649 et seq., 659, 665, 834, 1197

Am. Jur. Pleading and Practice Forms. — 10 Am. Jur. Pleading and Practice Forms, Executors and Administrators, § 672.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 522, 589.

ALR. — Priority received by creditors as regards ancillary assets of receivership or decedent's estate as justification for reducing their claims or dividends upon distribution in the primary or domiciliary jurisdiction so as to effect ultimate equality among creditors as regards total assets, 92 A.L.R. 596; 127 A.L.R. 504.

Constitutionality, construction, and application of statute forbidding suit against representative of estate until expiration of prescribed period, 104 A.L.R. 892.

Treatment of personal claim of executor or administrator antedating the death of decedent, 144 A.L.R. 940.

Right of devisee or heir and duty of personal representative with respect to completion of improvements, 5 A.L.R.2d 1250.

Executors and administrators: construction of statutory provision giving priority on distribution to claims for wages of servants, employees, or the like, 52 A.L.R.3d 940.

Claims for expenses of last sickness or for funeral expenses as within contemplation of statute requiring presentation of claims against decedent's estate, or limiting time for bringing action thereon, 17 A.L.R.4th 530.

53-7-43. Compelling heirs or beneficiaries to contribute to payment of debt.

If the estate shall have been distributed to the heirs or beneficiaries without notice of an existing debt, a creditor may compel them to contribute pro rata to the payment of the debt.

History. — Code 1981, § 53-7-43, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-7-95. Former OCGA Secs. 53-7-96 through -100, which dealt with actions to compel making of title according to terms of bond to make title or of contract for sale of land, are repealed.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-1506, are included in the annotations for this Code section.

An assent once given to a devise is irrevocable as a general rule, and perfects the inchoate title to the property in the devisee, even if the assets of the estate may prove insufficient to pay the debts; in which case the remedy of an unpaid creditor is, generally, not to have the devised land subjected to a sale under an order of the ordinary (now probate judge), or under a judgment against the executor, but to follow the property into the hands of the devisee and there subject it at law or equity to the payment of the devisee's claim. Wilson v. Aldenderfer, 183 Ga. 760, 189 S.E. 907 (1937) (decided under former Code 1933, § 113-1506).

An exception to the general rule that assent to a devise is irrevocable even if the assets of the estate prove insufficient to pay debts is that an executor is precluded from administering to oneself as against the rights of creditors of whose claims the administrator has notice. Wilson v. Aldenderfer, 183 Ga. 760, 189 S.E. 907 (1937) (decided under former Code 1933, § 113-1506).

Plaintiff, claiming as a devisee under the will of plaintiff's father, was estopped from asserting that the executor of the will had assented to the devise, and from denying that title to the property devised was in subsequently appointed administrators de bonis non cum testamento annexo at the time of their public sale of the realty of the estate, under which the defendant claimed, the basis of such alleged estoppel being that the plaintiff joined in a written request by all four devisees to the ordinary (now probate judge) for the appointment of such administrators, upon their petition setting forth that the will remained unexecuted. Wilson v. Aldenderfer, 183 Ga. 760, 189 S.E. 907 (1937) (decided under former Code 1933, § 113-1506).

Defendant legatees stand in the place of the executor as regards the establishment of the debt due by the estate. Thus, the action is not governed by the limitations in reference to actions for money had and received or unjust enrichment, but by the limitations to actions on the character of the claim against the estate. Trustees of Jesse Parker Williams Hosp. v. Nisbet, 191 Ga. 821, 14 S.E.2d 64 (1941) (decided under former Code 1933, § 113-1506).

Creditor's right is to have the assets of the estate in the hands of the legatee applied in satisfaction of the debt, if they be sufficient for that purpose. Trustees of Jesse Parker Williams Hosp. v. Nisbet, 191 Ga. 821, 14 S.E.2d 64 (1941) (decided under former Code 1933, § 113-1506).

Assessment on stock in insolvent bank is not debt. — An assessment by the superintendent of banks (now commissioner of banking and finance) on shares of stock in an insolvent bank, the shares having in the superintendent's lifetime been in the name of the decedent, is not a debt within the meaning of this statute. Griffin v. Securities Inv. Co., 185 Ga. 726, 196 S.E. 408 (1938) (decided under former Code 1933, § 113-1506).

Cited in Wilson v. Aldenderfer, 183 Ga. 760, 189 S.E. 907 (1937); Holsomback v. Akins, 134 Ga. App. 543, 215 S.E.2d 306 (1975); Allan v. Allan, 236 Ga. 199, 223 S.E.2d 445 (1976); Tarbutton v. All That Tract or Parcel of Land Known as Carter Place, 641 F. Supp. 521 (M.D. Ga. 1986); Babb v. Potts, 183 Ga. App. 785, 360 S.E.2d 44 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 649 et seq., 962 et seq.

C.J.S. — 34 C.J.S., Executors and Administrators, § 589.

ALR. — Lien of judgment against heir

or devisee as attaching to land solely by executor or administrator, 68 A.L.R. 1479.

Right of retainer in respect of indebtedness of heir, legatee, or distributee, 110 A.L.R. 1384; 164 A.L.R. 717.

Jurisdiction and power of equity to subject legacy, devise, or distributive share in estate to claim of creditor of legatee, devisee, or distributee, 123 A.L.R. 1293.

Time within which personal representative must commence action for refund of legacy or distribution, 29 A.L.R.2d 1248.

Construction and application of statutes apportioning or prorating estate taxes, 71 A.L.R.3d 247.

Remedies and practice under estate tax apportionment statutes, 71 A.L.R.3d 371.

53-7-44. Satisfaction of debts.

Except as otherwise provided by the will, any debt not due by its terms at the time for payment of debts of equal priority shall be satisfied and the estate shall be discharged with respect to such debt in such manner as the personal representative deems to be in the best interest of the estate in accordance with the following rules:

(1) The debt may be prepaid in accordance with the terms of any right to prepay;

(2) By agreement with the creditor, the debt may be satisfied before it is due by the payment of an amount representing the agreed present value of the debt;

(3) By agreement with the creditor, the debt may be assumed by one or more heirs or beneficiaries or by any other person; and

(4) By agreement with the creditor, or by order of the probate court after notice to the creditor and a hearing, arrangement for future payment may be made by creating a trust, giving a deed to secure debt or security interest, obtaining a bond or other security from one or more heirs or beneficiaries, or otherwise.

History. — Code 1981, § 53-7-44, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section had no counterpart in former OCGA Title 53. Case law, however, does allow the type of arrangements described in this Code section.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 4003, former Code 1933, §§ 113-1512, 113-1513, 113-1514, and 113-1515, and former O.C.G.A. § 53-7-104 are included in the annotations for this Code section.

Suits of creditors and heirs. — Creditors and heirs may sue third persons only in the name of the representative of the estate. Higginbotham v. Adams, 192 Ga. 203, 14 S.E.2d 856 (1941) (decided under former Code 1933, § 113-1512).

Right of heir to expenses. — An heir who has done the exact thing provided for by statute, except that the heir has been unable to obtain the consent or assignment of the administrator (which, under

Supreme Court decisions, does not preclude the heir's action) may also realize expenses out of the fund brought in, the ordinary (now probate judge) having awarded the expenses in the exercise of the court's general jurisdiction over the disposition and distribution of the property of the estate. Estes v. Collum, 91 Ga. App. 186, 85 S.E.2d 561 (1954) (decided under former Code 1933, § 113-1512).

Appeals. — Absent an allegation of fraud or collusion, legatee was precluded from appealing a probate court order directing the administrator of the decedent's estate to pay a creditor. Williams v. Theus, 186 Ga. App. 401, 367 S.E.2d 288 (1988) (decided under former O.C.G.A. § 53-7-104).

Statute requires that before such a compromise as contemplated by statute may be made the ordinary (now probate judge) shall first make an order directing it, and that the administrator upon making the administrator's return to the ordinary (now probate judge) shall make oath that such settlement was made in good faith and to the best interests of the estate. Hartford Accident & Indem. Co. v. Cohran, 106 Ga. App. 14, 126 S.E.2d 289 (1962) (decided under former Code 1933, § 113-1515).

Cited in Taylor v. Georgia Loan & Trust Co., 21 Ga. App. 272, 94 S.E. 254 (1917); Bond v. Maxwell, 40 Ga. App. 679, 150 S.E. 860 (1929); Price v. Nehi, Inc., 49 Ga. App. 196, 174 S.E. 722 (1934); Guthrie v. Gaskins, 184 Ga. 537, 192 S.E. 36 (1937); Hines v. Farkas, 109 F.2d 289 (5th Cir. 1940); Stewart v. Stewart, 240 Ga. App. 573, 524 S.E.2d 267 (1999).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 391, 392, 476, 479 et seq., 484, 509, 650, 1133, 1166 et seq., 1175.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 218, 236, 237.

ALR. — Power of court to authorize compromise of infants' rights in controversies over estates or property, 33 A.L.R. 105.

Right of attorney whose selection is directed or suggested by will, against estate or personal representative, 166 A.L.R. 491.

Power and responsibility of executor or administrator to compromise claim due estate, 72 A.L.R.2d 191.

Tort claim as within nonclaim statutes, 22 A.L.R.3d 493.

Amount of claim filed against decedent's estate as limiting amount recoverable in action against estate, 25 A.L.R.3d 1356.

Liability of executor or administrator, or his bond, for loss caused to estate by act or default of his agent or attorney, 28 A.L.R.3d 1191.

53-7-45. Compromise of claims.

Personal representatives are authorized to compromise, adjust, arbitrate, assign, sue or defend, abandon, or otherwise deal with or settle debts or claims in favor of or against the estate. A personal representative who declines to litigate any claim may assign the claim to a creditor or an heir of an intestate estate or a beneficiary of a testate estate for the purpose of prosecuting the claim at that person's own expense and, after reimbursement of the expenses to the creditor, heir, or beneficiary, any remaining proceeds shall be paid over to the personal representative for administration.

History. — Code 1981, § 53-7-45, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 22; Ga. L. 1998, p. 1586, § 34.

Law reviews. — For article, "Joint Bank Accounts: A Different Form of Joint Tenancy," see 17 Ga. St. B.J. 184 (1981). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

COMMENT

This section combines and replaces the provisions of former OCGA Secs. 53-7-104 through 53-7-107. Some of these provisions required court approval, whereas such approval is not required under this section. Former OCGA Sec. 53-7-103 appears at Code Sec. 53-6-31. Former OCGA Secs. 53-7-120 through 53-7-123, relating to the removal of the jurisdiction over the estate to another county, are repealed.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 3426, former Civil Code 1910, § 4002, and former Code 1933, § 113-1510, are included in the annotations for this Code section.

Claim for a year's support is a claim against the estate; thus, the executor had authority under O.C.G.A. § 53-7-45 to settle the claim. Davis v. Hawkins, 238 Ga. App. 749, 521 S.E.2d 10 (1999).

Signing of estate tax return did not abandon claim. — Trial court's denial of a sister's motion to dismiss an action by siblings, seeking to set aside quitclaim deeds that the parties' father had executed in favor of the sister, was proper because the siblings, as heirs at law and beneficiaries of the estate, were proper parties to have brought the action pursuant to O.C.G.A. §§ 53-7-2 and 53-7-5(a) when it was clear that the co-executors, one of whom was the sister, were not going to bring the claim; there was no abandonment of the claim against the property despite the signing by the co-executors of a federal estate tax return under O.C.G.A. § 53-7-45, as the tax return was due and any changes based on rights to the property could have been set forth in an amended return. Field v. Mednikow, 279 Ga. App. 380, 631 S.E.2d 395 (2006).

Perpetuation of indulgence as exercised by testator prohibited. — Administrator de bonis non would be liable for failure to collect a debt due the estate, which became uncollectible by reason of indulgence to the debtor by the administrator, even though the will provided that "the handling of my property and the operation of the business to be done by and through my executors hereinafter named just in the manner as near as practical as I have handled and operated my business during my life," and it was shown that the testator in the testator's lifetime had indulged the debtor for a long time. Musselwhite v. Ricks, 55 Ga. App. 58, 189 S.E. 597 (1936) (decided under former Code 1933, § 113-1510).

Retirement funds. — There was evidence and legal authority to support the probate court's ruling that retirement funds belonged to the decedent's son because the son was named as beneficiary, and the funds did not pass into the decedent's estate because the executor testified that the executor concluded that the retirement funds were not an estate asset so the executor did not attempt to collect the funds from the son; resolution of the issue of the retirement proceeds in the context of a petition for settlement of accounts under O.C.G.A. § 53-7-63 fell within the probate court's jurisdiction, and the probate court did not err in failing to transfer the claim to the superior court under O.C.G.A. § 53-7-75 because the claim involved a conflict between the will and a designation of beneficiary, and not the construction of the will itself. In re Estate of Long, 307 Ga. App. 896, 706 S.E.2d 704 (2011).

Claim not in estate's best interest. — There was evidence to support a probate court's finding that it was not in the estate's best interest to pursue a claim regarding a death-bed gift because the probate court's ruling that assignment of the claim passed to the residual beneficiaries under the decedent's will, and pursu-

ant to O.C.G.A. § 53-7-45, the prosecution of the claim would be at the beneficiary's expense, comported with O.C.G.A. § 53-7-45, and the probate court had the authority to enter the finding; the ruling assigned the claim to the beneficiaries, including the decedent's daughter, who could pursue the claim at her own expense. In re Estate of Long, 307 Ga. App. 896, 706 S.E.2d 704 (2011).

Authority to settle claims. — Decedent's wife, as the surviving spouse, was the proper party to seek damages for the decedent's wrongful death, and, as the administrator of the decedent's estate, damages for the decedent's shock, fright and terror prior to the collision, all components of the mental pain and suffering endured by the decedent upon impact up until the decedent's death, and funeral and burial expenses, and the wife had the authority to settle or compromise the claims without any input from the decedent's children. Leanhart v. Knox, 351 Ga. App. 268, 830 S.E.2d 545 (2019).

Cited in Traley v. Thomas, 98 Ga. 375, 25 S.E. 446 (1896); Bond v. Maxwell, 40 Ga. App. 679, 150 S.E. 860 (1929); Spence v. Phillips, 172 Ga. 782, 158 S.E. 797 (1931); Harrison v. Holsenbeck, 208 Ga. 410, 67 S.E.2d 311 (1951); Fuller v. Booth, 118 Ga. App. 685, 165 S.E.2d 318 (1968); Stewart v. Stewart, 240 Ga. App. 573, 524 S.E.2d 267 (1999).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 185, 186, 191, 192, 474 et seq.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 216, 239.

ALR. — Measure of damages in action for personal injuries commenced by deceased in his lifetime and revived by personal representative, 7 A.L.R. 1355; 42 A.L.R. 187.

Right of executor, administrator, or testamentary trustee to commission in respect of his own debt to estate or trust, 88 A.L.R. 189; 104 A.L.R. 1301.

Payment to one of two or more trustees, executors, or administrators, 106 A.L.R. 109.

Payment of negotiable paper to, or enforcement thereof by, personal representative of owner appointed in one state as affected by appointment of another representative in another state, 114 A.L.R. 1461; 149 A.L.R. 1083.

Kind of verdict or judgment, or verdicts or judgments, where administrator or executor whose decedent was negligently killed brings an action which combines a cause of action for benefit of estate and another for statutory beneficiaries, 124 A.L.R. 621.

Trustee's power to compromise and settle claims and actions by or against trust estate, 35 A.L.R.2d 967.

Power and responsibility of executor or administrator to compromise claim due estate, 72 A.L.R.2d 191.

Amount of claim filed against decedent's estate as limiting amount recoverable in action against estate, 25 A.L.R.3d 1356.

Statute of limitations: effect of delay in appointing administrator or other representative on cause of action accruing at or after death of person in whose favor it would have accrued, 28 A.L.R.3d 1141.

ARTICLE 5

DISCHARGE AND RESIGNATION

53-7-50. Petition by personal representative for discharge; citation and publication; hearing; subsequently discovered estate.

(a) A personal representative who has fully performed all duties or who has been allowed to resign may petition the probate court for

discharge from the office and from all liability. The petition shall state that the personal representative has fully administered the estate of the decedent and shall set forth the names and addresses of all known heirs of an intestate decedent or beneficiaries of a testate decedent, including any persons who succeeded to the interest of any heir or beneficiary who died after the decedent died, and shall name which of the heirs or beneficiaries is or should be represented by a guardian. The petition shall state that the personal representative has paid all claims against the estate or shall enumerate which claims of the estate have not been paid and the reason for such nonpayment. The petition shall also state that the personal representative has filed all necessary inventory and returns or, alternatively, has been relieved of such filings by the testator, the heirs or beneficiaries, or the probate court.

(b)(1) Subject to paragraphs (2) and (3) of this subsection, upon the filing of a petition for discharge, citation shall issue to all heirs or beneficiaries, as provided in Chapter 11 of this title, requiring them to file any objections to the discharge, except that in all cases a citation shall be published one time in the newspaper in which sheriff's advertisements are published in the county in which the petition is filed at least ten days prior to the date on or before which any objection is required to be filed. Any creditors whose claims are disputed or who have not been paid in full due to insolvency of the estate shall be served in accordance with Chapter 11 of this title.

(2) Notwithstanding paragraph (1) of this subsection, it shall not be necessary to serve with notice any heir or beneficiary who has relieved the personal representative of all liability or any heir or beneficiary with respect to whom the personal representative has been relieved of all further liability in a binding proceeding such as a settlement of accounts pursuant to Code Sections 53-7-60 through 53-7-63 or an intermediate report pursuant to Code Sections 53-7-73 through 53-7-76.

(3) For purposes of this Code section, a beneficiary is a person, including a trust, who is designated in a will to take an interest in real or personal property and who (A) has a present interest, including but not limited to a vested remainder interest but not including a trust beneficiary where there is a trustee who is not also the personal representative seeking discharge and (B) whose identity and whereabouts are known or may be determined by reasonable diligence. For purposes of this Code section, a trust beneficiary may be represented as provided in Code Section 53-12-8.

(c) If any party in interest files objection to the discharge, a hearing shall be held. If as a result of the hearing, the probate court is satisfied that the personal representative has faithfully and honestly discharged the office, an order shall be entered releasing and discharging the

personal representative from all liability. If no objections are filed, the probate court shall enter the order for discharge without further proceedings or delay. Any heir or beneficiary or creditor who is a minor at the time of the discharge and who is not represented by a guardian may, within two years of reaching the age of majority, commence suit against the personal representative and such discharge shall be no bar to the action.

(d) If other property of the estate is discovered after an estate has been settled and the personal representative discharged, the probate court, upon petition of any interested person and upon such service or notice as it directs, may appoint the same personal representative or a successor personal representative to administer the subsequently discovered estate. If a new appointment is made, unless the probate court orders otherwise, the provisions of this title shall apply as appropriate; but no claim previously barred may be asserted in the subsequent administration.

(e) A personal representative may petition the court solely for discharge from office by filing the petition described in subsection (a) of this Code section and by serving notice by publication one time in the official county newspaper and by first-class mail to all creditors of the estate whose claims have not been paid informing them of their right to file an objection and be heard as described in subsection (c) of this Code section.

History. — Code 1981, § 53-7-50, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 23; Ga. L. 1998, p. 1586, § 35; Ga. L. 2002, p. 1316, § 4; Ga. L. 2020, p. 377, § 1-44/HB 865.

The 2020 amendment, effective January 1, 2021, substituted "service with notice" for "notify" in paragraph (b)(2); added the last sentence in paragraph (b)(3); inserted "service or" in the first sentence in subsection (d); and substituted "serving notice" for "giving notice" in subsection (e).

History of Code section. — This Code section is derived from the decision in Ewing v. Moses, 50 Ga. 264 (1873).

Law reviews. — For article discussing methods of simplifying the administration of estates by excusing the executors from certain obligations, see 6 Ga. L. Rev. 74 (1971). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

COMMENT

This section combines and replaces former OCGA Secs. 53-7-140, 53-7-141, 53-7-143 and 53-7-145. Under this section, a discharge may be granted without a hearing if no interested party files an objection to the discharge. The petition for discharge must contain a list of any known claims against the estate that the personal representative has not paid. The creditors of these claims shall be given notice and the opportunity to file objections to the discharge. Subsection (e) is modeled after Uniform Probate Code Sec. 3-1008.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, §§ 4089, 4090, and 4091, former Code 1933, § 113-2301, Ga. L. 1953, p. 451, § 1, and former O.C.G.A. § 53-7-140 are included in the annotations for this Code section.

Administrator may not petition for discharge until the administrator has fully discharged all the administrator's duties, which includes the duty of distribution. Fuller v. Fuller, 107 Ga. App. 429, 130 S.E.2d 520 (1963) (decided under former Code 1933, § 113-2301).

Judgment of a probate court discharging an executor will relieve the executor from all liability on account of the executor's administration, unless it be impeached or set aside in some appropriate manner. First Nat'l Bank & Trust Co. v. Hirschfeld, 178 Ga. 581, 173 S.E. 663 (1934) (decided under former Code 1933, § 113-2301).

Retention of authority and obligations until discharge. — Until an executor is properly discharged or otherwise relieved by law, an executor retains the authority of that appointment and the obligations of that fiduciary relationship with those the executor represents. Liner v. North, 188 Ga. App. 677, 373 S.E.2d 846 (1988) (decided under former O.C.G.A. § 53-7-140).

Discharge vacated. — Probate court's order that discharged the administrator was vacated because a party in interest could file an objection to a petition for discharge and was entitled to a hearing thereon. Here, the administrator neither listed the creditor with a disputed claim, nor did the administrator serve the creditor with notice of the administrator's petition for discharge. In re Estate of Johnston, 318 Ga. App. 324, 733 S.E.2d 856 (2012).

Judgment of discharge may be impeached. — Judgment of the court of ordinary (now probate court) discharging administrators may be impeached in that court for irregularity, or in the superior court for fraud. Morris v. Johnstone, 172 Ga. 598, 158 S.E. 308 (1931) (decided under former Civil Code 1910, §§ 4090 and 4091).

Judgment of a court of ordinary (now probate court) discharging an administrator will relieve the administrator from all liability on account of the administrator's administration unless it be impeached or set aside in some appropriate manner. Clair v. Burke, 62 Ga. App. 607, 9 S.E.2d 119 (1940) (decided under former Code 1933, §§ 113-2302).

Court did not err in sustaining general demurrer and dismissing petition seeking to hold defendant liable for money which defendant had deposited in a bank while acting as administrator since the judgment by the court of ordinary (now probate court) discharging defendant as administrator had not been attacked. Clair v. Burke, 62 Ga. App. 607, 9 S.E.2d 119 (1940) (decided under former Code 1933, §§ 113-2302).

Cited in Loyless v. Rhodes, 9 Ga. 547 (1851); Phoenix Mut. Life Ins. Co. v. Daniel, 46 Ga. App. 129, 167 S.E. 117 (1932); White v. Roper, 176 Ga. 180, 167 S.E. 177 (1932); Phoenix Mut. Life Ins. Co. v. Daniel, 46 Ga. App. 129, 167 S.E. 117 (1932); Robinson v. Georgia Sav. Bank & Trust Co., 106 F.2d 944 (5th Cir. 1939); McMullen v. Carlton, 192 Ga. 282, 14 S.E.2d 719 (1941); Crow v. Martin, 66 Ga. App. 76, 17 S.E.2d 90 (1941); Neal v. Stapleton, 203 Ga. 236, 46 S.E.2d 130 (1948); Sublusky v. Fudge, 121 Ga. App. 674, 175 S.E.2d 100 (1970); Killingsworth v. First Nat'l Bank, 237 Ga. 544, 228 S.E.2d 901 (1976); Bacon v. Smith, 222 Ga. App. 542, 474 S.E.2d 728 (1996); Sublusky v. Fudge, 121 Ga. App. 674, 175 S.E.2d 100 (1970); Sinclair v. Sinclair, 284 Ga. 500, 670 S.E.2d 59 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, §§ 113-2307, 113-2308, and 113-2309 and Ga. L. 1971,

p. 433, § 3, are included in the annotations for this Code section.

Executor is not required to wait six months after the executor's qualification before the executor may file a petition for discharge pursuant to Ga. L. 1964, p. 269, §§ 1-3. 1974 Op. Att'y Gen. No. U74-35 (decided under former Code 1933, §§ 113-2307 — 113-2309 and Ga. L. 1971, p. 433, § 3).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 269, 272, 309, 900.

C.J.S. — 33 C.J.S., Executors and Administrators, § 100.

ALR. — When statute of limitations begins to run against action on bond of personal representative, 44 A.L.R.2d 807.

Appointment of guardian for incompetent or for infant as affecting running of statute of limitations against ward, 86 A.L.R.2d 965.

53-7-51. Discharge when funds unclaimed.

If funds are in the hands of the personal representative and no person claims such funds, the probate court may nevertheless grant a discharge.

History. — Code 1981, § 53-7-51, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 36.

COMMENT

This section carries forward the substance of former OCGA Sec. 53-7-142. See Article 5 of Chapter 2 of this Title for provisions relating to the escheat of estates upon the failure of heirs.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Laws 1840, Cobb's 1851 Digest, p. 332, and former Code 1933, § 113-2304, are included in the annotations for this Code section.

Cited in Springer v. Oliver, 21 Ga. 517 (1857); Jones v. Reed, 58 Ga. App. 72, 197 S.E. 665 (1938).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 272, 309.

C.J.S. — 33 C.J.S., Executors and Administrators, § 100.

53-7-52. Discharge of temporary administrator.

A temporary administrator may be discharged in the same manner as provided for discharge of personal representatives.

History. — Code 1981, § 53-7-52, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward the substance of former OCGA Sec. 53-7-144. See Code Sec. 53-1-2 for the definitions of "personal representative" and "temporary administrator". Former OCGA Sec. 53-7-146, relating to grant of letters of dismission without administration of reversionary interest in dower lands, is repealed.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1953, p. 451, § 1, are included in the annotations for this Code section.

Cited in Hayes v. Strickland, 112 Ga. App. 567, 145 S.E.2d 728 (1965); Deller v. Smith, 250 Ga. 157, 296 S.E.2d 49 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 269, 272, 278 et seq., 294 et seq.

C.J.S. — 33 C.J.S., Executors and Administrators, § 90 et seq.

53-7-53. Discharge obtained by fraud.

A discharge obtained by the personal representative by means of any fraud is void and may be set aside on motion and proof of fraud.

History. — Code 1981, § 53-7-53, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-7-147.

JUDICIAL DECISIONS

Analysis

General Consideration
Pleading and Practice
1. In General
2. Procedure to Set Aside Discharge Judgment

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 4091, and former Code 1933, § 113-2303, are included in the annotations for this Code section.

Administrator occupies a position of the highest trust and confidence to heirs at law, and is required to act in entire good faith in performing the duties of the trust. Harris v. Birnbaum, 82 Ga. App. 653, 62 S.E.2d 204 (1950) (decided under former Code 1933, § 113-2303).

Judgment of discharge may be impeached. — Judgment of the court of ordinary (now probate court) discharging administrators may be impeached in that court for irregularity, or in the superior court for fraud. Morris v. Johnstone, 172 Ga. 598, 158 S.E. 308 (1931) (decided under former Civil Code 1910, § 4091).

Purchase by an administrator at

General Consideration (Cont'd)

the administrator's own sale is not in itself fraud. Gormley v. Askew, 177 Ga. 554, 170 S.E. 674 (1933) (decided under former Code 1933, § 113-2303).

When silence constitutes fraud. — When persons sustain toward another a relation of trust and confidence, their silence when they ought to speak, or their failure to disclose what they ought to disclose, is as much a fraud in law as an actual affirmative false representation. Harris v. Birnbaum, 82 Ga. App. 653, 62 S.E.2d 204 (1950) (decided under former Code 1933, § 113-2303).

Cited in Phoenix Mut. Life Ins. Co. v. Daniel, 46 Ga. App. 129, 167 S.E. 117 (1932); Hampton v. Taylor, 230 Ga. 602, 198 S.E.2d 316 (1973); Hampton v. Taylor, 233 Ga. 63, 209 S.E.2d 634 (1974); Sinclair v. Sinclair, 284 Ga. 500, 670 S.E.2d 59 (2008).

Pleading and Practice

1. In General

Judgment of discharge may be set aside for fraud. — While the statute seemingly refers to a motion in the court of ordinary (now probate court) which granted the discharge, the action can be sustained under the general rule that a judgment may be set aside for fraud in a court of equity; a judgment of the court of ordinary (now probate court) being no exception to this rule. White v. Roper, 176 Ga. 180, 167 S.E. 177 (1932) (decided under former Civil Code 1910, § 4091).

Provisions of this statute do not alter the cardinal rule that a judgment rendered by a court of competent jurisdiction, and regular upon the judgment's face, is to be deemed conclusive until the judgment is duly set aside, either on motion in the court in which the judgment was rendered, or in an equitable proceeding instituted in the superior court. Stanton v. Gailey, 72 Ga. App. 292, 33 S.E.2d 747 (1945) (decided under former Code 1933, § 113-2303).

While the judgment of a court of ordinary (now probate court) discharging the administrator is open to attack on the ground that the judgment was fraudulently procured, the judgment is to be deemed "void" only when, in a proceeding to set it aside, the proof shows the judgment was secured by practicing a fraud upon the heirs at law or upon the ordinary. Stanton v. Gailey, 72 Ga. App. 292, 33 S.E.2d 747 (1945) (decided under former Code 1933, § 113-2303).

2. Procedure to Set Aside Discharge Judgment

Procedure to set aside fraudulently obtained discharge. — Judgment of the court of ordinary (now probate court) discharging an administrator, which has been fraudulently obtained by falsely representing to the ordinary (now probate judge) that the applicant has fully discharged the applicant's duties as administrator, can be set aside by a proper proceeding for that purpose, instituted in the court rendering it; and this remedy is open to creditors as well as to heirs. Mullis v. Bank of Chauncey, 40 Ga. App. 582, 150 S.E. 471 (1929) (decided under former Civil Code 1910, § 4091).

Though the discharge of an executor obtained by actual fraud practiced on the heirs or the ordinary (now probate judge) may be set aside on motion and proof of the fraud, the beneficiaries sui juris under the will must institute their action to set aside the discharge within three years from the date of the order discharging the executor. Warnock v. Warnock, 206 Ga. 548, 57 S.E.2d 571 (1950) (decided under former Code 1933, § 113-2303).

Petition seeking to set aside a judgment of the court of ordinary (now probate court) discharging an executor, brought 13 years after such discharge, which did not contain specific allegations of actual fraud on the part of the executor deterring and debarring the plaintiffs from sooner instituting the action so as to toll the statute of limitations, was subject to dismissal on general demurrer. Warnock v. Warnock, 206 Ga. 548, 57 S.E.2d 571 (1950) (decided under former Code 1933, § 113-2303).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 272, 309.

C.J.S. — 33 C.J.S., Executors and Administrators, § 100.

53-7-54. Breach of fiduciary duty.

(a) If a personal representative or temporary administrator commits a breach of fiduciary duty or threatens to commit a breach of fiduciary duty, a beneficiary of a testate estate or heir of an intestate estate shall have a cause of action:

(1) To recover damages;

(2) To compel the performance of the personal representative's or temporary administrator's duties;

(3) To enjoin the commission of a breach of fiduciary duty;

(4) To compel the redress of a breach of fiduciary duty by payment of money or otherwise;

(5) To appoint another personal representative or temporary administrator to take possession of the estate property and administer the estate;

(6) To remove the personal representative or temporary administrator; and

(7) To reduce or deny compensation to the personal representative or temporary administrator.

(b) When estate assets are misapplied and can be traced in the hands of persons affected with notice of misapplication, a constructive trust shall attach to the assets.

(c) The provision of remedies for breach of fiduciary duty by this Code section does not prevent resort to any other appropriate remedy provided by statute or common law.

(d) In any action or proceeding brought pursuant to this Code section, service of notice or process shall be made in the manner provided by Chapter 11 of this title if Chapter 11 of this title is applicable under Code Section 53-11-1. If Chapter 11 of this title is not applicable to such action or proceeding under Code Section 53-11-1, such service shall be made in the manner provided by Chapter 11 of Title 9 unless Chapter 11 of such title is not applicable to such action or proceeding under Code Section 9-11-81.

History. — Code 1981, § 53-7-54, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-45/HB 865.

The 2020 amendment, effective January 1, 2021, inserted "constructive" in subsection (b); and added subsection (d).

COMMENT

This section provides for beneficiaries and heirs the same causes of action for breach of fiduciary duty that are allowed to trust beneficiaries under the Georgia Trust Act in Code Sec. 53-12-192.

JUDICIAL DECISIONS

Breach of fiduciary duty shown. — Probate court properly revoked letters testamentary, ordered reimbursement to a decedent's estate of excessive expenses, and ordered a settling of the estate's accounts when the decedent's executor committed 17 breaches of fiduciary duty, including failing to wind up the estate and failing to provide the decedent's other child with an accounting. Fowler v. Cox, 264 Ga. App. 880, 592 S.E.2d 510 (2003).

Appellate court applies an abuse of discretion standard in reviewing a probate court's order removing an executor; the relevant question in reviewing a removal order regarding an executor is whether the trial court had grounds to conclude that there was good cause for the removal. In re Estate of Arnsdorff, 273 Ga. App. 612, 615 S.E.2d 758 (2005).

Probate court order removing an executor from an estate and ordering the attorney to forfeit $79,000 in commissions and fees received and costs incurred as executor and attorney for the estate was upheld on appeal because: (1) the record showed that the attorney filed a purported estate accounting six inches thick, which was prepared by the staff and which the attorney showed little familiarity with; (2) the attorney delayed a distribution to a beneficiary by trying to force the beneficiary to create a trust, which was not required by the decedent's will; (3) the attorney filed an erroneous tax return that had to be amended as well as took a deduction the attorney knew was improper; and (4) the attorney incurred unnecessary expenses and fees by showing the decedent's house when the sale of the house was not required by the will. In re Estate of Arnsdorff, 273 Ga. App. 612, 615 S.E.2d 758 (2005).

Because an executor ignored a testator's intent and the directions contained in the testator's will, and consciously failed to seek direction from the courts despite the executor's admitted knowledge that the executor should do so, the trial court properly found that the executor violated the executor's fiduciary duties and forfeited the executor's right to compensation in O.C.G.A. § 53-7-54(a)(7). Cronic v. Baker, 284 Ga. 452, 667 S.E.2d 363 (2008).

Personal representative's wrongful conveyance of the estate's primary asset, a house, to the personal representative was a breach of fiduciary duty. The beneficiary's evidence of the house's rental value authorized the award to the beneficiary of compensatory damages for lost rent under O.C.G.A. §§ 53-7-54 and 53-12-193. In re Estate of Zeigler, 295 Ga. App. 156, 671 S.E.2d 218 (2008).

Venue. — Assuming that O.C.G.A. § 53-7-54(b) created a cause of action against third parties, as the trust created by the statute was a creature of equity jurisdiction, under Ga. Const. 1983, Art. VI, Sec. II, Para. III, venue for such actions was in the county where a defendant resided. Thus, if a contempt petition was filed pursuant to the statute, the motion to transfer venue filed by two lawyers and their law firm should have been granted as neither lawyer resided in the forum county and their law firm was not located in that county. Rader v. Levenson, 290 Ga. App. 227, 659 S.E.2d 655 (2008).

53-7-55. Revocation of letters of personal representative or other sanctions.

(a) Upon the petition of any person having an interest in the estate or whenever it appears to the probate court that good cause may exist to revoke the letters of a personal representative or impose other

sanctions, the court shall cite the personal representative to answer to the charge. Upon investigation, the court may, in the court's discretion:

(1) Revoke the personal representative's letters;

(2) Require additional security;

(3) Require the personal representative to appear and submit to a settlement of accounts following the procedure set forth in Article 6 of this chapter, regardless of whether the personal representative has first resigned or been removed and regardless of whether a successor fiduciary has been appointed; or

(4) Issue such other order as in the court's judgment is appropriate under the circumstances of the case.

(b) In any proceeding brought pursuant to this Code section, service of notice shall be made in the manner provided by Chapter 11 of this title.

History. — Code 1981, § 53-7-55, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-46/HB 865.

The 2020 amendment, effective January 1, 2021, designated the existing provisions as subsection (a); in paragraph (a)(3), substituted "regardless of whether" for "whether or not" twice; and added subsection (b).

Law reviews. — For survey article on wills, trusts, guardianships, and fiduciary administration for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003).

COMMENT

This section carries forward the provisions of former OCGA Sec. 53-7-148.

JUDICIAL DECISIONS

Analysis

General Consideration
Mismanagement Generally
Remedies
Discretionary Power of Probate Court or Jury
Jurisdiction

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Laws 1821, Cobb's 1851 Digest, p. 321, former Code 1863, § 2474, former Code 1868, § 2472, former Code 1873, § 2511, former Code 1882, § 2511, former Civil Code 1895, § 3402, former Civil Code 1910, § 3978, former Code 1933, § 113-1229, and former O.C.G.A. § 53-7-148 are included in the annotations for this Code section.

Statute is applicable to executors as well as administrators. Bruce v. Fogarty, 53 Ga. App. 443, 186 S.E. 463 (1936); McLendon v. McLendon, 96 Ga. App. 197, 99 S.E.2d 489 (1957) (decided under former Code 1933, § 113-1229).

An administrator cannot be allowed to violate the public law of the state in the management of the estate entrusted to the administrator, and then be heard to say that such violation of the law was for the benefit of that estate, when called on to show cause why the administrator's letters of administration

General Consideration (Cont'd)

should not be revoked. Lokey v. Lokey, 82 Ga. App. 171, 60 S.E.2d 569 (1950) (decided under former Code 1933, § 113-1229).

Word "unfit," as used in this statute, is not limited to physical, mental, or moral conditions, but is sufficiently broad to include a legal disqualification under the will or otherwise. Bruce v. Fogarty, 53 Ga. App. 443, 186 S.E. 463 (1936) (decided under former Code 1933, § 113-1229).

Accounting and final settlement required only upon removal of administrator. — When it appears that, under a previous adjudication of this court, the administrator is entitled to hold and manage the estate, without accounting to the legatee under a will, until the happening of a certain contingency, which the petition reveals has not occurred, an accounting and final settlement would be premature in the absence of a removal of the administrator. Hoffman v. Chester, 204 Ga. 296, 49 S.E.2d 760 (1948) (decided under former Code 1933, § 113-1229).

Failure to make required returns. — There was no abuse of discretion in the probate court's removal of an administrator based on findings that the administrator failed to file timely and proper annual returns. In re Estate of Jackson, 241 Ga. App. 392, 526 S.E.2d 884 (1999).

Cited in Hall v. Carter, 8 Ga. 388 (1850); Whiddon v. Williams & Co., 98 Ga. 310, 24 S.E. 437 (1896); Zipperer v. LaRoche, 145 Ga. 829, 90 S.E. 40 (1916); Stanley v. Spell, 46 Ga. App. 91, 166 S.E. 669 (1932); Goodwyn v. Veal, 50 Ga. App. 657, 179 S.E. 126 (1935); Ballard v. Zachry, 54 Ga. App. 101, 187 S.E. 139 (1936); Maddox v. Waldrop, 60 Ga. App. 702, 4 S.E.2d 684 (1939); Beecher v. Carter, 189 Ga. 234, 5 S.E.2d 648 (1939); Robinson v. Georgia Sav. Bank & Trust Co., 106 F.2d 944 (5th Cir. 1939); Astin v. Carden, 194 Ga. 758, 22 S.E.2d 481 (1942); Bowen v. Bowen, 200 Ga. 572, 37 S.E.2d 797 (1946); Jue v. Joe, 207 Ga. 119, 60 S.E.2d 442 (1950); Gill v. Gill, 211 Ga. 567, 87 S.E.2d 389 (1955); Conkle v. Babb, 93 Ga. App. 405, 91 S.E.2d 789 (1956); Fuller v. Fuller, 217 Ga. 691, 124 S.E.2d 741 (1962); Saffold v. Cheatham, 221 Ga. 155, 143 S.E.2d 629 (1965); Shackelford v. Whatley, 172 Ga. App. 127, 322 S.E.2d 331 (1984); Pitts v. Attaway, 259 Ga. 455, 384 S.E.2d 629 (1989).

Mismanagement Generally

An allegation of insolvency of the executor is a substantial factor for consideration when there are specific allegations showing danger of loss to persons interested in the estate, but an allegation of insolvency, standing alone, is insufficient to authorize a court of equity to interfere in the administration of an estate. The ordinary (now probate judge) has ample authority to investigate charges that an executor is mismanaging an estate, and to require the executor to give bond or to remove the person as executor. Gaines v. Johnson, 216 Ga. 668, 119 S.E.2d 28 (1961) (decided under former Code 1933, § 113-1229).

While failure to make returns as required by law may be cause for removing an executor, it is not a compulsory ground for so doing, but one within the discretion of the court. Holsenbeck v. Arnold, 75 Ga. App. 311, 43 S.E.2d 348 (1947) (decided under former Code 1933, § 113-1229).

Failure of an executor or guardian to make returns is an omission of duty, and therefore a breach of trust, and throws on the executor or guardian the burden of proving to the satisfaction of the court and jury that the executor or guardian has discharged the duty of the trust with fidelity. Holsenbeck v. Arnold, 75 Ga. App. 311, 43 S.E.2d 348 (1947) (decided under former Code 1933, § 113-1229).

In a proceeding by a legatee against an executor for an accounting, before the ordinary (now probate judge) under former Code 1933, § 113-2201, the ordinary (or the superior court on appeal) is authorized to remove such executor when it appears that the executor has without authority used property in the executor's hands, in a joint venture or partnership in which the executor in the executor's individual right is interested, and when, without authority, the executor is shown to have held as speculation property or crops which it was the executor's duty under the law to sell. This is true, even though such

venture or speculation does not result in loss to the beneficiary, the law being that as to such a trust this relationship must not be assumed and no such risk be taken, unless authorized by the will. Perdue v. McKenzie, 194 Ga. 356, 21 S.E.2d 705 (1942) (decided under former Code 1933, § 113-1229).

Executor's breach of fiduciary duty. — Probate court order removing an executor for cause was affirmed because the executor violated the executor's fiduciary duty in numerous ways by failing to dissolve the estate business, using estate property and funds for the executor's own benefit and to pay personal bills, overpaying executor's fees, and having a conflict of interest by continuing to operate the business despite the estate losing money but personally benefiting by using the business property rent free. Myers v. Myers, 297 Ga. 490, 775 S.E.2d 145 (2015).

Removal not required. — Statute does not require an ordinary (now probate judge), or a jury in the judge's stead to remove the administrator when, though admittedly there were certain violations of the law, no loss is claimed to have resulted to the estate, and when no accounting is sought. Lokey v. Lokey, 82 Ga. App. 171, 60 S.E.2d 569 (1950) (decided under former Code 1933, § 113-1229).

Remedies

Suit on bond of administrator as remedy for fraud. — When the heirs allege that the administrator of the estate is guilty of fraud and collusion with respect to the sale of property, and that a receiver should be appointed to reclaim and resell the property, but the heirs do not want to prevent the ultimate sale of the property, the question is merely one of damage resulting from an alleged breach of duty by the administrator. In this case, the administrator's bond as administrator would furnish an adequate remedy to the heirs, since they could not possibly be in such danger of loss or injury as to require either a receivership or an injunction for the protection of their interests. Conner v. Yawn, 200 Ga. 500, 37 S.E.2d 541 (1946) (decided under former Code 1933, § 113-1229).

When, in a suit against an administrator and another for the appointment of a receiver and other equitable relief, it appears from the pleadings and evidence that the heirs of an estate may obtain adequate protection and redress in the court of ordinary (now probate court) as to each complaint against an administrator in reference to the estate of the intestate, the heirs do not present a proper case for the appointment of a receiver for such estate or for injunction since a suit on the administrator's bond is an adequate remedy at law. Conner v. Yawn, 200 Ga. 500, 37 S.E.2d 541 (1946) (decided under former Code 1933, § 113-1229).

If a bond is not sufficient to protect any interested party, the ordinary (now probate judge) has authority, upon proper application, to increase the bond, revoke the letters of administration, or pass such other order as may in the party's judgment be expedient under the circumstances of the case. Furr v. Jordan, 196 Ga. 862, 27 S.E.2d 861 (1943) (decided under former Code 1933, § 113-1229).

Appointment of widow upon removal of administrator. — While, as provided in law after the administrator has been appointed and has taken charge of the estate, upon proof that the administrator wastes or in any manner mismanages the estate or for any reason the administrator is unfit for the trust reposed in the administrator, the ordinary (now probate judge) may in the ordinary's discretion revoke the letters of administration. The widow, who is legally entitled to the administration, cannot, when she is of sound mind, be denied the appointment upon the mere speculation that she will, on account of lack of business experience and want of capacity to manage the particular estate, mismanage the estate and prove unfit for the trust reposed. Sampson v. Sampson, 44 Ga. App. 803, 163 S.E. 326 (1932) (decided under former Civil Code 1910, § 3978).

Removal of executor proper. — When an executor destroys or attempts to destroy evidence in the executor's possession that would help prove an arguably valid claim against the estate, the probate court does not abuse the court's discretion in removing the executor, particularly when, as here, the executor is the residual

Remedies (Cont'd)

beneficiary under the will and thus stands to personally profit from defeat of the claim. In re Estate of Davis, 243 Ga. App. 58, 532 S.E.2d 169 (2000).

Probate court properly revoked letters testamentary, ordered reimbursement to a decedent's estate of excessive expenses, and ordered a settling of the estate's accounts when the decedent's executor committed 17 breaches of fiduciary duty, including failing to wind up the estate and failing to provide the decedent's other child with an accounting. Fowler v. Cox, 264 Ga. App. 880, 592 S.E.2d 510 (2003).

Trial court did not abuse the court's discretion under O.C.G.A. § 53-7-55(1) in removing the executor as executor of the decedent's estate as the executor did not carry out the duties under O.C.G.A. § 53-7-1(a); the executor did not take control of the assets of the estate, the executor commingled estate funds with the executor's own funds, and the executor sold the decedent's house without obtaining an appraisal or attempting to realize the best price on the open market. In re Estate of Zeigler, 273 Ga. App. 269, 614 S.E.2d 799 (2005).

As the question of the legitimacy of the administrator's transactions was properly before the court, the probate court did not err in addressing it or in granting the relief necessary to protect the estate. Ray v. Nat'l Health Investors, Inc., 280 Ga. App. 44, 633 S.E.2d 388 (2006).

Removal of executor not proper. — Trial court erred in removing an executor of an estate based on the executor's failure to appear at a hearing concerning a will beneficiary's request for information; there was no evidence that the executor was on notice that executor's letters testamentary could be revoked for failing to attend the hearing as required by O.C.G.A. § 53-7-55. In re Estate of Zeigler, 259 Ga. App. 807, 578 S.E.2d 519 (2003).

Failure to remove proper. — Probate court properly denied a petition to remove an executor. The assertion rested upon an assertion that a will was void, which had been rejected, and upon an assertion that the estate should be distributed according to an alleged contract between the parties, which the probate court held that the court did not have jurisdiction to consider. In re Estate of Brice, 288 Ga. App. 449, 654 S.E.2d 420 (2007).

Discretionary Power of Probate Court or Jury

Broad discretion. — Under this statute, the discretion of the ordinary (now probate judge), or a jury acting in the ordinary's stead on appeal to the superior court, is very broad and may be exercised whether the violation of law under consideration is a minor or major "matter," and the court may not in either event withdraw that discretion. Lokey v. Lokey, 82 Ga. App. 171, 60 S.E.2d 569 (1950) (decided under former Code 1933, § 113-1229).

Court may not lawfully tell a jury that they have no right to remove an administrator who is guilty of mismanagement which does not result in any injury to the estate. To do so would be to invade the province of the jury by withdrawing the jury's discretion. Lokey v. Lokey, 82 Ga. App. 171, 60 S.E.2d 569 (1950) (decided under former Code 1933, § 113-1229).

Because removal of an executor was within the jury's discretion but was not mandated, the trial court properly denied the petitioner's motions for directed verdict and judgment n.o.v. following a special verdict finding that the executor should not be removed. Crump v. McDonald, 239 Ga. App. 647, 520 S.E.2d 283 (1999) (decided under former O.C.G.A. § 53-7-148).

Statute furnishes the necessary guidance for the exercise of the ordinary's (now probate judge) or jury's discretion as to remedial measures to be adopted against a negligent or derelict administrator upon consideration of the evidence upon the hearing. An ordinary (now probate judge) or a jury in the ordinary's stead has broad discretion in the premises, and the law does not require an administrator's removal, even if guilty of mismanagement or misconduct, as the only remedial measure. The jury may in the jury's discretion do something else. Lokey v. Lokey, 82 Ga. App. 171, 60 S.E.2d

569 (1950) (decided under former Code 1933, § 113-1229).

Revoking letters of administration is an action that a jury may take or not take in the jury's discretion, and this discretion will not be controlled unless abused. Lokey v. Lokey, 82 Ga. App. 171, 60 S.E.2d 569 (1950) (decided under former Code 1933, § 113-1229).

When an administrator has been guilty of a violation of the law in the management of an estate, but the administrator's act has not resulted in any loss to the estate, the jury could still remove the administrator. Lokey v. Lokey, 82 Ga. App. 171, 60 S.E.2d 569 (1950) (decided under former Code 1933, § 113-1229).

Even if the jury found some derelictions of the administrator to be "minor matters" the jury might regard them as presaging more serious infractions, and having found such violations of the law might, in their discretion, remove the administrator. Lokey v. Lokey, 82 Ga. App. 171, 60 S.E.2d 569 (1950) (decided under former Code 1933, § 113-1229).

When the findings and conclusions of the probate court established that a former spouse's marital status was not correctly stated in the former spouse's application for letters of administration, and that this incorrect information was a material factor in the issuance of those letters, it was not an abuse of discretion to remove the spouse as administrator of the deceased's estate. In re Estate of Dunn, 236 Ga. App. 211, 511 S.E.2d 575 (1999) (decided under former O.C.G.A. § 53-7-148).

Authority to remedy executor's misconduct. — Trial court did not err in dismissing purported beneficiary's complaint alleging that executors breached the fiduciary duties owed to the beneficiary by wasting the assets of the parents' estates and failing to distribute assets to the beneficiary because the claims would be more properly heard by the probate court which had original and exclusive jurisdiction over such matters; the probate court was equipped to handle such claims and had the authority to grant the relief requested, if necessary. Benefield v. Martin, 276 Ga. App. 130, 622 S.E.2d 469 (2005).

Removal of executor proper. — When decedent's 89-year-old parent did not comprehend the duties and responsibilities of an executor and may have been acting in a manner detrimental to the estate, the probate court acted within the court's discretion in removing the parent as coexecutor. Nesmith v. Pierce, 226 Ga. App. 851, 487 S.E.2d 687 (1997) (decided under former O.C.G.A. § 53-7-148).

Probate court did not abuse the court's discretion by removing all four siblings as co-executors because there was eminent distrust on all sides and the situation was untenable, thus, good cause existed for the removal order. In re Estate of Hubert, 325 Ga. App. 276, 750 S.E.2d 511 (2013).

Transfer of discretion. — On appeal to the superior court after a finding adverse to the petitioner on the issue of the administrator's unfitness by the ordinary (now probate judge), the trial in the superior court is had without reference to the evidence introduced in the former trial, and in such a case the discretion exercised by the ordinary (now probate judge) is transferred to the jury in the superior court. Wofford v. Vandiver, 72 Ga. App. 623, 34 S.E.2d 579 (1945) (decided under former Code 1933, § 113-1229).

While former Code 1933, § 113-1101 made the provisions of former Code 1933, § 113-1229 applicable to executors, and by the provisions of § 113-1229, an executor may be removed or required to give additional security — in the exercise of sound discretion by the ordinary (now probate judge) — when it is shown that the ordinary is guilty of waste or mismanagement or that the ordinary is insolvent or, for any reason, the ordinary is unfit for the trust, yet despite this power courts are reluctant to exercise the power when no strong case therefor is shown. And the discretion vested by the statute in the ordinary (now probate judge) is to be exercised by the jury or judge acting as jury on appeal to the superior court. Patterson v. Patterson, 208 Ga. 17, 64 S.E.2d 585 (1951) (decided under former Code 1933, § 113-1229).

Jurisdiction

Revocation powers of probate court. — For a failure to make "returns

Jurisdiction (Cont'd)

as required by law," or for insufficient security, the administrator may be cited in the court of ordinary (now probate court) and the court of ordinary (now probate judge) is vested with full power to revoke the letters of administration, or to pass such order as may be necessary for the protection of interested parties. Hoffman v. Chester, 204 Ga. 296, 49 S.E.2d 760 (1948) (decided under former Code 1933, § 113-1229).

A proceeding for the revocation of letters of administration or letters testamentary may be initiated "whenever the ordinary (now probate judge) knows, or is informed by any person having any interest in the estate," that one or more of the specified conditions exist which will authorize the ordinary (now probate judge) in the ordinary's discretion to revoke the letters; an attorney may convey such information to the ordinary and initiate by a petition the proceeding, resulting in an order of revocation of the letters testamentary by the ordinary (now probate judge), and in an affirmance of such order by the superior court on appeal, even though the attorney may not be a beneficiary under the will or a creditor of the estate, but is merely interested therein on account of a claim for attorney's fees in connection with the probate of the will. Bruce v. Fogarty, 53 Ga. App. 443, 186 S.E. 463 (1936) (decided under former Code 1933, § 113-1229).

When the executor is unfit to handle the estate or there is cause for the executor's removal, plaintiffs have a remedy for such in a court of ordinary (now probate court). Tinsley v. Maddox, 176 Ga. 471, 168 S.E. 297 (1933) (decided under former Civil Code 1910, § 3978).

Breach of settlement agreement by executor. — It is necessary for the probate court to address any material unresolved factual issues including the question of whether an executor has breached a settlement agreement; since the beneficiary under the will is not seeking to enforce the agreement, but instead to determine whether the executor has breached the agreement, the superior court should not have jurisdiction. Gray v. McKenna, 202 Ga. App. 685, 415 S.E.2d 295 (1992) (decided under former O.C.G.A. § 53-7-148).

Res judicata. — Probate court order removing executor was reversed since the issue upon which the probate court removed the executor already had been decided in the executor's favor by the superior court in a suit alleging fraud and waste. Pitts v. Attaway, 259 Ga. 455, 380 S.E.2d 709 (1989) (decided under former O.C.G.A. § 53-7-148).

Appointment as executor "only so long as remains a widow." — When the testator in a will appoints a person to be the executor only so long as the executor remains a widow, and the executor remarries after qualification as the executor, the court of ordinary (now probate court) has jurisdiction of a petition to revoke the court's letters testamentary on the ground that the executor is no longer qualified under the will. Bruce v. Fogarty, 53 Ga. App. 443, 186 S.E. 463 (1936) (decided under former Code 1933, § 113-1229).

Jurisdiction of the court of ordinary (now probate court) to revoke the letters of executorship, and to require the executor to make an accounting and settlement to the heirs, is limited to the case as one at law. Goodman v. Little, 213 Ga. 178, 97 S.E.2d 567 (1957) (decided under former Code 1933, § 113-1229).

Probate court's jurisdiction to disqualify wife as executor of husband's will. — Probate court did not lack jurisdiction to disqualify a wife as the executor of her husband's will probated in common form. Even though it was termed a caveat, the daughter's petition did not challenge the will's validity, but rather merely challenged the wife's ability to serve as executor, which was permitted under O.C.G.A. § 53-7-55. In re Estate of Moriarty, 262 Ga. App. 241, 585 S.E.2d 182 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 275, 278 et seq., 279 et seq., 294 et seq., 356 et seq.

C.J.S. — 33 C.J.S., Executors and Administrators, § 107 et seq.

ALR. — Delay of one named as executor and created trustee in setting up trust as declination of or vacancy in trust, or as ground for removal as trustee, 76 A.L.R. 1385.

Allowance out of decedent's estate for costs and attorneys' fees incurred by parties interested in granting or revoking of letters of administration or letters testamentary, 90 A.L.R. 101.

Insolvency of, or appointment of receiver or other liquidator for corporation, as affecting its status as executor, administrator, guardian, or trustee, 102 A.L.R. 124.

Personal interests of executor or administrator adverse to or conflicting with those of other persons interested in estate as ground for revocation of letters or removal, 119 A.L.R. 306.

Requisites of notice and hearing in court proceedings for removal of personal representative, 47 A.L.R.2d 307.

Physical condition as affecting competency to act as executor or administrator, 71 A.L.R.3d 675.

Resignation or removal of executor, administrator, guardian, or trustee, before final administration or before termination of trust, as affecting his compensation, 96 A.L.R.3d 1102.

Delay of executor or administrator in filing inventory, account, or other report, or in completing administration and distribution of estate, as ground for removal, 33 A.L.R.4th 708.

53-7-56. Resignation.

(a) A personal representative may resign:

(1) In the manner and under the circumstances described in the will;

(2) Upon petition to the probate court, showing that the resignation has been requested in writing by all heirs of an intestate estate or all beneficiaries of a testate estate; or

(3) Upon petition to the probate court, showing to the satisfaction of the court that:

(A) The personal representative is unable to continue serving due to age, illness, infirmity, or other good cause;

(B) Greater burdens have developed upon the office of personal representative than those that originally were contemplated or should have been contemplated when the personal representative was qualified and the additional burdens would work a hardship upon the personal representative;

(C) Disagreement exists between one or more of the beneficiaries or heirs and the personal representative in respect to the personal representative's management of the estate, which disagreement and conflict appear deleterious to the estate;

(D) The resignation of the personal representative will result in or permit substantial financial benefit to the estate;

(E) The resigning personal representative is one of two or more acting personal representatives and the other personal representatives will continue in office with no adversity to the estate contemplated; or

(F) The resignation would not be disadvantageous to the estate.

(b) A personal representative's petition to resign shall be made to the probate court and the court shall cause citation to issue and service of notice to be made upon all the heirs of an intestate estate or the beneficiaries of a testate estate in the manner provided by Chapter 11 of this title.

History. — Code 1981, § 53-7-56, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-47/HB 865.

The 2020 amendment, effective January 1, 2021, substituted "that originally were" for "which were originally" in subparagraph (a)(3)(B); and, in subsection (b), substituted "the court shall cause citation to issue and service of notice to" for "service shall" and inserted "in the manner provided by Chapter 11 of this title" at the end.

COMMENT

This section applies the resignation provisions for trustees that are found in the Georgia Trust Act at Code Sec. 53-12-175 to personal representatives. This section replaces former OCGA Sec. 53-7-149.

JUDICIAL DECISIONS

Analysis

General Consideration
Notice

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 4091, and former Code 1933, § 113-2303, are included in the annotations for this Code section.

Designations of executors. — Provisions of this statute, relating to the resignations of administrators, are applicable to executors. Darnell v. Tate, 84 Ga. App. 831, 67 S.E.2d 819 (1951) (decided under former Code 1933, § 113-2306).

When an administrator desires to resign a trust from any cause, the administrator shall petition the ordinary (now probate judge), setting forth the administrator's reasons and the name of a suitable person qualified and entitled to serve in the administrator's place, and citation shall issue requiring the next of kin to show cause why the resignation should not become effective and the new administrator appointed. Davis v. Melton, 51 Ga. App. 685, 181 S.E. 300 (1935) (decided under former Code 1933, § 113-2306).

Original executor cannot name an executor of the estate represented by the original executor; but when the original executor executes a will and therein names an executor for one's own estate, the latter ipso facto becomes a successor executor of the original estate. Gormley v. Watson, 177 Ga. 763, 171 S.E. 280 (1933) (decided under former Code 1933, § 113-2306).

Cited in Mutual Benefit Life Ins. Co. v. Wilson, 189 Ga. 344, 6 S.E.2d 716 (1939); Darnell v. Tate, 206 Ga. 576, 58 S.E.2d 160 (1950).

Notice

Executor must give notice of resignation. — Former Code 1933, § 113-2306 considered in conjunction with former Code 1933, § 113-1101 required that an executor desiring to resign the executor's trust give notice of this fact to the next of kin of the testator. Gormley v. Watson, 177 Ga. 763, 171 S.E. 280 (1933) (decided under former Code 1933, § 113-2306).

Nearest of next of kin are entitled to notice of proceedings for the resignation of administrators and guardians where they reside in the state. Bivins v. Middlebrooks, 72 Ga. App. 570, 34 S.E.2d 551 (1945) (decided under former Code 1933, § 113-2306).

Publication of the application and citation is necessary in order for the resignation to become effective and valid. Davis v. Melton, 51 Ga. App. 685, 181 S.E. 300 (1935) (decided under former Code 1933, § 113-2306).

Next of kin of a testate are entitled to the same notice as the next of kin of an intestate; and the next of kin who are also legatees under the will are entitled to the formal written notice of the resignation of an executor and the appointment of the executor's successor. Gormley v. Watson, 177 Ga. 763, 171 S.E. 280 (1933) (decided under former Civil Code 1910, § 4091).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 306, 307.

C.J.S. — 33 C.J.S., Executors and Administrators, §§ 103, 104, 105.

ALR. — Right of executor or administrator to resign, 91 A.L.R. 712.

ARTICLE 6

SETTLEMENT OF ACCOUNTS

PART 1

GENERAL PROVISIONS

53-7-60. Jurisdiction.

The superior court shall have concurrent jurisdiction with the probate court over the settlement of accounts of personal representatives.

History. — Code 1981, § 53-7-60, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-7-160.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
JURISDICTION GENERALLY
STATUTE OF LIMITATIONS

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 4075, former Code 1933, § 113-2203, and former O.C.G.A. § 53-7-160 are included in the annotations for this Code section.

Statute does not appear to be of legislative origin, but seems to have been placed in the Code by the first codifiers, and retained in each subsequent Code. It was not meant to announce any new principle; for the English courts of equity had long exercised such a jurisdiction, and the American courts, with certain limitations and restrictions, have generally recognized the same rule. Jones v. Head, 185 Ga. 857, 196 S.E. 725 (1938) (decided under former Code 1933, § 113-2203).

Former Code 1933, § 37-403 (see O.C.G.A. § 23-2-91) must be construed with former Code 1933, § 113-2203, which declared that a court of equity shall have concurrent jurisdiction with the ordinary (now probate judge) over the settlement of accounts of administrators. Manry v. Manry, 196 Ga. 365, 26 S.E.2d 706 (1943) (decided under former Code 1933, § 113-2203).

Performance of supervisory office. — Neither former Code 1933, § 113-2203 nor former Code 1933, § 37-403 (see O.C.G.A. § 23-2-91) intended to confer upon a court of equity the performance of a supervisory office and the duty of overseeing the conduct of the court of ordinary (now probate court) in the administration of estates. Arnold v. Harris, 179 Ga. 896, 177 S.E. 738 (1934) (decided under former Code 1933, § 113-2203).

Extent of jurisdiction. — A court of equity is distinctly and in terms declared to have jurisdiction over the settlement of accounts of administrators, and a court of equity having jurisdiction for that purpose may go on and give full relief in the premises. Calbeck v. Herrington, 169 Ga. 869, 152 S.E. 53 (1930) (decided under former Civil Code 1910, § 4075); Morris v. Nicholson, 198 Ga. 450, 31 S.E.2d 786 (1944) (decided under former Code 1933, § 113-2203).

It by no means follows that because a court of equity has concurrent jurisdiction with the ordinary (now probate judge) over the settlement of accounts of administrators, it will act in every case involving that subject matter. Jones v. Head, 185 Ga. 857, 196 S.E. 725 (1938) (decided under former Code 1933, § 113-2203).

Courts of equity and courts of ordinary (now probate courts) have concurrent jurisdiction over the matter of accounting as against an administrator or executor, and a suit in equity for accounting may be filed, notwithstanding the fact that the court of ordinary (now probate court) may require an accounting, so long as no actual proceedings for an accounting have been instituted in the court of ordinary (now probate court). Morris v. Nicholson, 198 Ga. 450, 31 S.E.2d 786 (1944) (decided under former Code 1933, § 113-2203); Spence v. Brown, 198 Ga. 566, 32 S.E.2d 297 (1944) (decided under former Code 1933, § 113-2203).

Applicability to executors. — Principle that a court of equity has concurrent jurisdiction over the settlement of accounts of administrators is made applicable to executors. Powell v. Smith, 178 Ga. 737, 174 S.E. 341 (1934) (decided under former Code 1933, § 113-2203).

An executor is entitled to the direction of the courts of Georgia and to the aid of equity in the settlement of the executor's accounts in the performance of the executor's duties and the fulfillment of the executor's oath if a proper case for equity is alleged. Georgia Money Corp. v. Rissman, 220 Ga. 476, 139 S.E.2d 486 (1964) (decided under former Code 1933, § 113-2203).

When a legatee under a will brings an equitable proceeding to compel an executor to settle with the executor and to turn over to the legacies or devises coming to the executor under the will, a court of equity has jurisdiction to require the executor to give bond in a proper case. Powell v. Smith, 178 Ga. 737, 174 S.E. 341 (1934) (decided under former Code 1933, § 113-2203).

Proceeding by the heirs at law for an accounting may be maintained jointly against the administrator in the administrator's official capacity and as an individual. Rowland v. Rowland, 204 Ga.

603, 50 S.E.2d 343 (1948) (decided under former Code 1933, § 113-2203).

Proceeding brought for accounting with an administrator is not predicated upon any debt or claim against the administrator or the estate; the heirs at law are not creditors of either, but the owners of the property of the deceased, subject to the rules of administration of estates. Rowland v. Rowland, 204 Ga. 603, 50 S.E.2d 343 (1948) (decided under former Code 1933, § 113-2203).

Application may be made to a court of equity by a party interested in the estate, before application for the appointment of an administrator, or the filing of a will and a petition that it be probated. But the concurrent jurisdiction of equity is not confined to this. Howard v. Boone, 170 Ga. 156, 152 S.E. 462 (1930) (decided under former Civil Code 1910, § 4075).

Equity will not interfere with the regular administration of estates at the instance of an heir except when there is danger of loss or other injury to the heir's interest. Gill v. Gill, 211 Ga. 567, 87 S.E.2d 389 (1955) (decided under former Code 1933, § 113-2203).

Courts of equity are loath to interfere in the administration of estates; but having concurrent jurisdiction with the court of ordinary (now probate court) in the settlement of accounts, the court's will not hesitate to interfere for the full protection of the rights of parties in interest. Hamrick v. Prewett, 174 Ga. 895, 164 S.E. 678 (1932) (decided under former Civil Code 1910, § 4075).

Cited in Dean v. Central Cotton Press Co., 64 Ga. 670 (1880); Brantley v. Greer, 71 Ga. 11 (1883); Bivins v. Marvin, 96 Ga. 268, 23 S.E. 923 (1895); Bryan v. Bryan, 170 Ga. 472, 153 S.E. 188 (1930); Chapalas v. Papachristos, 185 Ga. 544, 195 S.E. 737 (1937); Benton v. Turk, 188 Ga. 710, 4 S.E.2d 580 (1939); Beecher v. Carter, 189 Ga. 234, 5 S.E.2d 648 (1939); Robinson v. Georgia Sav. Bank & Trust Co., 106 F.2d 944 (5th Cir. 1939); Reynolds v. Hyers, 190 Ga. 200, 9 S.E.2d 78 (1940); Bacon v. Federal Land Bank, 109 F.2d 285 (5th Cir. 1940); McCord v. Walton, 192 Ga. 279, 14 S.E.2d 723 (1941); Park v. Park, 37 F. Supp. 185 (N.D. Ga.); Taylor v. Abbott, 201 Ga. 254, 39 S.E.2d 471 (1946); Toler v. Goodin, 74 Ga. App. 468, 40 S.E.2d 214 (1946); Saliba v. Saliba, 201 Ga. 681, 40 S.E.2d 732 (1946); Hoffman v. Chester, 204 Ga. 296, 49 S.E.2d 760 (1948); Taylor v. Taylor, 205 Ga. 483, 53 S.E.2d 769 (1949); Jackson v. Jackson, 206 Ga. 470, 57 S.E.2d 602 (1950); Hamrick v. Hamrick, 206 Ga. 564, 58 S.E.2d 145 (1950); Flaherty v. Dillon, 209 Ga. 25, 70 S.E.2d 377 (1952); Estes v. First Nat'l Bank, 223 Ga. 653, 157 S.E.2d 449 (1967); L.L. Minor Co. v. Perkins, 246 Ga. 6, 268 S.E.2d 637 (1980); Powell v. Thorsen, 248 Ga. 697, 285 S.E.2d 699 (1982).

Jurisdiction Generally

Jurisdictional equality. — Proceeding brought against an administrator or executor and for a settlement by an heir at law or legatee is not such interference with the regular administration of estates as is denounced by law. The jurisdiction of a court of ordinary (now probate court) and a court of equity in respect to bringing proceedings for an account and settlement is co-ordinate and equal, and has always been so in this state. The jurisdiction conferred upon the court of ordinary (now probate court) in the management and distribution of estates does not oust the jurisdiction of equity in matters of settlement. Terry v. Chandler, 172 Ga. 715, 158 S.E. 572 (1931) (decided under former Civil Code 1910, § 4075); Manry v. Manry, 196 Ga. 365, 26 S.E.2d 706 (1943) (decided under former Code 1933, § 113-2203).

Court first taking jurisdiction will retain it. — "A court of equity" having "concurrent jurisdiction with the ordinary (now probate judge) over the settlement of accounts of administrators" the court first taking jurisdiction will "retain it, unless a good reason shall be given for the interference of equity." "A proceeding in equity for such settlement is not an interference with the regular administration of the estate, within the meaning" of former Civil Code 1910, § 4596 (see O.C.G.A. § 23-2-91). Clements v. Fletcher, 154 Ga. 386, 114 S.E. 637 (1922) (decided under former Civil Code 1910, § 4075); Terry v. Chandler, 172 Ga. 715, 158 S.E. 572 (1931) (decided under former Civil Code 1910, § 4075); Robinson v. Georgia Sav. Bank & Trust Co., 185 Ga. 688, 196 S.E.

Jurisdiction Generally (Cont'd)

395 (1938) (decided under former Code 1933, § 113-2203); Manry v. Manry, 196 Ga. 365, 26 S.E.2d 706 (1943) (decided under former Code 1933, § 113-2203).

Even after administration has begun, and whenever it is made to appear that the conditions in the administration of the estate and the rights of all persons interested in the estate's administration can be more effectually preserved or promoted by the intervention of equity, the subject-matter of administration may be assumed by a court of equity. Howard v. Boone, 170 Ga. 156, 152 S.E. 462 (1930) (decided under former Civil Code 1910, § 4075).

Though a court of ordinary (now probate court) and a court of equity are declared to have concurrent jurisdiction, it is a general rule that the court first taking will retain jurisdiction, unless the intervention of equity is necessary to afford relief in aid of the administration of the estate by the court of ordinary (now probate court); but the intervention of equity which seeks merely to oust the jurisdiction already acquired by the ordinary (now probate judge) cannot be used as a substitute for the appeal from the court of ordinary (now probate judge) to the superior court, which is provided by law, or to relieve from the results of failure to file proper caveats to an application for letters testamentary and the probate of a will in solemn form, unless it appears from the petition in equity that the judgment of the court of ordinary (now probate court) was procured by fraud on the part of an adversary, unmixed with negligence upon the part of the petitioner. Darby v. Green, 174 Ga. 146, 162 S.E. 493 (1932) (decided under former Code 1933, § 113-2203).

Superior Court's concurrent jurisdiction upheld. — When the parties alleged that the parties were in danger of loss contrary to their interests, and sought to enforce specific performance of an agreement, to imply a trust, and to enjoin a party, the superior court properly exercised the court's concurrent jurisdiction. Lee v. Lee, 260 Ga. 356, 392 S.E.2d 870 (1990) (decided under former O.C.G.A. § 53-7-160).

Concurrent jurisdiction. — Trial court did not err in dismissing a purported beneficiary's complaint alleging that the executors breached the fiduciary duties owed to the beneficiary by wasting the assets of the parents' estates and failing to distribute assets to the beneficiary because the claims would be more properly heard by the probate court which had original and exclusive jurisdiction and was equipped to handle such claims and had the authority to grant the relief requested, if necessary. Benefield v. Martin, 276 Ga. App. 130, 622 S.E.2d 469 (2005).

Courts of equity have concurrent jurisdiction with courts of ordinary (now probate courts) in the administration of the estates of deceased persons in all cases where equitable interference is necessary or proper for the full protection of the rights of the parties in interest. Jones v. Head, 185 Ga. 857, 196 S.E. 725 (1938) (decided under former Code 1933, § 113-2203).

Either a probate court or a court of equity could take hold of any particular fund held by the representative of an estate, or anything which might be shown to be the proceeds of that fund actually in the representative's hands, and compel the representative to surrender possession thereof. Paschal v. Melton, 174 Ga. 910, 164 S.E. 757 (1932) (decided under former Code 1933, § 113-2203).

Jurisdiction of equity dependent upon adequacy of remedies available in probate court. — Whatever may be the remedies that have been provided by statute against administrators, the concurrent jurisdiction of equity in the settlement of accounts of administrators is specially retained by the provisions of this statute. Howard v. Boone, 170 Ga. 156, 152 S.E. 462 (1930) (decided under former Civil Code 1910, § 4075).

If an insolvent executor in charge of real estate which includes houses which need repairs, no matter however small, and the executor, being without sufficient funds to make them, fails to do so, and on this account the property is deteriorating, the persons to whom the property has been devised are entitled to have the property protected, and the appointment of a receiver with directions to the receiver to

have the repairs made seems not to be an inappropriate remedy. Jones v. Proctor, 195 Ga. 607, 24 S.E.2d 779 (1943) (decided under former Code 1933, § 113-2203).

When devisee brings equitable petition against coexecutors of an estate, seeking a partition of the property of the estate through a sale by the receiver, and alleging that more than 20 years had elapsed since the executors had qualified, that all the debts of the estate had been paid, and that executors were in possession of all real and personal property belonging to the estate, the allegations are insufficient to authorize the grant of the prayers for equitable partition between the devisees because plaintiff devisee has a full and adequate remedy under the law in the court of ordinary (now probate court) to require executors to distribute the estate by division or partition. Salter v. Salter, 209 Ga. 511, 74 S.E.2d 241 (1953) (decided under former Code 1933, § 113-2203).

Though a court of equity has concurrent jurisdiction with the ordinary (now probate judge) over the settlement of accounts of executors, it will not assume jurisdiction solely for that purpose unless it be shown that the remedies available in the court of ordinary (now probate court) are inadequate to afford complete relief to the party claiming to be aggrieved. Salter v. Salter, 209 Ga. 511, 74 S.E.2d 241 (1953) (decided under former Code 1933, § 113-2203); Turner v. Turner, 210 Ga. 586, 82 S.E.2d 137 (1954) (decided under former Code 1933, § 113-2203); Gaines v. Johnson, 216 Ga. 668, 119 S.E.2d 28 (1961) (decided under former Code 1933, § 113-2203).

By consenting to the continuation of a temporary restraining order and to a consent order, defendants consented to an injunction against themselves, thereby at least temporarily conceding that the equity court had jurisdiction, i.e., that plaintiffs had no adequate remedy at law. Vowell v. Carmichael, 235 Ga. 387, 219 S.E.2d 732 (1975) (decided under former Code 1933, § 113-2203).

Defense of adequate remedy at law is waivable. — Defense available in equity that the complainant has an adequate remedy at law must be raised before the decree is entered; i.e., this defense is waivable. Vowell v. Carmichael, 235 Ga. 387, 219 S.E.2d 732 (1975) (decided under former Code 1933, § 113-2203).

Statute of Limitations

Statute of limitations applicable to a proceeding for an accounting against an administrator was former Code 1933, § 3-709 (see O.C.G.A. § 9-3-27), and under former Code 1933, § 113-1526 the statute did not commence to run until one year (now six months) after the qualification of the administrator. Rowland v. Rowland, 204 Ga. 603, 50 S.E.2d 343 (1948) (decided under former Code 1933, § 113-2203).

Statute of limitations does not run during heir's minority. — Statute of limitations applicable to a proceeding for an accounting against an administrator would not run during heir's minority. Rowland v. Rowland, 204 Ga. 603, 50 S.E.2d 343 (1948) (decided under former Code 1933, § 113-2203).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 95, 905.

C.J.S. — 34 C.J.S., Executors and Administrators, § 984.

53-7-61. Filing of petition upon termination of personal representative.

If the personal representative resigns, is removed, or dies, an heir of an intestate estate or a beneficiary of a testate estate, the sureties of the personal representative or other personal representatives, or the successor personal representative may petition for an accounting and settlement. In the event a petition is filed for such accounting and

settlement, the probate court shall retain jurisdiction over the personal representative until such accounting and settlement is completed.

History. — Code 1981, § 53-7-61, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section replaces former OCGA Secs. 53-7-161, 53-7-162, and 53-7-167. The new section requires an accounting by a personal representative who resigns, is removed, or dies only in the event such an accounting and settlement is requested.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 2514, former Civil Code 1910, § 3982, former Code 1933, § 113-2204, and former O.C.G.A. § 53-7-167 are included in the annotations for this Code section.

Purpose of section. — Statute makes it the duty of a representative of a deceased executor to account fully with the administrator de bonis non. Estes v. First Nat'l Bank, 223 Ga. 653, 157 S.E.2d 449 (1967) (decided under former Code 1933, § 113-2204).

Accounting required. — Since an administrator de bonis non is necessarily a successor to an administrator or executor whose authority has expired by death, removal, or otherwise, this statute gives to the administrator de bonis non the right to an accounting only from executors and administrators who have been removed. Ballard v. Zachry, 54 Ga. App. 101, 187 S.E. 139 (1936) (decided under former Code 1933, § 113-2204).

An executor of a deceased executor's estate, which allegedly possesses assets of the estate of the decedent which were acquired by the deceased executor in the executor's capacity as executor of the decedent's estate, is an officer of the court of ordinary (now probate court) and subject to account to the administrator de bonis non with will annexed of the decedent's estate. Estes v. First Nat'l Bank, 223 Ga. 653, 157 S.E.2d 449 (1967) (decided under former Code 1933, § 113-2204).

Court of ordinary (now probate court) is without jurisdiction to issue a citation upon the application of an administrator de bonis non requiring a former administrator of the estate who had been removed to render an accounting to the applicant; the jurisdiction of the court of ordinary (now probate court) in such cases applied only to the persons who are actually officers of the court at the time and does not apply to removed or discharged officers. Ellis v. McWilliams, 71 Ga. App. 336, 30 S.E.2d 796 (1944) (decided under former Code 1933, § 113-2204).

Impact of death of executor. — Representative of a deceased coexecutor, who was not the representative of the estate which the deceased coexecutor represented, is not, as to the estate represented by the administrator de bonis non, an officer of the court of ordinary (now probate court). Ballard v. Zachry, 54 Ga. App. 101, 187 S.E. 139 (1936) (decided under former Code 1933, § 113-2204).

Probate of the will worked a revocation of the letters of administration as to assets unadministered. This is equivalent to a removal of the administrator. Hudmon v. Thomasson, 74 Ga. App. 31, 38 S.E.2d 683 (1946) (decided under former Code 1933, § 113-2204).

Administrator de bonis non of an estate is ordinarily the person in whom is vested the right to sue a removed or deceased administrator of such estate for an alleged devastavit. Langford v. Johnson, 46 Ga. App. 444, 167 S.E. 779 (1933) (decided under former Civil Code 1910, § 3982).

When the pleadings showed that the administratrix de bonis non of an estate was also the administrator of the estate of the deceased administrator who was alleged to have committed the devastavit,

and when the pleadings showed that the administrator had acted in both capacities since the year 1915, and that up to the filing of the plaintiff heirs' suit in 1930 the administrator made no returns nor brought any action for such alleged devastavit, it was not necessary for the plaintiff in this case to make the specific allegation that the administratrix de bonis non had failed to sue in order to bring suit in plaintiff's own right; and there was no duty resting on the heir to have an administratrix de bonis non appointed who was qualified. Langford v. Johnson, 46 Ga. App. 444, 167 S.E. 779 (1933) (decided under former Civil Code 1910, § 3982).

Cited in Douglas v. Murray, 63 Ga. 369 (1879); Bailey v. McAlpin, 122 Ga. 616, 50 S.E. 388 (1905); Waldrop v. Nolan, 192 Ga. 234, 15 S.E.2d 225 (1941); Harrison v. Holsenbeck, 208 Ga. 410, 67 S.E.2d 311 (1951); Wheeler v. McDonald, 175 Ga. App. 785, 334 S.E.2d 367 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 874 et seq., 1035.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 979, 980.

53-7-62. Appearance before court; failure of personal representative to appear; right to appeal.

(a) Any person interested as an heir or beneficiary of an estate or the probate court may, after the expiration of six months from the granting of letters, cite the personal representative to appear before the probate court for a settlement of accounts. Alternatively, if the personal representative chooses, the personal representative may cite all the heirs or beneficiaries and all persons who claim to be creditors whose claims the personal representative disputes or cannot pay in full to be present at the settlement of the personal representative's accounts by the court. The settlement shall be conclusive upon the personal representative and upon all the heirs or beneficiaries and all remaining persons who claim to be creditors who receive service of notice of the settlement proceeding in the probate court and the hearing in the manner provided by subsection (b) of this Code section or by Chapter 11 of this title. The court may, in the court's discretion, give the personal representative additional time to settle the estate.

(b) If the personal representative fails or refuses to appear as cited, the probate court may proceed without the appearance of the personal representative. If the personal representative has been required to give bond, the surety on such bond shall be bound by the settlement if the surety is served with notice by personal service of the settlement proceeding in the probate court. If one or more unsuccessful attempts at service are made by the sheriff or the sheriff's deputies upon the personal representative at the last address of the personal representative in the court records and it appears to the probate court that further attempts are likely to be futile, then service of notice shall be sufficient upon the personal representative for purposes of this Code section if the citation is mailed by first-class mail to such address.

(c) Any party to the settlement shall have the right to appeal.

History. — Code 1981, § 53-7-62, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2002, p. 1316, § 5; Ga. L. 2020, p. 377, § 1-48/HB 865.

The 2020 amendment, effective January 1, 2021, substituted "service of notice of the settlement proceeding in the probate court and the hearing in the manner provided by subsection (b) of this Code section or by Chapter 11 of this title" for "notice of the hearing" at the end of the third sentence in subsection (a); and, in subsection (b), substituted "served with notice" for "given notice" in the second sentence, and, in the third sentence, substituted "service of notice shall be sufficient upon the personal representative" for "service shall be sufficient upon the personal administrator".

COMMENT

This section carries forward the provisions of former OCGA Sec. 53-7-163 and the last sentence of former OCGA Sec. 53-7-164.

JUDICIAL DECISIONS

Analysis

General Consideration
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Jurisdiction

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 2599, former Civil Code 1910, § 4073, and former Code 1933, §§ 113-2201 and 113-2202, are included in the annotations for this Code section.

Purpose. — Statute does not restrict and confine the remedy of an accounting merely as against the administrator individually or as administrator; the statute's purpose is to require an accounting of the property of the estate that went into the administrator's hands, and could be maintained whether brought against one as administrator, or jointly as administrator and as an individual. Rowland v. Rowland, 204 Ga. 603, 50 S.E.2d 343 (1948) (decided under former Code 1933, § 113-2201).

Statute gives the right to a legatee to cite the administrator to appear before the ordinary (now probate judge) for a settlement of accounts. Cubine v. Cubine, 69 Ga. App. 656, 26 S.E.2d 462 (1943) (decided under former Code 1933, § 113-2201).

If the statute should be construed as not embracing an assignee, this would merely constitute an additional ground for proceeding in equity, and would not defeat such assignee altogether. Sanders v. Hepp, 190 Ga. 18, 8 S.E.2d 87 (1940) (decided under former Code 1933, § 113-2201).

Sounder and better construction of this statute, touching the enforcement of judgments rendered by the ordinary (now probate judge) against executors and administrators on citations to account, is that mere money liabilities, when no specific fund is involved, are enforceable only by execution against the property, and not by attachment against the person. Paschal v. Melton, 174 Ga. 910, 164 S.E. 757 (1932) (decided under former Code 1933, § 113-2202).

Proceeding brought for accounting with an administrator is not predicated upon any debt or claim against the administrator or the estate; the heirs at law are not creditors of either, but the owners of the property of the deceased, subject to the rules of administration of estates. Rowland v. Rowland, 204 Ga. 603, 50 S.E.2d 343 (1948) (decided under former Code 1933, § 113-2201).

Mere qualification and the filing of

annual returns by an executor in the court of ordinary (now probate court) do not constitute a proceeding for a "settlement of his accounts," with judgment enforcing the settlement, as provided by former Code 1933, §§ 2201 and 2202, and would not preclude the superior court from taking jurisdiction of a subsequent petition by a residuary legatee for an accounting and settlement against the executor. Robinson v. Georgia Sav. Bank & Trust Co., 185 Ga. 688, 196 S.E. 395 (1938) (decided under former Code 1933, § 113-2201).

Heirs at law may bring their suit for their distributive shares against an administrator and the sureties on the administrator's bond, and pray for an accounting and settlement, at any time after the expiration of one year from the time of the qualification of such administrator. No prior judgment establishing the liability of the administrator or a devastavit by the administrator shall be necessary before suit against the sureties on the bond. Langford v. Johnson, 46 Ga. App. 444, 167 S.E. 779 (1933) (decided under former Civil Code 1910, § 4073).

One distributee or legatee may proceed for an accounting and settlement without joining other distributees or legatees as parties, and the representative of the estate is not required, unless one so desires for one's own protection, to make other distributees or legatees parties to the proceeding. Robinson v. Georgia Sav. Bank & Trust Co., 185 Ga. 688, 196 S.E. 395 (1938) (decided under former Code 1933, § 113-2201); Bracewell v. Bracewell, 117 Ga. App. 553, 161 S.E.2d 390 (1968) (decided under former Code 1933, § 113-2201).

Proceeding by the heirs at law for an accounting may be maintained jointly against the administrator in the administrator's official capacity and as an individual. Rowland v. Rowland, 204 Ga. 603, 50 S.E.2d 343 (1948) (decided under former Code 1933, § 113-2201).

Administrator's decision as res judicata. — When an administrator is cited for settlement before the court of ordinary (now probate court), and one issue involved is whether certain certificates of deposit in a bank are the property of the estate and should be administered, the ordinary (now probate judge), in making settlement of the account between the administrator and the distributees, has jurisdiction to pass upon such issue, and the administrator's decision therein becomes res judicata as to all distributees who are present at the hearing. Brooks v. Brooks, 184 Ga. 872, 193 S.E. 893 (1937) (decided under former Code 1933, § 113-2201).

Agreement between administrators and heirs touching sale of lands and conveyance thereof to certain of the heirs did not constitute a final settlement of the estate. Musselwhite v. Ricks, 55 Ga. App. 58, 189 S.E. 597 (1936) (decided under former Code 1933, § 113-2201).

Claim of deceased heir asserted by personal representative. — In action against an administrator for an accounting, the heirs at law of a deceased heir at law cannot maintain a suit as such for the portion due the deceased heir at law, as any interest of the deceased heir at law must be asserted by a personal representative; but the failure to join, as a party plaintiff, the personal representative of a deceased heir at law would not authorize the dismissal of the suit. Rowland v. Rowland, 204 Ga. 603, 50 S.E.2d 343 (1948) (decided under former Code 1933, § 113-2201).

Accountability as executor and holder of life estate. — When an executor also held a life estate in property, the executor's broad power as life tenant was not determinative of the executor's liability for an accounting of the estate in her capacity as executor, in the face of the remainderman's claims of fraud and mismanagement. Cannon v. Bangs, 269 Ga. 671, 502 S.E.2d 224 (1998).

Suits by minors. — When the minor is a "person interested as distributee or legatee" who might, under the terms of this statute, cite the executor "to appear before the ordinary (now probate judge) for settlement of his accounts," which, when had, would be conclusive upon the executor, ordinarily, this right in the minor, where the minor has a legal guardian, should be maintained by the minor's guardian, or by next friend or other competent representative; and such a citation would be bind-

General Consideration (Cont'd)

ing on the minor. Perdue v. McKenzie, 194 Ga. 356, 21 S.E.2d 705 (1942) (decided under former Code 1933, § 113-2201).

When the guardian, acting on behalf of the minor by reason of the disqualification of the trustee who might otherwise have acted as testamentary guardian, seeks a settlement of the accounts with the executor, such proceeding is properly maintained. Perdue v. McKenzie, 194 Ga. 356, 21 S.E.2d 705 (1942) (decided under former Code 1933, § 113-2201).

Probate court's authority to order executor to turn over funds. — In circumstances in which an estate executor used a power of attorney before the executor's mother's death to add the executor's name to bank accounts and a certificate of deposit, eventually taking all of the money from those accounts for the executor's own without reporting that money as part of the estate, a probate court was authorized to order the executor to turn over that money to the estate; after the executor was appointed to handle the estate, the executor knew that the executor possessed money that should have been in the estate, knowledge the executor gained by being the person who removed the money from the estate, and the executor's retention of those funds promoted the executor's own interest to injury of beneficiaries of the estate, and thus was a breach of the executor's fiduciary duty. Greenway v. Hamilton, 280 Ga. 652, 631 S.E.2d 689 (2006).

Appeal not authorized. — When issues remained pending in the probate court, no final accounting or settlement of accounts was possible; thus, O.C.G.A. § 53-7-62 did not authorize an appeal. Geeslin v. Sheftall, 263 Ga. App. 827, 589 S.E.2d 601 (2003).

Removal of administrator. — Because an administrator was personally served with a copy of the removal petition and the "citation and rule nisi," and never raised any objection to the alleged procedural defect in the answer or during the hearing, the administrator's claim that the probate court erred in ordering an accounting during the removal proceeding because the administrator was not served with a citation to appear before the court for a settlement of accounts, as required by O.C.G.A. § 53-7-63, was meritless; hence, the probate court's order was not void. Ray v. Nat'l Health Investors, Inc., 280 Ga. App. 44, 633 S.E.2d 388 (2006).

Attorney fees assessed against executor, not estate. — Since the probate court found that an executor kept an estate open without legitimate reason, disregarded court orders, breached the executor's fiduciary duty to the estate, and unnecessarily expanded the proceedings once a petition for accounting had been filed, such that an award of attorney fees to the petitioner was warranted under O.C.G.A. § 9-15-14(b), those fees had to be assessed against the executor, not the estate. In re Estate of Holtzclaw, 293 Ga. App. 577, 667 S.E.2d 432 (2008).

Cited in Davis v. Harper, 54 Ga. 180 (1875); Coleman v. Hodges, 166 Ga. 288, 142 S.E. 875 (1928); White v. Roper, 176 Ga. 180, 167 S.E. 177 (1932); Goodwyn v. Veal, 50 Ga. App. 657, 179 S.E. 126 (1935); Porter v. Watson, 51 Ga. App. 848, 181 S.E. 680 (1935); Chapalas v. Papachristos, 185 Ga. 544, 195 S.E. 737 (1937); Robinson v. Georgia Sav. Bank & Trust Co., 185 Ga. 688, 196 S.E. 395 (1938); Robinson v. Georgia Sav. Bank & Trust Co., 106 F.2d 944 (5th Cir. 1939); McCord v. Walton, 192 Ga. 279, 14 S.E.2d 723 (1941); Manry v. Manry, 196 Ga. 365, 26 S.E.2d 706 (1943); Ware v. Martin, 207 Ga. 512, 63 S.E.2d 335 (1951); Salter v. Salter, 209 Ga. 511, 74 S.E.2d 241 (1953); Hartsfield v. Hartsfield, 87 Ga. App. 707, 75 S.E.2d 276 (1953); Toombs v. Hilliard, 209 Ga. 755, 75 S.E.2d 801 (1953); Turner v. Turner, 210 Ga. 586, 82 S.E.2d 137 (1954); Goodman v. Little, 213 Ga. 178, 97 S.E.2d 567 (1957); Mathews v. Mathews, 136 Ga. App. 833, 222 S.E.2d 609 (1975); DuBose v. Box, 246 Ga. 660, 273 S.E.2d 101 (1980); Simon v. Bunch, 260 Ga. 201, 391 S.E.2d 648 (1990); In re Estate of Sims, 246 Ga. App. 451, 540 S.E.2d 650 (2000); In re Estate of Long, 307 Ga. App. 896, 706 S.E.2d 704 (2011).

Nonresident Executor

Nonresident executor. — If a nonresident of a county accepts appointment as an executor of an estate, subject to the

jurisdiction of the ordinary (now probate judge) of that county, such executor is subject to a citation for settlement before the ordinary (now probate judge) or court of ordinary (now probate court) of such county. Trust Co. v. Smith, 54 Ga. App. 518, 188 S.E. 469 (1936) (decided under former Code 1933, § 113-2201).

Statute of Limitations Generally

Timing based on qualification of administrator. — Statute of limitations applicable to a proceeding for an accounting against an administrator was former Code 1933, § 3-709 (see O.C.G.A. § 9-3-27), and under former Code 1933, § 113-1526 the statute did not commence to run until one year (now six months) after the qualification of the administrator. Rowland v. Rowland, 204 Ga. 603, 50 S.E.2d 343 (1948) (decided under former Code 1933, § 113-2201).

Limitation period does not run during heir's minority. — Statute of limitations applicable to a proceeding for an accounting against an administrator would not run during the heir's minority. Rowland v. Rowland, 204 Ga. 603, 50 S.E.2d 343 (1948) (decided under former Code 1933, § 113-2201).

Summary judgment improperly granted to siblings on statute of limitations bar issue. — Trial court erred in granting summary judgment to the siblings on the basis that the challenging sister's claim against the estate seeking an accounting was time-barred because a question of fact remained as to whether the sister was on notice that they had claimed any estate property adversely to the sister, thus, a jury had to decide whether the 10-year bar of O.C.G.A. § 9-3-27(2) began to run before that time. In re Estate of Wade, 331 Ga. App. 535, 771 S.E.2d 214 (2015).

Jurisdiction

Jurisdiction of probate court. — Court of ordinary (now probate court) has jurisdiction of matters pertaining to the estates of deceased persons, jurisdiction over administrators, jurisdiction to compel administrators to account for the assets of an estate in their possession or custody, and jurisdiction in such cases to attach and punish for contempt. Melton v. Jenkins, 50 Ga. App. 615, 178 S.E. 754 (1935) (decided under former Code 1933, § 113-2201).

Jurisdiction of the court of ordinary (now probate court) to revoke the letters of executorship, and to require the executor to make an accounting and settlement to the heirs is limited to the case as one at law. Goodman v. Little, 213 Ga. 178, 97 S.E.2d 567 (1957) (decided under former Code 1933, § 113-2201).

Statute provides only for a proceeding in a court of ordinary (now probate court). Sanders v. Hepp, 190 Ga. 18, 8 S.E.2d 87 (1940) (decided under former Code 1933, § 113-2201).

Citation is all that is necessary. — Petition brought by certain heirs and distributees in the "Court of Ordinary (now probate court) of Colquitt County," against the executor of such estate, who has qualified in Colquitt County, asking a citation for settlement and accounting is properly brought although such petition is not addressed to the ordinary (now probate judge). In such a case, there is no distinction between the ordinary (now probate judge) and the court of ordinary (now probate court). Trust Co. v. Smith, 54 Ga. App. 518, 188 S.E. 469 (1936) (decided under former Code 1933, § 113-2201).

When the administrator contended that it was not the administrator's duty to administer certain certificates of deposit for the reason that the decedent had given the certificates away during life, and therefore that the certificates were no part of the estate, whereas certain of the distributees contended to the contrary, it would be the duty of the court of ordinary (now probate court) to decide the question thus submitted, under authority of former Code 1933, § 113-2201 or former Code 1933, § 113-2202. Brooks v. Brooks, 184 Ga. 872, 193 S.E. 893 (1937) (decided under former Code 1933, § 113-2201).

In a proceeding by a legatee against an executor, before the ordinary (now probate court) under this statute, for an accounting, the ordinary (or the superior court on appeal) is authorized to remove such executor when it appears that the executor has without authority used property in

Jurisdiction (Cont'd)

the executor's hands, in a joint venture or partnership in which the executor in one's individual right is interested, and where, without authority, the executor is shown to have held as a speculation property or crops which it was the executor's duty under the law to sell. This is true even though such venture or speculation does not result in loss to the beneficiary, the law being that as to such a trust this relationship must not be assumed and no such risk be taken, unless authorized by the will. Perdue v. McKenzie, 194 Ga. 356, 21 S.E.2d 705 (1942) (decided under former Code 1933, § 113-2201).

In a proceeding in the court of ordinary (now probate court) to call executors and administrators to account, a citation is all the pleading that is necessary. Cubine v. Cubine, 69 Ga. App. 656, 26 S.E.2d 462 (1943) (decided under former Code 1933, § 113-2201).

It is not essential to the sufficiency of a petition in the court of ordinary (now probate court) to call the administrator to an accounting, or to a citation, that it be alleged that there are assets of the estate, or any specific property in the hands of the administrator to be administered. Cubine v. Cubine, 69 Ga. App. 656, 26 S.E.2d 462 (1943) (decided under former Code 1933, § 113-2201).

When it appears in the petition and citation for a settlement that the petitioners are legatees under a will, and as such are entitled to an accounting, and there are no allegations as to the interpretation or construction of the will, the petition is not subject to dismissal on the ground that there is presented a case for the construction of a will and that the ordinary (now probate judge) has no jurisdiction. Cubine v. Cubine, 69 Ga. App. 656, 26 S.E.2d 462 (1943) (decided under former Code 1933, § 113-2201).

Determining title to property. — Court of ordinary (now probate court) does not have jurisdiction to try and determine title to property, either real or personal, and, upon appeal to the superior court of a caveat to a year's support for a widow, the jurisdiction of that court was no broader or greater than that of the court appealed from. Hartsfield v. Hartsfield, 87 Ga. App. 707, 75 S.E.2d 276 (1953) (decided under former Code 1933, § 113-2201).

Equitable jurisdiction. — While a court of equity has concurrent jurisdiction with the ordinary (now probate judge) in settlement of accounts of guardians (or administrators), the jurisdiction of the ordinary (now probate judge) is original and the court of equity concurrent. In settling accounts of the representative of an estate, the representative's returns which have been allowed by the ordinary (now probate judge) are considered as stated accounts, and the rule that any one who objects to a stated account must surcharge and falsify applies. The object of settling the accounts of the representative of an estate is to determine whether or not the representative has properly administered the trust. Trust Co. v. Smith, 54 Ga. App. 518, 188 S.E. 469 (1936) (decided under former Code 1933, § 113-2201).

When devisee brings equitable petition against coexecutors of an estate, seeking a partition of the property of the estate through a sale by the receiver, and alleging that more than 20 years had elapsed since the executors had qualified, that all the debts of the estate had been paid, and that executors were in possession of all real and personal property belonging to the estate, the allegations are insufficient to authorize the grant of the prayers for equitable partition between the devisees because plaintiff devisee has a full and adequate remedy under the law in the court of ordinary (now probate court) to require executors to distribute the estate by division or partition. Salter v. Salter, 209 Ga. 511, 74 S.E.2d 241 (1953) (decided under former Code 1933, § 113-2201).

When the court of ordinary (now probate court) has first taken jurisdiction of proceedings against an executor or administrator for an accounting and settlement that court will retain jurisdiction, unless good reason can be given for the interference of equity. Manry v. Manry, 196 Ga. 365, 26 S.E.2d 706 (1943) (decided under former Code 1933, § 113-2201).

Dispute between cotenants. — Probate court is without jurisdiction to resolve a dispute which involves equitable claims asserted by cotenants. Evans v.

Little, 246 Ga. 219, 271 S.E.2d 138 (1980) (decided under former Code 1933, § 113-2201).

Statute does not provide for a settlement of accounts between cotenants. Evans v. Little, 246 Ga. 219, 271 S.E.2d 138 (1980) (decided under former Code 1933, § 113-2201).

Judge may decide any presented question necessary. — Provision that the ordinary (now probate judge) may "hear evidence upon any contested question, and settle finally between the distributee and administrator" means that in the hearing of such citation it is within the power of the court of ordinary (now probate court) to decide any presented question which it is necessary for the court to decide in order to determine whether the administrator has discharged all the administrator's duties with respect to the assets of the estate, and consequently how the administrator's account should be settled with the distributees. Brooks v. Brooks, 184 Ga. 872, 193 S.E. 893 (1937) (decided under former Code 1933, § 113-2202).

Court of ordinary (now probate court) has jurisdiction of matters pertaining to the estates of deceased persons, jurisdiction over administrators, jurisdiction to compel administrators to account for the assets of an estate in their possession or custody, and jurisdiction in such cases to attach and punish for contempt. Melton v. Jenkins, 50 Ga. App. 615, 178 S.E. 754 (1935) (decided under former Code 1933, § 113-2202).

When an administrator is cited for settlement before the court of ordinary (now probate court), under former Code 1933, § 113-2201, and one issue involved is whether certain certificates of deposit in a bank are the property of the estate and should be administered, the ordinary (now probate judge) in making settlement of the account between the administrator and the distributees, has jurisdiction to pass upon such issue, and the ordinary's decision therein becomes res judicata as to all distributees who are present at the hearing. Brooks v. Brooks, 184 Ga. 872, 193 S.E. 893 (1937) (decided under former Code 1933, § 113-2202).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 867, 872 et seq., 900, 903.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 979, 1011.

ALR. — Right of surety on bond of executor, administrator, or testamentary trustee, as regards notice of proceedings to settle principal's account or reopen settlement, 93 A.L.R. 1366.

Decree settling account of executor who is also trustee as res judicata in respect of this liability in capacity of trustee, 116 A.L.R. 1290.

Right of executor or administrator to contest, or appeal from, court's rejection of claim against decedent's estate, 129 A.L.R. 922.

Failure of executor, administrator, trustee, or guardian to disclose self-dealing, as ground for vacating order or decree settling account, 132 A.L.R. 1522.

Refusal or failure of executor, administrator, guardian, conservator, trustee, receiver, or other fiduciary to pay over, or account for, funds, as contempt, 134 A.L.R. 927.

Conclusiveness of allowance of account of trustee or personal representative as respects self-dealing in assets of estate, 1 A.L.R.2d 1060.

Right of debtor of or person claimed to be liable to estate to contest will or challenge its admission to probate, 15 A.L.R.2d 864.

Beneficiary's consent to, acquiescence in, or ratification of, trustee's improper allocation or distribution of assets, 29 A.L.R.2d 1034.

Accountability of personal representative for his use of decedent's real estate, 31 A.L.R.2d 243.

53-7-63. Making and enforcing final settlement.

Upon proof of issuance of citation and service of notice pursuant to Code Section 53-7-62, the probate court may proceed to make an account, hear evidence upon any contested question, and make a final settlement between the personal representative and the heirs or beneficiaries. The settlement may be enforced by a judgment, writ of fieri facias, execution, or attachment for contempt.

History. — Code 1981, § 53-7-63, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-49/HB 865.

The 2020 amendment, effective January 1, 2021, substituted "issuance of citation and service of notice" for "citation" in the first sentence of this Code section.

COMMENT

This section carries forward the provisions of former OCGA Sec. 53-7-164.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 2599, and former Code 1933, § 113-2202, are included in the annotations for this Code section.

Order removing administrator. — Because an administrator was personally served with a copy of the removal petition and the "citation and rule nisi," and never raised any objection to the alleged procedural defect in the answer or during the hearing, the administrator's claim that the probate court erred in ordering an accounting during the removal proceeding because the administrator was not served with a citation to appear before the court for a settlement of accounts, as required by O.C.G.A. § 53-7-63, was meritless; hence, the probate court's order was not void. Ray v. Nat'l Health Investors, Inc., 280 Ga. App. 44, 633 S.E.2d 388 (2006).

Additional compensation upheld. — Estate distribution plan providing for $50,000 in extra compensation to the estate administrator was upheld as the challenging sibling did not show that the payment varied the terms of the will, which was not in the record, and the administrator was permitted to petition the probate court for such additional compensation. After hearing any objections, the probate court allowed such extra compensation as the court deemed reasonable in consideration of the years of contentious litigation that was involved. In re Estate of Nesbit, 299 Ga. App. 496, 682 S.E.2d 641 (2009).

Sounder and better construction of this statute, touching the enforcement of judgments rendered by the ordinary (now probate judge) against executors and administrators on citations to account, is that mere money liabilities, when no specific fund is involved, are enforceable only by execution against the property, and not by attachment against the person. Paschal v. Melton, 174 Ga. 910, 164 S.E. 757 (1932) (decided under former Code 1933, § 113-2202).

Judge may decide any presented question necessary. — Provision that the ordinary (now probate judge) may "hear evidence upon any contested question, and settle finally between the distributee and administrator" means that in the hearing of such citation it is within the power of the court of ordinary (now probate court) to decide any presented question which it is necessary for the court to decide in order to determine whether the administrator has discharged all his duties with respect to the assets of the estate, and consequently how the administrator's account should be settled with the distributees. Brooks v. Brooks, 184 Ga. 872, 193 S.E. 893 (1937) (decided under former Code 1933, § 113-2202).

Purpose. — Statute does not restrict and confine the remedy of an accounting merely as against the administrator individually or as administrator; the statute's purpose is to require an accounting of the property of the estate that went into the administrator's hands, and could be maintained whether brought against one as administrator, or jointly as administrator and as an individual. Rowland v. Rowland, 204 Ga. 603, 50 S.E.2d 343 (1948) (decided under former Code 1933, § 113-2202).

Jurisdiction. — There was evidence and legal authority to support the probate court's ruling that retirement funds belonged to the decedent's son because the son was named as beneficiary, and the funds did not pass into the decedent's estate because the executor testified that the executor concluded that the retirement funds were not an estate asset so the executor did not attempt to collect the funds from the son; resolution of the issue of the retirement proceeds in the context of a petition for settlement of accounts under O.C.G.A. § 53-7-63 fell within the probate court's jurisdiction, and the probate court did not err in failing to transfer the claim to the superior court under O.C.G.A. § 53-7-75 because the claim involved a conflict between the will and a designation of beneficiary, and not the construction of the will itself. In re Estate of Long, 307 Ga. App. 896, 706 S.E.2d 704 (2011).

Court of ordinary (now probate court) has jurisdiction of matters pertaining to the estates of deceased persons, jurisdiction over administrators, jurisdiction to compel administrators to account for the assets of an estate in their possession or custody, and jurisdiction in such cases to attach and punish for contempt. Melton v. Jenkins, 50 Ga. App. 615, 178 S.E. 754 (1935) (decided under former Code 1933, § 113-2202).

When an administrator is cited for settlement before the court of ordinary (now probate court), under former Code 1933, § 113-2201, and one issue involved is whether certain certificates of deposit in a bank are the property of the estate and should be administered, the ordinary (now probate judge) in making settlement of the account between the administrator and the distributees, has jurisdiction to pass upon such issue, and the ordinary's decision therein becomes res judicata as to all distributees who are present at the hearing. Brooks v. Brooks, 184 Ga. 872, 193 S.E. 893 (1937) (decided under former Code 1933, § 113-2202).

Funds beneficiaries owed an estate. — Case was remanded for a probate court to determine whether, and in what amount, any beneficiary owed funds to a decedent's estate, and to order such reimbursements, if the probate court found it appropriate based on the evidence adduced at the hearing because the executor showed projected and net distributions to the estate, accounting for the amounts owed by the beneficiaries, and evidence was adduced on that issue at the hearing, yet the probate court's order was silent thereon; a final settlement of accounts must resolve all pending issues. In re Estate of Long, 307 Ga. App. 896, 706 S.E.2d 704 (2011).

Cited in Davis v. Harper, 54 Ga. 180 (1875); Porter v. Watson, 51 Ga. App. 848, 181 S.E. 680 (1935); Chapalas v. Papachristos, 185 Ga. 544, 195 S.E. 737 (1937); Robinson v. Georgia Sav. Bank & Trust Co., 185 Ga. 688, 196 S.E. 395 (1938); McCord v. Walton, 192 Ga. 279, 14 S.E.2d 723 (1941); Manry v. Manry, 196 Ga. 365, 26 S.E.2d 706 (1943); Salter v. Salter, 209 Ga. 511, 74 S.E.2d 241 (1953); Hartsfield v. Hartsfield, 87 Ga. App. 707, 75 S.E.2d 276 (1953); Goodman v. Little, 213 Ga. 178, 97 S.E.2d 567 (1957); In re Estate of Sims, 246 Ga. App. 451, 540 S.E.2d 650 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 867, 886, 887, 900, 904.

C.J.S. — 34 C.J.S., Executors and Administrators, § 1007 et seq.

ALR. — Right of executor or administrator to contest, or appeal from, court's rejection of claim against decedent's estate, 129 A.L.R. 922.

Refusal or failure of executor, adminis-

trator, guardian, conservator, trustee, receiver, or other fiduciary to pay over, or account for, funds, as contempt, 134 A.L.R. 927.

53-7-64. Accounting for income on property administered.

A personal representative shall account for income on the property administered as follows:

(1) The personal representative shall be charged with all income earned during the period of one year after the date of qualification;

(2) For the period beginning one year after the date of qualification, the personal representative shall account for income as follows:

(A) All income earned on property the personal representative is:

(i) Authorized by the laws of this state to hold or invest in without securing the approval of any court to do so;

(ii) Authorized by any court to hold or invest in; or

(iii) Authorized by will to hold or invest in; and

(B) On all other property administered by the personal representative and, except as provided in paragraph (3) of this Code section, the personal representative shall be charged with the greater of the income earned on such property or the income it would have earned if invested at the legal rate of interest fixed by the laws of this state and in effect during the time the property was held. In applying this subparagraph, each item of property shall be treated separately, and income in excess of the legal rate of interest earned on one item may not be used to make up any deficiency in the income earned on another item; and

(3) The personal representative shall be charged only with interest actually earned, if any, on funds held in a reasonable sum to pay anticipated expenses.

History. — Code 1981, § 53-7-64, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section replaces former OCGA Sec. 53-7-165.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-2207, are included in the annotations for this Code section.

Statute provides in part for the basis for an accounting, and must be considered in the light of other sections of the Code concerning the duties of administrators and the penalties for failure to

perform such duties. The object of the proceeding is to require of the administrator a full accounting concerning the discharge of the administrator's trust in a detailed statement of the administrator's actings and doings, and a settlement with the administrator's successor; and the paying of any portion of the estate which by evidence may be found to be due by the former administrator to the administrator's successor. Ellis v. McWilliams, 70 Ga. App. 195, 27 S.E.2d 886 (1943) (decided under former Code 1933, § 113-2207).

Law fixes the duties of the administrator as to the disposal of the funds of the estate, and the administrator's failure to conform thereto by keeping the money not needed for current expenses and in failing to invest the money as provided by law deprives the beneficiary of the use thereof. Accordingly, for this breach of duty and in order to protect the beneficiary from loss of income, the law requires that the administrator pay interest on funds so held. Thomas v. State, 87 Ga. App. 765, 75 S.E.2d 193 (1953) (decided under former Code 1933, § 113-2207).

Cited in Chapalas v. Papachristos, 185 Ga. 544, 195 S.E. 737 (1937); Raines v. Shipley, 200 Ga. 180, 36 S.E.2d 150 (1945).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 879, 892, 894, 896 et seq.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 1012, 1013.

ALR. — Rate of interest chargeable against guardians, executors or administrators, and trustees, 112 A.L.R. 833; 156 A.L.R. 936.

53-7-65. Recordation of final receipts; admission in evidence.

The final receipts on settlements given by heirs or beneficiaries to a personal representative, whether a judicial or an informal settlement, may be admitted to record by the clerk of the probate court or the clerk of the superior court in either the county of residence of the personal representative or the county in which the estate is administered if attested by a judge of any court of this state, a magistrate, or a notary public. When recorded, the receipts shall be admitted in evidence without further proof. In case of loss of the original, a copy may be used in evidence under the same rules as for admission of copies of registered deeds.

History. — Code 1981, § 53-7-65, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward the provisions of former OCGA Sec. 53-7-166.

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, § 942.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 606, 607, 940.

53-7-66. Refunding bonds.

When litigation against the estate is pending or is threatened or when notice of a claim has been given to the personal representative, the personal representative may demand that the heirs or beneficiaries give refunding bonds to indemnify the personal representative against the claims. Upon the failure of the heirs or beneficiaries to give such bonds, the personal representative may reserve enough of the assets to respond to the claims.

History. — Code 1981, § 53-7-66, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-7-168, without the last sentence of that former Code section, which prohibited an executor or administrator from demanding a refunding bond from a distributee or legatee when no threatened action rendered the bond necessary.

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 915, 917, 919, 983.

C.J.S. — 34 C.J.S., Executors and Administrators, § 608.

Part 2

Annual Returns and Intermediate Reports

53-7-67. Required annual filing; reporting period.

(a) Within 60 days of the anniversary of the date of qualification, in each year, every personal representative required by the laws of this state to make annual returns shall file with the probate court a true and just verified accounting of the receipts and expenditures in behalf of the estate during the year preceding the anniversary date of qualification, together with a note or memorandum of any other fact necessary to the exhibition of the true condition of the estate. The return shall include an updated inventory of the assets of the estate as of the anniversary date of qualification. With this return, either the original vouchers shall be filed, showing the correctness of each item, or, in lieu thereof, the personal representative shall attach an affidavit stating that the original vouchers have been compared to each item on the return and that the return is correct; but the probate court shall require the original vouchers to be produced for good cause shown. If the original vouchers are filed with the return, they shall remain in the probate court for 30 days.

(b) The probate court, upon petition of the personal representative or upon the court's own motion, may change the reporting period from the year immediately preceding the anniversary date of qualification to the year immediately preceding a date ordered by the court. In lieu of changing the reporting date, the probate court is authorized to accept and approve a return even if the return does not cover the appropriate reporting period; however, such acceptance shall not change the reporting period established by either the anniversary date of qualification or a subsequent order of the court, unless the court also enters an order changing the reporting date.

History. — Code 1981, § 53-7-67, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article, "Fiduciary Problems of the Executor and Trustee: Conflicts of Interest, Violations of Fiduciary Duties, Surcharge, and Other Remedies of Beneficiaries," see 9 Ga. St. B.J. 187 (1972).

COMMENT

This section carries forward former OCGA Sec. 53-7-180.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1943, p. 409, § 1, are included in the annotations for this Code section.

Failure to make required returns. — There was no abuse of discretion in the probate court's removal of an administrator based on findings that the administrator failed to file timely and proper annual returns. In re Estate of Jackson, 241 Ga. App. 392, 526 S.E.2d 884 (1999).

Annual returns which do not substantially comply with the law are not prima facie proof in favor of the administrator. If they are allowed by the ordinary (now probate judge) and recorded, under the terms of the statute, anyone challenging their correctness must carry the burden of proving their incorrectness. But when the returns are not allowed by the ordinary (now probate judge), the burden is upon the administrator to prove the returns' correctness in a proceeding in the court of ordinary (now probate court) for an accounting and settlement. Ellis v. McWilliams, 70 Ga. App. 195, 27 S.E.2d 886 (1943) (decided under Ga. L. 1943, p. 409, § 1).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former O.C.G.A. § 53-7-180 are included in the annotations for this Code section.

Filing originals or copies of vouchers. — Banks, acting as guardians and administrators of estates, need not file originals or copies of vouchers with their returns if the banks file an affidavit stating that the original vouchers have been compared to each item on the return and that the return is correct. 1983 Op. Att'y Gen. No. U83-34 (decided under former O.C.G.A. § 53-7-180).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 488, 489, 867, 872 et seq., 877.

C.J.S. — 34 C.J.S., Executors and Administrators, § 995.

53-7-68. Mailing of return to heirs and beneficiaries; relieving personal representative of duty to file return.

(a) Upon filing the annual return with the probate court, the personal representative shall mail by first-class mail a copy of the return, but not the vouchers, to each heir of an intestate estate or each beneficiary of a testate estate. It shall not be necessary to mail a copy of the return to any heir or beneficiary who is not sui juris or for the court to appoint a guardian for such person. The personal representative shall file a verified statement with the probate court stating that all required mailings of the return to heirs or beneficiaries have been made.

(b) Any heir or beneficiary may waive individually the right to receive a copy of the annual return by a written statement that is delivered to the personal representative. Such waiver may be revoked in writing at any time.

(c) By unanimous written consent, the heirs of an intestate estate or the beneficiaries of a testate estate may authorize the probate court to relieve the personal representative from filing annual returns with them or with the court or both, in the same manner as provided in subsection (b) of Code Section 53-7-1 for the granting of powers to a personal representative. Any such unanimous written consent, regardless of the date of execution, that relieves the personal representative from filing annual returns with the court shall also relieve the personal representative from sending a copy of the return to the heirs or beneficiaries.

History. — Code 1981, § 53-7-68, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 37; Ga. L. 2020, p. 377, § 1-50/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (c), inserted "for the granting of powers to a personal representative" at the end of the first sentence, and, in the last sentence, substituted "that relieves" for "which relieves" and substituted "heirs or beneficiaries" for "beneficiaries" at the end.

Law reviews. — For article surveying wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982).

COMMENT

This new section requires the personal representative to mail a copy of the annual return to the heirs of an intestate estate or the beneficiaries of a testate estate. This section also provides that the heirs or beneficiaries may individually waive the right to receive the inventory or, by unanimous consent, relieve the personal representative of the duty to file the annual returns. Code Sec. 53-7-1(b)

describes ways in which the consent of individuals who are not sui juris or who are dead may be given. Under Code Sec. 53-7-1(b), the heirs or beneficiaries may authorize the grant [of] some or all of the powers contained in Code Sec. 53-12-232. Code Sec. 53-12-232(31) allows the fiduciary to serve without making returns. Therefore, it is possible that the heirs or beneficiaries will either relieve the personal representative of the duty to make returns under subsection (b) this Code section or simply by authorizing the grant of all the powers contained in Code Sec. 53-12-232, in the manner described in Code Sec. 53-7-1(b).

53-7-69. Power of testator to dispense with necessity of return.

A testator may, by will, dispense with the necessity of the personal representative's filing an annual return with the probate court or the beneficiaries or both, provided the same does not work any injury to creditors or persons other than beneficiaries under the will. If a will was executed in another state and the will is valid in this state and under the laws of the state where the will was executed the personal representative would not have been required to file annual returns or if the will otherwise expresses an intent to relieve the personal representative from all reporting requirements, such a will shall be construed as dispensing with the necessity of annual returns in Georgia, provided the same does not work any injury to creditors or parties other than beneficiaries under the will. In all wills, regardless of the date of execution, relief from filing returns with the court shall also relieve the personal representative from sending a copy of the return to the beneficiaries.

History. — Code 1981, § 53-7-69, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 38.

Law reviews. — For article discussing methods of simplifying the administration of estates by excusing the executors from certain obligations, see 6 Ga. L. Rev. 74 (1971).

COMMENT

This section replaces the provisions of former OCGA Sec. 53-7-79 that related to the dispensation of the duty to file returns. This section reflects the provisions of Code Sec. 53-7-33 by allowing a testator by will to dispense with the requirement that the personal representative file annual returns.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-1414, are included in the annotations for this Code section.

Statute did not provide cause of action to creditor of the estate. — Because an estate's executors were exempted by the terms of the testator's will from the duty to file an accounting or inventory, a creditor of the estate was not entitled to compel the executors to file such reports. O.C.G.A. §§ 53-7-33 and 53-7-69 did not provide for a cause of action but simply noted that the executors were not unaccountable for injury based on the exemption. In re Estate of Willis, 310 Ga. App. 377, 713 S.E.2d 464 (2011).

Cited in Chapalas v. Papachristos, 185 Ga. 544, 195 S.E. 737 (1937).

53-7-69.1. Annual statement of receipts and disbursements.

(a) Except as provided in subsection (b) of this Code section, a personal representative shall furnish to the heirs of an intestate estate or the beneficiaries of a testate estate, at least annually, a statement of receipts and disbursements.

(b) Any heir or beneficiary may waive individually the right to receive a statement of receipts and disbursements in the same manner as provided in subsection (b) of Code Section 53-7-68 for waiving the right to receive a copy of an annual return. The heirs or beneficiaries may authorize the probate court to relieve the personal representative from furnishing statements of receipts and disbursements in the same manner as provided in subsection (c) of Code Section 53-7-68 for relieving the personal representative from filing annual returns. A testator may, by will, dispense with the necessity of the personal representative's furnishing a statement of receipts and disbursements in the same manner as provided in Code Section 53-7-69 for dispensing with the necessity of the personal representative's filing an annual return.

History. — Code 1981, § 53-7-69.1, enacted by Ga. L. 2020, p. 377, § 1-51/HB 865.

Effective date. — This Code section became effective January 1, 2021.

53-7-70. Examination and recordation of returns and vouchers; evidentiary effect.

The probate court shall carefully examine each return of a personal representative and its vouchers; and if the court finds it correct and no objection is filed within 30 days of the time it is filed and mailed to the heirs or beneficiaries, the court shall allow the return to be recorded, together with the original or copy vouchers attached. The return and copy vouchers shall be kept on file in the probate court. If the original vouchers are filed without copies, they shall when recorded be returned to the personal representative on demand. The return thus allowed and recorded shall be prima-facie evidence in favor of the personal representative of its correctness.

History. — Code 1981, § 53-7-70, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article, "Some Problems in Providing for Nonjudicial Settlement of the Trustee's Accounts," see 3 Ga. St. B.J. 417 (1967).

COMMENT

This section carries forward former OCGA Sec. 53-7-181.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 3994, and former Code 1933, § 113-1411, are included in the annotations for this Code section.

Mere failure to attach vouchers to returns, standing alone, would not constitute a fraud upon the court of ordinary (now probate court). The total failure to file any returns at all would not, within itself, constitute fraud, nor afford a good reason for the interference of equity. While under the law it is the duty of an administrator to file annual returns accompanied by original vouchers, the duty is placed upon the ordinary (now probate court) to examine the returns to determine their correctness and interested parties are given 30 days in which to file objections to the returns. Hoffman v. Chester, 240 Ga. 296, 49 S.E.2d 760 (1948) (decided under former Code 1933, § 113-1411).

Cited in Peavey v. Clemons, 10 Ga. App. 507, 73 S.E. 756 (1912); McMullen v. Carlton, 192 Ga. 282, 14 S.E.2d 719 (1941).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 490, 492, 867.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 181, 183, 1001.

53-7-71. Return of nonresident or deceased personal representative.

(a) The return of a nonresident personal representative may be admitted to record upon affidavit of the personal representative's surety.

(b) If a personal representative is dead, the personal representative of the estate of the deceased personal representative or, if at any time there is no such personal representative of the estate of the deceased personal representative, any surety on the bond of the deceased personal representative may make returns of the accounts of such deceased personal representative in the same manner and with the same effect as if the deceased personal representative were living.

History. — Code 1981, § 53-7-71, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-52/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (b), inserted "personal" preceding the second instance of "representative", inserted "personal representative of the estate of the deceased personal", substituted "surety" for "security", substituted "such" for "the" preceding "deceased", and inserted the last instance of "deceased".

COMMENT

This section carries forward former OCGA Sec. 53-7-182.

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 867, 875.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 979, 980, 1000.

53-7-72. Docket of persons liable to make returns; failure to make returns.

To ensure annual returns from every personal representative, it shall be the duty of the probate court to keep a docket of all those who are liable to make returns and, immediately after the ceasing of the January term or as soon thereafter as the court deems practical in each year, to cite all defaulters to show cause for their neglect. A willful and continued failure to make a return shall be good cause for removal.

History. — Code 1981, § 53-7-72, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 24.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

COMMENT

This section carries forward former OCGA Sec. 53-7-183.

53-7-73. Filing and contents of intermediate report; notice to heirs and beneficiaries.

(a) Any time after the six-month period following qualification, but not more frequently than once every 12 months, a personal representative may file with the probate court a report to be known as an intermediate report to the date specified.

(b) Whenever a personal representative elects to file an intermediate report under subsection (a) of this Code section, the petition and report shall set forth all of the information required by law in annual returns and, in addition thereto, shall show:

(1) The period which the report covers;

(2) The names and addresses of living heirs of an intestate estate or beneficiaries of a testate estate known to the personal representative with the names of those who have or require a guardian; a description of any possible unborn or unascertained beneficiaries; and the name of the surety on the personal representative's bond, with the amount of the bond;

(3) In a separate schedule, the principal on hand at the beginning of the accounting period and the status at that time of its investment; the investments received from the decedent and still held; additions to principal during the accounting period, with dates and sources of acquisition; investments collected, sold, or charged off during the accounting period, with the consequent loss or gain and whether credited to principal or income; investments made during the accounting period, with the date, source, and cost of each; deductions from the principal during the accounting period, with the date and

purpose of each; and principal on hand at the end of the accounting period, how invested, and the estimated market value of each investment;

(4) In a separate schedule, the income on hand at the beginning of the accounting period and in what form held; income received during the accounting period, when, and from what source; income paid out during the accounting period, when, to whom, and for what purpose; and income on hand at the end of the accounting period and how invested;

(5) A statement of unpaid claims, with the reason for the failure to pay them, including a statement as to whether any estate or inheritance taxes have become due with regard to the property and, if due, whether paid;

(6) A brief summary of the account; and

(7) Such other facts as the court may by rule or by court order require.

(c) The probate court, upon the petition and return being filed, shall issue a citation and shall require any objections to be filed in conformity with Chapter 11 of this title. Service shall be made on the heirs of an intestate estate or the beneficiaries of a testate estate or such other persons as the court requires in conformity with Chapter 11 of this title.

History. — Code 1981, § 53-7-73, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 39.

Cross references. — Guardians ad litem and appraisers for year's support in probate court proceedings, Uniform Rules for the Probate Courts, Rule 23.

Law reviews. — For article, "Fiduciary Problems of the Executor and Trustee: Conflicts of Interest, Violations of Fiduciary Duties, Surcharge, and Other Remedies of Beneficiaries," see 9 Ga. St. B.J. 187 (1972).

COMMENT

This section carries forward former OCGA Sec. 53-7-184. Former sections 53-7-185 and -186 are subsumed in this section or covered by the general provisions relating to the filing of petitions in the probate court, which are found in Chapter 11 of this Title.

RESEARCH REFERENCES

Am. Jur. 2d. — 28 Am. Jur. 2d, Estoppel and Waiver, § 158. 31 Am. Jur. 2d, Executors and Administrators, §§ 489, 868, 869, 873, 878. 42 Am. Jur. 2d, Infants, §§ 143, 148. 58 Am. Jur. 2d, Notice, §§ 26, 27, 30, 31, 36. 80 Am. Jur. 2d, Wills, § 808 et seq.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 1005 et seq., 1046.

53-7-74. Filing of objections to intermediate report; continuation of hearing; appeal.

At or before the time fixed for hearing, any parties at interest may file objections to the personal representative's report, actions, and accounting, in which case the hearing on the accounting shall automatically be continued until a date certain, when, subject to the probate court's power to grant continuances, the same shall be heard as other cases pending in the probate court with like right of appeal to the superior court. In such case, an appeal by consent may be taken to the superior court; provided, however, that such appellate procedures shall not apply to cases provided for by Article 6 of Chapter 9 of Title 15. The parties at interest who have been served with notice as provided in subsection (c) of Code Section 53-7-73 and who have filed no objections to the report and accounting need not be served with notice of an appeal or any other or further proceedings, and their consent shall not be required for an appeal to the superior court.

History. — Code 1981, § 53-7-74, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 40; Ga. L. 2020, p. 377, § 1-53/HB 865.

The 2020 amendment, effective January 1, 2021, in this Code section, substituted "automatically be" for "be automatically", inserted "probate" twice, substituted "court. In" for "court; in", substituted "; provided, however, that such appellate procedures" for ". Such appellate procedures", and substituted "with notice as provided in subsection (c) of Code Section 53-7-73" for "appropriately".

Law reviews. — For article, "Some Problems in Providing for Nonjudicial Settlement of the Trustee's Accounts," see 3 Ga. St. B.J. 417 (1967). For article, "Fiduciary Problems of the Executor and Trustee: Conflicts of Interest, Violations of Fiduciary Duties, Surcharge, and Other Remedies of Beneficiaries," see 9 Ga. St. B.J. 187 (1972).

COMMENT

This section carries forward former OCGA Sec. 53-7-187.

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 886, 887, 904.

C.J.S. — 34 C.J.S., Executors and Administrators, § 1116 et seq.

53-7-75. Construction of will by superior court.

(a) Except as otherwise provided in subsection (b) of this Code section and in paragraph (7) of subsection (a) of Code Section 15-9-127, whenever it appears that a question of construction of a will is involved in the accounting, the probate court, upon its own motion or upon the motion of any party in interest, shall enter an order transferring the accounting to the superior court for the determination of all such questions, which shall be presented to, heard, and determined by the

superior court as appeals from the probate court are presented, heard, and determined.

(b) A probate court subject to Article 6 of Chapter 9 of Title 15 shall have jurisdiction over questions of construction of a will involved in the accounting and may determine all such questions without transferring the accounting to the superior court.

(c) The probate court may suspend further proceedings pending a final determination of the questions of construction.

(d) After a final determination of the questions of construction, the probate court shall proceed with the accounting.

History. — Code 1981, § 53-7-75, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-54/HB 865.

The 2020 amendment, effective January 1, 2021, rewrote this Code section, which read: "The probate court, upon its own motion or upon the motion of any party in interest, whenever it appears that a question of construction of a will is involved in the accounting, shall enter an order transferring the accounting to the superior court for the determination of all such questions, which shall be presented to, heard, and determined by the superior court as appeals from the probate court are presented, heard, and determined. The probate court may suspend further proceedings pending a final decision of the superior court. After a final determination of the questions of construction, the probate court shall proceed with the accounting."

COMMENT

This section carries forward former OCGA Sec. 53-7-188.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1943, p. 409, § 9, and former O.C.G.A. § 53-7-188 are included in the annotations for this Code section.

Jurisdiction. — There was evidence and legal authority to support the probate court's ruling that retirement funds belonged to the decedent's son because the son was named as beneficiary, and the funds did not pass into the decedent's estate because the executor testified that the executor concluded that the retirement funds were not an estate asset so the executor did not attempt to collect the funds from the son; resolution of the issue of the retirement proceeds in the context of a petition for settlement of accounts under O.C.G.A. § 53-7-63 fell within the probate court's jurisdiction, and the probate court did not err in failing to transfer the claim to the superior court under O.C.G.A. § 53-7-75 because the claim involved a conflict between the will and a designation of beneficiary, and not the construction of the will itself. In re Estate of Long, 307 Ga. App. 896, 706 S.E.2d 704 (2011).

Appeal of non-final court order. — When a superior court's ruling in a probate matter was directed solely to the will construction issue placed before it by a removal proceeding pursuant to O.C.G.A. § 53-7-75, after which the superior court returned the case to the probate court, and the administration of the estate remained pending, the superior court order was not a final judgment, and since the decedent's daughter failed to comply with the interlocutory procedures in O.C.G.A. § 5-6-34(b), the appellate court was without jurisdiction to hear an appeal brought by the daughter. Bandy v. Elmo, 280 Ga. 221, 626 S.E.2d 505 (2006).

Construction of will not within probate court's jurisdiction. — Because

construction of a will is generally not within the jurisdiction of the probate court, the probate court's denial of a trustee's motion for accounting and distribution under O.C.G.A. § 15-9-86 constituted an exercise of a power the probate court did not have, and the judgment of that court must be reversed. Simon v. Bunch, 260 Ga. 201, 391 S.E.2d 648 (1990) (decided under former O.C.G.A. § 53-7-188).

Cited in Davis v. Davis, 94 Ga. App. 459, 95 S.E.2d 42 (1956); Ray v. Beneventi, 220 Ga. 209, 190 S.E.2d 514 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 80 Am. Jur. 2d, Wills, § 1274 et seq.

C.J.S. — 34 C.J.S., Executors and Administrators, § 649.

ALR. — Validity and construction of trust provision authorizing trustee to purchase trust property, 39 A.L.R.3d 836.

53-7-76. Judgment surcharging fiduciary.

Should it appear from the intermediate report that the personal representative is liable to the estate or to any beneficiary of the estate, the probate court is authorized and it shall be the court's duty to enter a judgment surcharging the personal representative in such amount as is authorized under the law and the evidence.

History. — Code 1981, § 53-7-76, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For article, "Some Problems in Providing for Nonjudicial Settlement of the Trustee's Accounts," see 3 Ga. St. B.J. 417 (1967). For article, "Fiduciary Problems of the Executor and Trustee: Conflicts of Interest, Violations of Fiduciary Duties, Surcharge, and Other Remedies of Beneficiaries," see 9 Ga. St. B.J. 187 (1972).

COMMENT

This section carries forward former OCGA Sec. 53-7-189.

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 876, 877.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 875, 1020, 1111.

ALR. — Liability of executor, administrator, trustee, or his counsel, for interest, penalty, or extra taxes assessed against estate because of tax law violations, 47 A.L.R.3d 507.

53-7-77. Conclusiveness of order on intermediate report.

All parties in interest shall be bound by the order of the probate court on the intermediate report; and thereafter no such person shall be heard in any court, except upon appeal, to contest or question any matters or things covered by the report and the order on the report in the absence of fraud, accident, or mistake.

History. — Code 1981, § 53-7-77, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-7-190.

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 900, 905.

C.J.S. — 34 C.J.S., Executors and Administrators, § 1085.

53-7-78. Taxing of costs.

Costs shall be taxed against the estate or the parties as the probate court shall deem fair and reasonable.

History. — Code 1981, § 53-7-78, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-7-191.

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 895, 898, 1152, 1153, 1243.

C.J.S. — 34 C.J.S., Executors and Administrators, § 985.

CHAPTER 8

INVESTMENTS, SALES, AND CONVEYANCES

Article 1

Investments

Sec.
53-8-1. Authorized investments; standard of care; deviation from will or other disposition; investments by personal representative who is a bank or trust company.
53-8-2. Real property.
53-8-3. Securities, obligations, and interest-bearing deposits.
53-8-4. Government obligations; standard of prudence; corporate fiduciaries.
53-8-5. Retention of property by personal representative; corporate fiduciaries.

Article 2

Sales and Conveyances

Sec.
53-8-10. Authority of personal representative; petition by temporary administrator.
53-8-11. Property that is perishable, liable to deteriorate, or expensive to keep.
53-8-12. Stocks or bonds.
53-8-13. General procedures.
53-8-14. Warranty; personal liability of personal representative.
53-8-15. Passage of title to heirs or beneficiaries; assent of personal representative.

Editor's notes. — This chapter was effective January 1, 1998, to the extent that no vested rights of title, year's support, succession, or inheritance are impaired, as provided by the version of Code Section 53-1-1 enacted by Ga. L. 1996, p. 504, § 10, as amended by Ga. L. 1997, p. 1352, § 1.

Ga. L. 1996, p. 504, § 10, effective January 1, 1998, repealed the Code sections formerly codified at this chapter, and enacted the current chapter. The former chapter consisted of §§ 53-8-1 through 53-8-73, and was based on Laws 1764, Cobb's 1851 Digest, p. 302; Laws 1804, Cobb's 1851 Digest, p. 313; Laws 1805, Cobb's 1851 Digest, p. 314; Laws 1809, Cobb's 1851 Digest, p. 315; Laws 1816, Cobb's 1851 Digest, p. 319; Laws 1821, Cobb's 1851 Digest, p. 532; Laws 1826, Cobb's 1851 Digest, p. 323; Laws 1845, Cobb's 1851 Digest, p. 334; Laws 1850, Cobb's 1851 Digest, p. 338; Ga. L. 1851-52, p. 91, §§ 1, 11, 12; Ga. L. 1851-52, p. 242, § 1; Ga. L. 1953, Jan.-Feb. Sess., p. 378, § 1; Ga. L. 1853-54, p. 36, § 1; Ga. L. 1855-56, p. 144, § 1; Ga. L. 1858, p. 56, § 1; Ga. L. 1861, p. 32, § 1; Code 1863, §§ 2513-2520, 2522, 2524, 2525, 2527-2529, 3666-3669; Ga. L. 1863-64, p. 30, § 1; Ga. L. 1865-66, p. 83, § 2; Ga. L. 1866, p. 65, § 1; Code 1868, §§ 2511, 2513-2523, 2525-2528, 3690-3693; Ga. L. 1869, p. 13, § 1; Ga. L. 1872, p. 32, § 1; Code 1873, §§ 2541, 2554-2564, 2566-2569, 3743-3746; Ga. L. 1873, p. 30, § 1; Ga. L. 1877, p. 115, § 1; Ga. L. 1878-79, p. 49, § 1; Code 1882, §§ 2541, 2554-2559(a), 2560-2564, 2566-2569, 3743-3746; Ga. L. 1884-85, p. 128, § 1; Ga. L. 1884-85, p. 142, § 2; Civil Code 1895, §§ 3181, 3432, 3445-3457, 3459-3463, 3514, 4630-4633; Ga. L. 1901, p. 57, § 1; Civil Code 1910, §§ 3764, 3765, 4008, 4021-4039, 4094, 5176-5179; Ga. L. 1920, p. 80, § 1; Ga. L. 1920, p. 245, §§ 1, 2; Code 1933, §§ 113-1517, 113-1519, 113-1520, 113-1701 through 113-1714, 113-1716 through 113-1724, 113-1801 through 113-1804; Ga. L. 1935, p. 483, §§ 1, 2; Ga. L. 1939, p. 366, § 1; Ga. L. 1943, p. 236, §§ 3-5; Ga. L. 1943, p. 416, § 1; Ga. L. 1951, p. 476, § 1; Ga. L. 1953, Nov.-Dec. Sess., p. 178, § 1; Ga. L. 1958, p. 657, §§ 13, 14, 19-22; Ga. L. 1959, p. 326, § 1; Ga. L. 1961, p. 188, § 1; Ga. L. 1970,

p. 230, § 1; Ga. L. 1972, p. 450, §§ 1-5; Ga. L. 1973, p. 718, § 1; Ga. L. 1974, p. 1135, § 1; Ga. L. 1976, p. 1524, § 1; Ga. L. 1984, p. 974, § 1; Ga. L. 1986, p. 882, § 1; Ga. L. 1986, p. 982, § 23; Ga. L. 1986, p. 1553, § 1; Ga. L. 1987, p. 191, § 9; Ga. L. 1988, p. 725, § 1; Ga. L. 1991, p. 810, § 11; Ga. L. 1992, p. 1438, §§ 1, 2; Ga. L. 1994, p. 1173, §§ 5, 6.

ARTICLE 1

INVESTMENTS

53-8-1. Authorized investments; standard of care; deviation from will or other disposition; investments by personal representative who is a bank or trust company.

(a) Unless otherwise expressly provided in the will, a personal representative shall be authorized to make those investments that are listed in Code Sections 53-8-2 and 53-8-3.

(b) In making any other investments and in acquiring and retaining those investments and managing the property of the estate, the personal representative shall exercise the judgment and care, under the circumstances then prevailing, which persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

(c) Within the limitations of the standard provided in subsection (b) of this Code section and considering individual investments as a part of an overall administrative strategy, a personal representative is authorized to acquire and retain every kind of property whether real, personal, or mixed, and every kind of investment, specifically including, but not by way of limitation, bonds, debentures, and other corporate obligations and stocks, preferred or common, which persons of prudence, discretion, and intelligence acquire or retain for their own account; and within the limitations of such standard, a personal representative may retain property properly acquired, without limitation as to time and without regard to its suitability for original purchase.

(d) Nothing contained in this Code section shall be construed as restricting the power of a court of proper jurisdiction to permit a fiduciary to deviate from the terms of any will, agreement, or other disposition relating to the acquisition, investment, reinvestment, exchange, retention, sale, or management of fiduciary property.

(e) A personal representative that is a bank or trust company shall not be precluded from acquiring and retaining securities of or other interests in an investment company or investment trust because the

bank or trust company or an affiliate provides services to the investment company or investment trust as investment adviser, custodian, transfer agent, registrar, sponsor, distributor, manager, or otherwise and receives compensation for such services.

History. — Code 1981, § 53-8-1, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 41.

Law reviews. — For article, "Fiduciary Problems of the Executor and Trustee: Conflicts of Interest, Violations of Fiduciary Duties, Surcharge, and Other Remedies of Beneficiaries," see 9 Ga. St. B.J. 187 (1972). For article, "The Scope of Permissible Investments by Fiduciaries Under Georgia Law," see 19 Ga. St. B.J. 6 (1982). For annual survey of law of wills, trusts, and administration of estates, see 38 Mercer L. Rev. 417 (1986).

For note discussing the reintroduction in Georgia of the prudent investor rule, see 24 Mercer L. Rev. 513 (1973).

COMMENT

This section replaces former OCGA Secs. 53-8-1 through 53-8-3. (Former Sec. 53-8-4, which contained the effective date for these sections, is repealed as unnecessary.) The provisions of this Code section apply to all personal representatives, while the provision of the former Code section applied only to executors. Subsection (a) provides a "safe harbor" for personal representatives who invest in the authorized investments that are listed in the next two Code sections. For all other investments, personal representatives must adhere to the prudence standard described in the remaining provisions of this section. This prudence standard appeared as former OCGA Sec. 53-8-2(b) prior to the amendment of that statute in 1988. The standard for investing that appeared in former OCGA Sec. 53-8-2(b) and (c), as amended in 1988, has been retained for trustees and now appears Article 13 of Chapter 12 of this Title. Former OCGA Sec. 53-8-2(d), relating to income beneficiaries of trusts that qualify for the federal estate tax marital deduction, has also been moved to that section of the Georgia Trust Act. Subsection (b) of the new section appeared as subsection (a) of former OCGA Sec. 53-8-2. Subsection (c) of the new section carries forward former OCGA Sec. 53-8-3(b). Subsection (d) of the new section carries former OCGA Sec. 53-2-8(e).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1972, p. 450, § 1, and former O.C.G.A. § 53-8-2 are included in the annotations for this Code section

Cited in Clayton v. First Nat'l Bank, 237 Ga. 604, 229 S.E.2d 346 (1976); Perling v. Citizens & S. Nat'l Bank, 250 Ga. 674, 300 S.E.2d 649 (1983).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 421, 499, 501, 502, 510, 543, 544.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 274 et seq., 357.

ALR. — Right of trustee to invest trust funds in stock of private corporation, 12 A.L.R. 574; 122 A.L.R. 657; 78 A.L.R.2d 7.

Right of trustee to retain unauthorized securities held by testator or creator of trust, 37 A.L.R. 559; 122 A.L.R. 801, 135 A.L.R. 1528; 47 A.L.R.2d 187.

Liability of trustee, guardian, executor, or administrator for loss of funds invested, as affected by order of court authorizing the investment, 88 A.L.R. 325.

Investment of trust funds in share or part of single security or group or pool of

securities, 103 A.L.R. 1192; 110 A.L.R. 1166; 125 A.L.R. 669.

Trustee's, executor's, administrator's, or guardian's purchase from or sale to corporation of which he is an officer or stockholder, as voidable or as ground for surcharging his account, 105 A.L.R. 449.

Liability of trustee or other fiduciary for loss on investment as affected by the fact that it was taken in his own name without indication of fiduciary capacity, 106 A.L.R. 271; 150 A.L.R. 805.

Liability of trustee, guardian, executor, or administrator for loss of funds as affected by failure to obtain order of court authorizing investment, in absence of mandatory statute, 116 A.L.R. 437.

Surchargeability of trustee, executor, administrator, or guardian, in respect of mortgage investment, as affected by matters relating to value of property, 117 A.L.R. 871.

Effect of beneficiary's consent to, acquiescence in, or ratification of, improper investments or loans (including failure to invest) by trustee or other fiduciary, 128 A.L.R. 4.

Authorization or approval by court of investments which are "nonlegal" or contrary to the terms of the trust instrument, 170 A.L.R. 1219.

Rights, duties, and liability of corporation in connection with transfer of stock of decedent, 7 A.L.R.2d 1240.

Construction and effect of instrument authorizing or directing trustee or executor to retain investments received under such instrument, 47 A.L.R.2d 187.

Authorization by trust instrument of investment of trust funds in nonlegal investments, 78 A.L.R.2d 7.

Power and authority, in the absence of determining clause in will, of executor or administrator to lease out, or to rent, decedent's real estate, 95 A.L.R.2d 258.

Second and higher offer as affecting final approval of trustee's sale, 1 A.L.R.3d 629.

Duty of trustee to diversify investments, and liability for failure to do so, 24 A.L.R.3d 730.

53-8-2. Real property.

A personal representative is authorized to invest estate funds in real property after first obtaining an order to that effect from the probate court or from the superior court. Service shall be made as provided in Chapter 11 of this title to the heirs of an intestate estate or the beneficiaries of a will. The court shall be authorized to grant the order immediately if the heirs or beneficiaries acknowledge service and consent to the petition or at any time after ten days after perfection of service.

History. — Code 1981, § 53-8-2, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For note discussing and comparing the prudent man rule and the legal list rule in trustee investment, see 15 Mercer L. Rev. 530 (1964).

COMMENT

This section carries forward former OCGA Sec. 53-8-5. As indicated by Code Sec. 53-8-1(a), the provisions of this Code section create a "safe harbor" for investments by personal representatives.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 4068, and former Code 1933, § 113-1517, are included in the annotations for this Code section.

Absence of evidence of obtaining order authorizing investment. — In the absence of evidence that the administrator or guardian first obtained an order from the judge of the superior court authorizing the investment, the administrator or guardian is liable to the heirs of the estate for the money belonging to the estate which the administrator has invested in real estate, notwithstanding that the administrator or guardian acted in good faith and with the approval of the ordinary (now probate judge) and that the minors received the benefit of the investment as a home. Paulk v. Roberts, 42 Ga. App. 79, 155 S.E. 55 (1930) (decided under former Civil Code 1910, § 4068).

While an executor or administrator cannot invest funds of the estate in lands, unless authorized by the will or by order of the superior court judge in term or vacation, the executor or administrator is not required or authorized to sell real estate except when it is necessary for the purpose of paying the debts or making distribution otherwise than in kind. Robinson v. Georgia Sav. Bank & Trust Co., 185 Ga. 688, 196 S.E. 395 (1938) (decided under former Code 1933, § 113-157).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 510, 511, 520.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 274 et seq., 357.

ALR. — Effect of beneficiary's consent to, acquiescence in, or ratification of, improper investments or loans (including failure to invest) by trustee or other fiduciary, 128 A.L.R. 4.

53-8-3. Securities, obligations, and interest-bearing deposits.

A personal representative is authorized to invest estate funds in:

(1) Bonds issued by any county or municipality of this state which have been validated as required by law for the validation of county and municipal bonds;

(2) Bonds issued by any county board of education under Subpart 1 of Part 3 of Article 9 of Chapter 2 of Title 20 for the purpose of building and equipping schoolhouses, which bonds have been validated and confirmed as required under Part 1 of Article 2 of Chapter 82 of Title 36;

(3) Bonds and other securities issued by this state or by the Board of Regents of the University System of Georgia;

(4) Bonds or other obligations issued by the United States government and bonds of any corporation created by an act of Congress, the bonds of which are guaranteed by the United States government as provided in Code Section 53-8-4; and

(5) Interest-bearing deposits in any chartered state or national bank or trust company or savings and loan association located in this state to the extent the deposits are insured by the Federal Deposit Insurance Corporation or comparable insurance.

History. — Code 1981, § 53-8-3, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For note discussing and comparing the prudent man rule and

the legal list rule in trustee investment, see 15 Mercer L. Rev. 530 (1964).

COMMENT

This section carries forward the permissible investments that appeared in former OCGA Sec. 53-8-6(a) through (c) and 53-8-8. As indicated by Code Sec. 53-8-1(a), the provisions of this Code section create a "safe harbor" for investments by personal representatives. The provisions in former OCGA Sec. 53-8-6(a) and (b) relating to interest rates are repealed. The requirement of a return to the probate court that appeared in former OCGA Sec. 53-8-7 is repealed.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 3765, and former Code 1933, § 113-1520, are included in the annotations for this Code section

Cited in Mobley v. Phinizy, 42 Ga. App. 33, 155 S.E. 73 (1930); Citizens' & S. Nat'l Bank v. Clark, 172 Ga. 625, 158 S.E. 297 (1931); State Banking Co. v. Hinton, 178 Ga. 68, 172 S.E. 42 (1933).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 510, 517, 525, 527.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 274 et seq., 357.

ALR. — Liability of executor, administrator, or trustee and his sureties for depreciation in value of corporate stock or other corporation securities held by estate or trust, because of his conduct, for which he is directly responsible to the corporation, 62 A.L.R. 563.

Liability for interest or profits on funds of estate deposited in bank or trust company which is itself executor, administrator, trustee, or guardian, or in which executor, etc., is interested, 88 A.L.R. 205.

Effect of beneficiary's consent to, acquiescence in, or ratification of, improper investments or loans (including failure to invest) by trustee or other fiduciary, 128 A.L.R. 4.

Construction and effect of instrument authorizing or directing trustee or executor to retain investments received under such instrument. 47 A.L.R.2d 187.

53-8-4. Government obligations; standard of prudence; corporate fiduciaries.

(a) Whenever by law or by an instrument or court order establishing a fiduciary relationship the personal representative is authorized, permitted, required, or directed to invest funds in direct and general obligations of the United States government, obligations unconditionally guaranteed by the United States government, or obligations of the agencies of the United States government enumerated in Code Section 53-8-3, the personal representative may invest in and hold such obligations either directly or in the form of securities or other interests in any open-end or closed-end management type investment company or investment trust registered under the Investment Company Act of 1940, as now or hereafter amended, so long as:

(1) The portfolio of such investment company or investment trust is limited to such obligations and repurchase agreements fully collateralized by such obligations;

(2) Such investment company or investment trust takes delivery of such collateral either directly or through an authorized custodian; and

(3) Such investment company or investment trust is operated so as to provide a constant net asset value or price per share.

(b) Nothing contained in this Code section shall be construed as relieving any personal representative from any duty or liability a personal representative has under the standard of prudence set forth in Code Section 53-8-1.

(c) The authority granted in this Code section shall be applicable notwithstanding that a corporate fiduciary or an affiliate of the corporate fiduciary provides services to the investment company or investment trust as investment adviser, custodian, transfer agent, registrar, sponsor, distributor, manager, or otherwise and receives compensation for such services.

History. — Code 1981, § 53-8-4, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-8-9 and expands that section to apply to all personal representatives rather than only to corporate fiduciaries who have trust powers under Georgia law. The provisions of this Code section also now appear in Article 13 of Chapter 12 of this Title (the Georgia Trust Act).

53-8-5. Retention of property by personal representative; corporate fiduciaries.

(a) Unless otherwise provided in the will, a personal representative is authorized to retain the property received by the personal representative on the creation of the estate, including, in the case of a corporate fiduciary, stock or other securities of its own issue, even though the property may not otherwise be a legal investment and a personal representative shall not be liable for such retention, except for gross neglect. In the case of corporate securities, a personal representative may likewise retain the securities into which the securities originally received are converted or which are derived therefrom as a result of merger, consolidation, stock dividends, splits, liquidations, and similar procedures; and a personal representative may exercise by purchase or otherwise any rights, warrants, or conversion features attaching to any such securities. This Code section applies to all property held by a personal representative on March 28, 1961, under estates previously

created, except that it shall not relieve a personal representative from liability for loss which had already accrued on or before March 28, 1961.

(b) In the case of a corporate fiduciary, the authority granted in subsection (a) of this Code section shall apply to the exchange or conversion of stock or securities of the corporate fiduciary's own issue, whether or not any new stock or securities received in exchange therefor are substantially equivalent to those originally held; and such authority shall also apply to the continued retention of all new stock and securities resulting from merger, consolidation, stock dividends, splits, liquidations, and similar procedures and received by virtue of such conversion or exchange of stock or securities of the corporate fiduciary's own issue, whether or not the stock or securities are substantially equivalent to those originally received by the fiduciary. The authority granted in subsection (a) of this Code section shall have reference, inter alia, to the exchange and continued retention of such stock or securities for stock or securities of any holding company which owns stock or other interests in one or more other corporations including the corporate fiduciary, whether the holding company is newly formed or already existing and whether or not any of the corporations owns assets identical or similar to the assets of or carries on businesses identical or similar to the corporation the stock or securities of which were previously received by the fiduciary; and any such authority shall apply regardless of whether any of the corporations has officers, directors, employees, agents, or trustees in common with the corporation the stock or securities of which were previously received by the fiduciary.

History. — Code 1981, § 53-8-5, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For note discussing and comparing the prudent man rule and the legal list rule in trustee investment, see 15 Mercer L. Rev. 530 (1964).

COMMENT

This section carries forward the provisions of former OCGA Sec. 53-8-6(d) and (e). The former Code section applied to trustees and guardians as well as executors and administrators. Similar provisions now appear in Article 13 of Chapter 12 of this Title (the Georgia Trust Act) and Chapter 2 of Title 29 (Guardian and Ward).

JUDICIAL DECISIONS

Estate administrator had right to inspect. — Order granting an estate administrator of a deceased shareholder the right to inspect the defendant's corporate books and denying the defendant's motions to compel and stay pending arbitration was affirmed because the statutes governing the transfer of stock to the estate vested ownership of the shares in the administrator of the estate and the probate court's order granted the adminstrator trustee's powers over those shares. Regal Nissan, Inc. v. Scott, 348 Ga. App. 91, 821 S.E.2d 561 (2018).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 510, 517, 525, 527, 531, 533.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 274 et seq., 357.

ALR. — Liability of executor, administrator, or trustee and his sureties for depreciation in value of corporate stock or other corporation securities held by estate or trust, because of his conduct, for which he is directly responsible to the corporation, 62 A.L.R. 563.

Liability for interest or profits on funds of estate deposited in bank or trust company which is itself executor, administrator, trustee, or guardian, or in which executor, etc., is interested, 88 A.L.R. 205.

Effect of beneficiary's consent to, acquiescence in, or ratification of, improper investments or loans (including failure to invest) by trustee or other fiduciary, 128 A.L.R. 4.

Construction and effect of instrument authorizing or directing trustee or executor to retain investments received under such instrument, 47 A.L.R.2d 187.

ARTICLE 2

SALES AND CONVEYANCES

COMMENT

The provisions of this Article replace former Article 2 of Chapter 8 of Title 53. The new provisions generally authorize sales and other transactions with the property of the estate provided that the requirements outlined in the subsequent Code sections are met. These provisions apply only in those estates where the personal representative has not been granted broad powers to sell and otherwise deal with the estate property. Such powers may appear expressly in the will, may be made part of the will by the incorporation by reference of the powers contained in OCGA Sec. 53-12-232, or may be granted to the personal representative pursuant to Code Section 53-7-1(b). For other provisions relating to the power of Temporary Administrators, see Code Section 53-7-4 and Article 4 of Chapter 6 of this Title.

53-8-10. Authority of personal representative; petition by temporary administrator.

(a) Subject to the provisions of this article, a personal representative may sell, rent, lease, exchange, or otherwise dispose of property, whether personal, real, or mixed, for the purpose of payment of debts, for distribution of the estate, or for any other purpose that is in the best interest of the estate; provided, however, that nothing in this article shall be construed to limit, enlarge, or change any authority, power, restriction, or privilege specifically provided by will or incorporated into a will or otherwise granted to the personal representative in accordance with the provisions of subsection (b) of Code Section 53-7-1.

(b) A temporary administrator is authorized to petition the probate court for leave to sell or otherwise deal with property of the estate following the procedures described in this article, provided that good cause is shown.

History. — Code 1981, § 53-8-10, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-55/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (a), substituted "estate," for "estate;", substituted "estate; provided, however," for "estate, provided"; and, in subsection (b), substituted "article, provided, that" for "article; provided, however, that".

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2020, the comma after "article, provided" in subsection (b) was deleted.

COMMENT

The provisions of this Article replace former Article 2 of Chapter 8 of Title 53. The new provisions generally authorize sales and other transactions with the property of the estate provided that the requirements outlined in the subsequent Code sections are met. These provisions apply only in those estates where the personal representative has not been granted broad powers to sell and otherwise deal with the estate property. Such powers may appear expressly in the will, may be made part of the will by the incorporation by reference of the powers contained in OCGA Sec. 53-12-232, or may be granted to the personal representative pursuant to Code Section 53-7-1(b). For other provisions relating to the power of Temporary Administrators, see Code Section 53-7-4 and Article 4 of Chapter 6 of this Title.

JUDICIAL DECISIONS

Administrator's deed proper. — In a purchaser's quiet title action against the executor of a testator's estate, the trial court did not err in adopting the report of a special master and in decreeing that fee simple title to the land was vested in the purchaser because it was the clear intent of the testator to give to the testator's nephew a limited fee to the property based on the contingency that the nephew live on the property, and if the nephew did not, the property was to revert to the estate; the executor was obligated to give effect to the clear intent of the testator to convey only a limited fee to the nephew, and upon a nonoccurrence of the contingency stated in the will, the property automatically reverted to the estate, and the administrator's deed from the executor to the nephew referenced the testator's will and perfected the limited estate. Mann v. Blalock, 286 Ga. 541, 690 S.E.2d 375 (2010).

"Good cause" not shown. — Probate court erred when the court failed to find that an estate's temporary administrator had "good cause" for the sale of estate property as required under O.C.G.A. § 53-8-10(b); the court's finding that the sale was in the "best interest of the estate" because the property was in disrepair and was costing the estate money was the standard applicable to personal representatives under § 53-8-10(a). In re Estate of Price, 324 Ga. App. 681, 751 S.E.2d 487 (2013).

53-8-11. Property that is perishable, liable to deteriorate, or expensive to keep.

Perishable property, property that is liable to deteriorate from keeping, or property that is expensive to keep shall be sold as early as practicable and in such manner as the probate court shall determine to be in the best interest of the estate, after such service of notice and opportunity for hearing, if any, as the probate court shall deem practicable under the circumstances.

History. — Code 1981, § 53-8-11, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-56/HB 865.

The 2020 amendment, effective January 1, 2021, inserted "service of" in this Code section.

COMMENT

This section replaces former OCGA Sec. 53-8-21 with substantially similar provisions. The provisions of former OCGA Sec. 53-8-21 now appear in Article 2 of Title 29 (Guardian and Ward).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 2513, and former Code 1933, § 113-1701, are included in the annotations for this Code section.

Temporary administrator may sell perishable personal property under this section at the discretion of the ordinary (now probate judge). Ewing v. Moses, 50 Ga. 264 (1873) (decided under former Code 1868, § 2513).

Cited in Price v. Nehi, Inc., 49 Ga. App. 196, 174 S.E. 722 (1934); Jones v. Moore, 94 Ga. App. 348, 94 S.E.2d 523 (1956).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 725, 728 et seq., 736, 797, 799 et seq., 806, 1048, 1054.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 404, 702, 714.

53-8-12. Stocks or bonds.

Stocks or bonds, either listed or admitted to unlisted trading privileges upon any stock exchange or quoted regularly in any newspaper having a general circulation in Georgia, may be sold at private sale without order from or report to the probate court at a sales price not less than the stock exchange bid price or the published bid price at the time of sale. Reasonable brokerage commissions, not in excess of those customarily charged by stock exchange members, may be paid.

History. — Code 1981, § 53-8-12, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section replaces former OCGA Sec. 53-8-37 with provisions that authorize the sale of listed stocks or bonds without the need to petition for approval to the probate court. The provisions of former OCGA Sec. 53-8-37 now appear in Article 2 of Title 29 (Guardian and Ward).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 725, 728 et seq. 76 Am. Jur. 2d, Trusts, § 430 et seq.

C.J.S. — 34 C.J.S., Executors and Ad-

ministrators, §§ 654, 719.

ALR. — What included in term "bonds" in will, 35 A.L.R.2d 1095.

53-8-13. General procedures.

(a) A personal representative desiring to sell, rent, lease, exchange, or otherwise dispose of property other than property that is perishable, liable to deteriorate, or expensive to keep or listed stocks and bonds shall file a petition with the probate court stating the property involved and the interests in such property; the specific purpose of the transaction; the proposed price, if any; and all other terms or conditions proposed for the transaction and listing the names, addresses, and ages or majority status of all heirs of an intestate estate or of all beneficiaries of a testate estate. In the event full particulars are lacking, the petition shall state the reasons for any such omission.

(b) Upon the filing of the petition by the personal representative, the court shall issue a citation and serve notice on the heirs of an intestate estate or the affected beneficiaries of a testate estate in accordance with the provisions of Chapter 11 of this title.

(c) If no written objection by a person so served with notice is filed within the appropriate period of time following the service of such notice, as provided by Chapter 11 of this title, the probate court shall order such sale summarily in the manner and terms petitioned. If timely written objection is filed, the court shall hear the matter and grant or deny the petition for sale or make such other order as is in the best interest of the estate, which may require the sale to be private or at public outcry including confirmation of the sale by the court or otherwise. An appeal shall lie to the superior court in the manner, under the restrictions, and with the effect provided for appeals from the probate court in other cases.

(d) A personal representative shall make a full return to the probate court of every sale, specifying the property sold, the purchasers, the amounts received, and the terms of the sale.

(e) The recital in the personal representative's deed of compliance with the provisions of this Code section shall be prima-facie evidence of the facts recited.

(f) Where a personal representative sells real property under the provisions of this Code section, liens on such real property may be divested and transferred to the proceeds of the sale as a condition of the sale.

History. — Code 1981, § 53-8-13, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 25; Ga. L. 2020, p. 377, § 1-57/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (a), in the first sentence, substituted a semicolon for a comma three times, substituted "listing the" for "a list of", substituted "all heirs of" for "heirs in", and substituted "all beneficiaries of" for "beneficiaries in"; in subsection (b), substituted "the filing of the petition by the personal representative, the court shall issue a citation and serve notice on" for "filing the petition, notice shall be given to"; in subsection (c), in the first sentence, substituted "served with notice" for "notified" and inserted "the service of such"; and, in subsection (e), substituted "the provisions of this Code section" for "legal provisions".

History of Code section. — This Code section is derived from the decisions in Patterson v. Lemon, 50 Ga. 231 (1873); Newsom v. Carlton, 59 Ga. 516 (1877); Barrett & Caswell v. Durham, 80 Ga. 336, 5 S.E. 102 (1887); Whitehurst v. Mason, 140 Ga. 148, 78 S.E. 938 (1913).

Cross references. — Livestock dealers and auctions, T. 4, C. 6. Regulation of advertising generally, § 10-1-420 et seq. Age of majority, § 39-1-1. Abolition of dower, § 53-1-3. Guardians ad litem and appraisers for year's support in probate court proceedings, Uniform Rules for the Probate Courts, Rule 23.

Law reviews. — For article discussing methods of summary distribution and settlement of decedent's estate, see 6 Ga. L. Rev. 74 (1971). For article surveying wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

COMMENT

This section replaces former OCGA Secs. 53-8-20, 53-8-22 through 53-8-36, and 53-8-38 through 53-8-47 with streamlined procedures for the sale of estate property. Subsection (d) carries forward former OCGA Sec. 53-8-49. Subsection (e) carries forward the provisions of former OCGA Sec. 53-8-50. Subsection (f) replaces former OCGA Sec. 53-8-51 with a provision that allows but does not require the divesting of liens on real property sold under the provisions of this Code section. Former OCGA Secs. 53-8-70 through 53-8-73, dealing with claims to property proposed to be sold, are repealed. Former Code Sections 53-8-20, 53-8-22, 53-8-38 and 53-8-47 now appear in Article 2 of Title 29 (Guardian and Ward).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Laws 1826, Cobb's 1851 Digest, p. 323, former Code 1863, § 2518, former Code 1868, § 2520, Ga. L. 1869, p. 13, § 1, former Code 1873, §§ 2564 and 2568, former Code 1882, § 2559, former Civil Code 1895, §§ 3446, 3450, 3454, 3457, and 3463, former Civil Code 1910, §§ 4022, 4024, 4025, 4026, 4029, 4033, and 4035, former Code 1933, §§ 113-1702 — 113-1707, 113-1709, 113-1714, 113-1716 — 113-1718, and 113-1720 — 113-1722, Ga. L. 1943, p. 416, § 1, and former O.C.G.A. §§ 53-8-20, 53-8-23, 53-8-24, 53-8-34, 53-8-36, 53-8-46, 53-8-47, and 53-8-51 are included in the annotations for this Code section.

Constitutionality. — Legislature has power to establish the rule of evidence set forth in this statute. Banks v. State, 124 Ga. 15, 52 S.E. 74 (1905) (decided under former Civil Code 1895, § 3454).

Law is inapplicable when administrator is not seeking to sell property.

Pritchard v. Myers, 219 Ga. 290, 133 S.E.2d 95 (1963) (decided under former Code 1933, § 113-1714).

Scope. — "Property" in this statute applies to all kinds of property. Downing Lumber Co. v. Medlin & Sundy, 136 Ga. 665, 72 S.E. 22 (1911) (decided under former Civil Code 1910, § 4033).

Statute provides that if in a sale by an administrator there be irregularities, or the administrator fails to comply with the law as to the mode of the sale, the sale is voidable except as to innocent purchasers. This statute applies also to sales by guardians, but it protects innocent purchasers against nothing except irregularities in carrying out a valid order. And the first part of the statute provides that "to divest the title of the heir at law, the administrator must have authority to sell." Powell v. Harrison, 180 Ga. 197, 178 S.E. 745 (1935) (decided under former Code 1933, § 113-1720).

Fraud between the executor and the executor's immediate grantee will not affect subsequent purchasers for value who derived title through the deed of the executor bona fide and without any notice of the alleged fraud. Wood v. Bowden, 182 Ga. 329, 185 S.E. 516 (1936) (decided under former Code 1933, § 113-1720).

Words "authority to sell" refer to order of ordinary (now probate judge) granting leave to sell. Wilcox v. Thomas, 191 Ga. 319, 12 S.E.2d 343 (1940) (decided under former Code 1933, § 113-1720); Guthrie v. Moran, 192 Ga. 607, 15 S.E.2d 890 (1941) (decided under former Code 1933, § 113-1720); Adamson v. Petty, 230 Ga. 87, 195 S.E.2d 436 (1973) (decided under former Code 1933, § 113-1720).

Construction. — As applicable to sales of land by a guardian, former Code 1933, §§ 113-1706 and 113-1720 are to be construed together, and authority for the guardian to sell lands of a ward for education and support must be obtained by compliance with § 113-1706. Powell v. Harrison, 180 Ga. 197, 178 S.E. 745 (1935) (decided under former Code 1933, § 113-1706).

Former Civil Code 1910, §§ 4024 and 4028 are in pari materia and are to be construed together. Heard v. Sheffield, 136 Ga. 730, 71 S.E. 1118 (1911) (decided under former Civil Code 1910, § 4024).

Statute permits "wild uncultivated lands lying in counties other than that of the administration" to be disposed of at private sale; but the order authorizing such sale must be after notice. Powell v. Harrison, 180 Ga. 197, 178 S.E. 745 (1935) (decided under former Code 1933, § 113-1704).

Cultivated land in the adverse possession of any one would not be wild land, and could not be sold as such under this statute. Downing Lumber Co. v. Medlin & Sundy, 136 Ga. 665, 72 S.E. 22 (1911) (decided under former Civil Code 1910, § 4024).

Question as to whether lands are "wild uncultivated lands" is one for the jury. Downing Lumber Co. v. Medlin & Sundy, 136 Ga. 665, 72 S.E. 22 (1911) (decided under former Civil Code 1910, § 4024).

Object and purpose. — Object of this statute is to prevent the administrator from sacrificing the value of the property by putting the property up for sale under such circumstances that the purchaser would buy a lawsuit along with the land. The law deems it more expedient that the administrator should first end the lawsuit personally, and then sell for full value. Downing Lumber Co. v. Medlin & Sundy, 136 Ga. 665, 72 S.E. 22 (1911) (decided under former Civil Code 1910, § 4033); Booth v. Young, 149 Ga. 276, 99 S.E. 886 (1919) (decided under former Civil Code 1910, § 4033). See also Thrift Bros. v. Baker, 144 Ga. 508, 87 S.E. 676 (1916) (decided under former Civil Code 1910, § 4033).

Provisions of this statute do not apply when the adverse holder is a mere squatter. Coggins v. Griswold, 64 Ga. 323 (1879) (decided under former Code 1873, § 2564).

Adverse possession. — Possession may be constructive, as when actual adverse possession of a part of a tract will constructively extend to the limits described in a deed recorded or to the boundaries of which the adverse party had knowledge. Weitman v. Thiot, 64 Ga. 11 (1879) (decided under former Code 1873, § 2564).

When the claimant is in possession and contends that the claimant is holding the

General Consideration (Cont'd)

land adversely, it does not matter under this statute whether the claimant's title is good. Hall v. Armor, 68 Ga. 449 (1882) (decided under former Code 1873, § 2564); Edwards v. Sands, 150 Ga. 11, 102 S.E. 426 (1920) (decided under former Civil Code 1910, § 4033).

Possession becomes adverse for the purposes of this statute also when, after possession has been given under a bond for titles, the obligor dies. Heard v. Phillips, 101 Ga. 691, 31 S.E. 216 (1897) (decided under former Civil Code 1895, § 3457).

Adverse possession within the meaning of this statute may be evidenced by occupation and use of the premises. Guthrie v. Bullock, 143 Ga. 17, 84 S.E. 59 (1915) (decided under former Civil Code 1910, § 4033); Booth v. Young, 149 Ga. 276, 99 S.E. 886 (1919) (decided under former Civil Code 1910, § 4033); Edwards v. Sands, 150 Ga. 11, 102 S.E. 426 (1920) (decided under former Civil Code 1910, § 4033).

Word "irregularities" refers "to such matters as the mode of advertising, … or other irregularities in the procedure." Guthrie v. Moran, 192 Ga. 607, 15 S.E.2d 890 (1941) (decided under former Code 1933, § 113-1720); Adamson v. Petty, 230 Ga. 87, 195 S.E.2d 436 (1973) (decided under former Code 1933, § 113-1720).

Sale of land in the wrong county, there being shown a general order granting leave to sell but no special order to sell in the county where the sale took place, has been held to be mere irregularity. Guthrie v. Moran, 192 Ga. 607, 15 S.E.2d 890 (1941) (decided under former Code 1933, § 113-1720).

Agreement by an administrator to make a conveyance upon stipulated terms is contrary to public policy and unenforceable. Cummings v. Johnson, 218 Ga. 559, 129 S.E.2d 762 (1963) (decided under former Code 1933, § 113-1706).

When the parties have agreed among themselves to a division of the property, a public or private sale in accordance with the statutory directives is not required. King v. King, 199 Ga. App. 496, 405 S.E.2d 319 (1991) (decided under former O.C.G.A. §§ 53-8-23, 53-8-34, and 53-8-36).

Administrators and other heirs to whom the administrators sold at public sale are required to abide by the terms of sale provided by the court of ordinary (now probate court) and announced by the administrators at the sale. Adamson v. James, 233 Ga. 130, 210 S.E.2d 686 (1974) (decided under former Code 1933, § 113-1706).

Adequate price. — It is the duty of an administrator to sell the property of the administrator's intestate for an adequate price, and to withdraw it from sale when it becomes apparent to the administrator that it is about to be sacrificed for want of a bid commensurate with its true market value. Adamson v. James, 233 Ga. 130, 210 S.E.2d 686 (1974) (decided under former Code 1933, § 113-1706).

Law presumes there are debts to be paid, in absence of anything to contrary; and in order for a purchaser to be affected by a fraudulent exercise of a power of sale granted by a will, as when a sale is made for the purported purpose of paying debts when a sale for that purpose is not necessary, either participation in the fraud or notice of it by the purchaser would have to appear; therefore, when a sale is advertised and made as being necessary to pay debts, the presumption referred to is not overcome, as to an innocent purchaser, by the circumstance that the sale occurred about five years after the death of the testator. Wood v. Bowden, 182 Ga. 329, 185 S.E. 516 (1936) (decided under former Code 1933, §§ 113-1717 and 113-1720).

Purchase by administrator who is also heir. — An administrator who is an heir at law of the administrator's intestate, and as such has an interest in property being sold by the administrator as such representative, may purchase at a sale of the property, provided the administrator is guilty of no fraud, and the property is exposed for sale in the ordinary mode and under circumstances to command the best price obtainable. Adamson v. James, 233 Ga. 130, 210 S.E.2d 686 (1974) (decided under former Code 1933, § 113-1706).

Loan of property not authorized. — An executor's power to sell estate property does not include the power to make an indefinite, gratuitous loan of property.

Rowland v. Clarke County Sch. Dist., 272 Ga. 471, 532 S.E.2d 91 (2000) (decided under former O.C.G.A. § 53-8-20).

Cited in Miller v. Hines, 145 Ga. 616, 89 S.E. 689 (1916); Blumenthal v. Cain, 22 Ga. App. 596, 96 S.E. 710 (1918); Dukes v. Bashlor, 162 Ga. 403, 134 S.E. 98 (1926); Middleton v. Westmoreland, 164 Ga. 324, 138 S.E. 852 (1927); Bond v. Maxwell, 40 Ga. App. 679, 150 S.E. 860 (1929); Terrell v. Harris, 42 Ga. App. 760, 157 S.E. 387 (1931); Paris v. Treadaway, 173 Ga. 639, 160 S.E. 797 (1931); Gabrell v. Byers, 178 Ga. 16, 172 S.E. 227 (1933); Price v. Nehi, Inc., 49 Ga. App. 196, 174 S.E. 722 (1934); Colyer v. Huntley, 179 Ga. 332, 175 S.E. 901 (1934); Williamson v. Key, 179 Ga. 502, 176 S.E. 373 (1934); Mutual Benefit Life Ins. Co. v. Wilson, 189 Ga. 344, 6 S.E.2d 716 (1939); Robinson v. Georgia Sav. Bank & Trust Co., 106 F.2d 944 (5th Cir. 1939); Hortman v. Vissage, 191 Ga. 446, 12 S.E.2d 294 (1940); Wilcox v. Thomas, 191 Ga. 319, 12 S.E.2d 343 (1940); East Atlanta Bank v. Limbert, 191 Ga. 486, 12 S.E.2d 865 (1940); Bacon v. Federal Land Bank, 109 F.2d 285 (5th Cir. 1940); Hines v. Farkas, 109 F.2d 289 (5th Cir. 1940); Aiken v. Mitchell, 70 Ga. App. 351, 28 S.E.2d 389 (1943); United States v. Williams, 164 F.2d 989 (5th Cir. 1947); Brown v. Gibson, 203 Ga. 213, 46 S.E.2d 68 (1948); Smith v. Tippins, 207 Ga. 262, 61 S.E.2d 138 (1950); Strickland v. Padgett, 209 Ga. 261, 71 S.E.2d 545 (1952); Salter v. Wetmore, 90 Ga. App. 672, 83 S.E.2d 852 (1954); Turner v. Kelley, 212 Ga. 175, 91 S.E.2d 356 (1956); Moore v. Hartford Accident & Indem. Co., 102 Ga. App. 514, 117 S.E.2d 206 (1960); Cummings v. Johnson, 218 Ga. 559, 129 S.E.2d 762 (1963); Freedman v. Scheer, 223 Ga. 705, 157 S.E.2d 875 (1967); Woodall v. First Nat'l Bank, 118 Ga. App. 440, 164 S.E.2d 361 (1968); Adamson v. Petty, 230 Ga. 87, 195 S.E.2d 436 (1973); Barfield v. Hilton, 232 Ga. 235, 206 S.E.2d 1 (1974); Wiley v. Wiley, 233 Ga. 824, 213 S.E.2d 682 (1975); First Nat'l Bank v. Rapides Bank & Trust Co., 145 Ga. App. 514, 244 S.E.2d 51 (1978); Duncan v. Baggett, 247 Ga. 609, 277 S.E.2d 733 (1981); Hawkins v. Walker, 158 Ga. App. 562, 281 S.E.2d 311 (1981); State Revenue Comm'r v. Fleming, 172 Ga. App. 887, 324 S.E.2d 821 (1984); Bell v. King, Phipps & Assocs., 176 Ga. App. 702, 337 S.E.2d 364 (1985); Rowland v. Clarke County Sch. Dist., 272 Ga. 471, 532 S.E.2d 91 (2000).

Sale Generally

Sale as void unless conducted in accordance with statute. — When a record shows that the provisions of this statute have not been complied with, a sale must be held void. Fussell v. Dennard, 118 Ga. 270, 45 S.E. 247 (1903) (decided under former Civil Code 1895, § 3446).

Withdrawing property from sale when highest bid falls below fair market value. — An administrator not only has a right to withdraw an intestate's property from sale, but it is the administrator's legal duty to do so when it becomes apparent to the administrator that it is about to be sacrificed for want of a bid commensurate with its true market value, since nothing can be tolerated which comes into conflict or competition with the interest or welfare of those interested in the estate. Hall v. White, 215 Ga. 144, 109 S.E.2d 516 (1959) (decided under former Code 1933, § 113-702).

When the property involved was, at the time of the property's sale, reasonably worth $2,000.00, and the intestate's administrator sold the property to his wife for $600.00, knowing at the time that her bid was for an amount far less than its fair and reasonable market value, it was the legal duty of the administrator to have withdrawn the property from sale and not to have knocked it off to his wife — the highest bidder. Hall v. White, 215 Ga. 144, 109 S.E.2d 516 (1959) (decided under former Code 1933, § 113-702).

When the administrator and the administrator's wife, while property was being exposed for sale, requested various persons attending the sale as prospective purchasers not to bid on the property, the intestate's property was not exposed for sale under circumstances to command the best price obtainable. Hall v. White, 215 Ga. 144, 109 S.E.2d 516 (1959) (decided under former Code 1933, § 113-702).

As a general rule, an administrator cannot bid at an administrator's sale of property belonging to an intestate's

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estate, and this rule applies to the administrator's wife just as it does to the administrator. Wallace v. Wallace, 142 Ga. 408, 83 S.E. 113 (1914) (decided under former Civil Code 1910, § 4022); Warner v. Hill, 149 Ga. 464, 100 S.E. 393 (1919) (decided under former Civil Code 1910, § 4022); Devaughn v. Griffith, 149 Ga. 697, 101 S.E. 794 (1920) (decided under former Civil Code 1910, § 4022); Hall v. White, 215 Ga. 144, 109 S.E.2d 516 (1959) (decided under former Code 1933, § 113-1702).

Sale for payment of debts and distribution must comply with statute. — Upon the death of the realty owner intestate, title vests directly in the heirs, subject to administration for payment of debts and distribution. Administrators can only sell real estate for these purposes after complying with former O.C.G.A. § 53-8-23, receiving leave to sell from the probate court, and proper advertisement. Horn v. Wright, 157 Ga. App. 408, 278 S.E.2d 66 (1981) (decided under former O.C.G.A. § 53-8-23).

When a will contained the following: "I wish my executor, as soon as possible after my death, to pay all my debts. If a sale of property shall be necessary I wish him to select for sale that which can be most advantageously used for that purpose; and I authorize him to sell the same at public or private sale, as he may see fit," under this provision, no application to the court of ordinary (now probate court) for leave to sell for the purpose of paying debts was necessary in order to exercise the power of sale. Wood v. Bowden, 182 Ga. 329, 185 S.E. 516 (1936) (decided under former Code 1933, § 113-1717).

When no authority for private sale of realty is conferred by will, the executor thereunder is without power to enter into a contract for such sale of the property of the testator's estate; such a contract is violative of public policy, and is unenforceable. Fisher v. Pair, 69 Ga. App. 492, 26 S.E.2d 187 (1943) (decided under former Code 1933, § 113-1716).

An administrator is not under any duty immediately to sell real property of the administrator's intestate after the expiration of the administration year; but, before the real property can be sold, it must distinctly be shown to the ordinary (now probate judge) that it is necessary to sell the land to satisfy one of the conditions referred to in this statute. Patterson v. Fidelity & Deposit Co., 181 Ga. 61, 181 S.E. 776 (1935) (decided under former Code 1933, § 113-1706).

It is not an absolute requirement of the law that an administrator shall sell all of the land of the estate at the expiration of the administration year and that the land shall be sold only for the payment of debts or distribution. Patterson v. Fidelity & Deposit Co., 181 Ga. 61, 181 S.E. 776 (1935) (decided under former Code 1933, § 113-1706).

Allegation that the real property was not sold promptly or at the expiration of the administration year did not show a breach of the bond of the administrators as there is no requirement of the law that an administrator shall sell the real estate promptly after the administrator's qualification, nor does the law require that an administrator sell the real property at the expiration of the year. Patterson v. Fidelity & Deposit Co., 181 Ga. 61, 181 S.E. 776 (1935) (decided under former Code 1933, § 113-1706).

Infeasibility of division of the land and the necessity of a sale for the purpose of distribution is one of the purposes for which land may be sold by an administrator. Warren v. Warren, 104 Ga. App. 184, 121 S.E.2d 343 (1961) (decided under former Code 1933, § 113-1706).

Allegations to the effect that a sale by the executor should be enjoined because there are in fact no debts of the estate, afford no reason for the grant of an injunction, when the executor obtained from the ordinary (now probate judge) an order permitting the sale for the purpose of paying the indebtedness claimed by the executor to be due. Brewton v. McLeod, 216 Ga. 686, 119 S.E.2d 105 (1961) (decided under former Code 1933, § 113-1706).

When, after due notice, leave has been regularly granted by the court of ordinary (now probate court) to an administrator to sell realty of a decedent, equity will not restrain the sale by injunction at the in-

stance of an heir on account of reasons which could have been as readily urged in a caveat to the application for leave to sell. Brewton v. McLeod, 216 Ga. 686, 119 S.E.2d 105 (1961) (decided under former Code 1933, § 113-1706).

Effect of alteration of terms generally. — When an administrator or executor alters the terms of a sale from those advertised, the administrator or executor can hold a purchaser to the altered terms only by showing clearly that the latter had actual knowledge of the altered terms before bidding off the property. Daniel v. Jackson, 53 Ga. 87 (1874) (decided under former Code 1873, § 2568).

Legality of parol declarations as to altered terms of sale. — Under the common law, printed or written particulars and conditions of sale could not be contradicted, added to, or altered by verbal declarations made by the auctioneer at the time of sale, but the Supreme Court is not disposed to apply this common-law rule so strictly as to exclude all parol declarations as to the altered terms of sale from the printed or written advertisements made by executors and administrators at their public sales, under the laws of this state, when the bidder or purchaser has full knowledge of such altered terms, and acts upon those terms. Adamson v. Petty, 230 Ga. 87, 195 S.E.2d 436 (1973) (decided under former Code 1933, § 113-1718).

Sale not set aside when specific terms of sale not advertised. — Terms of a sale as advertised may be altered at the sale itself, and the mere failure of the administrator to advertise specific terms of sale is not a sufficient ground to set aside the sale, since the terms of the sale were announced on the day of the sale. Duncan v. Baggett, 247 Ga. 609, 277 S.E.2d 733 (1981) (decided under former Code 1933, § 113-1718).

Sale of property to highest bidder approved. — Probate court properly approved the sale of property belonging to the estate of a child's deceased parent to the highest bidders because all interested parties, including the child, understood the timeline for bidding on the property, and the child presented a $150,000 offer after the bidding period expired; the parties' agreed-upon sales procedure did not give heirs 30 days to counter any offer presented by another bidder. In re Estate of Gore, 292 Ga. App. 285, 664 S.E.2d 290 (2008).

Sale must be properly conducted. — When administrator exposed the administrator's intestate's property for sale during the legal hours of sale, but intentionally selected a time for the sale, sold the property and personally purchased the property when no one was present at the place the administrator was required to sell except the administrator and the administrator's attorney, the petition sufficiently alleged that the administrator's sale of the property was not conducted under circumstances to command the best price, but the contrary for an amount equal to only one-half of its true value. Anderson v. Miller, 212 Ga. 477, 94 S.E.2d 321 (1956) (decided under former Code 1933, § 113-1707).

Conditions of sale. — Nothing in either O.C.G.A. § 53-8-23 or O.C.G.A. § 53-8-24 enumerates what conditions may be placed upon a sale of real property. Buckmon v. Futch, 237 Ga. App. 67, 514 S.E.2d 863 (1999) (decided under former O.C.G.A. §§ 53-8-23 and 53-8-24).

Purchase authorized when administrator is also heir. — When the administrator is an heir at law of an intestate, and as such has an interest in the property one is selling as such representative, he or his wife may purchase at his sale of the property, provided the administrator is guilty of no fraud, and it is exposed for sale in the ordinary mode and under circumstances to command the best price obtainable. Hall v. White, 215 Ga. 144, 109 S.E.2d 516 (1959) (decided under former Code 1933, § 113-1702).

When the administrator, or his wife, is the purchaser of property in which the administrator, as an heir at law, has an interest, the administrator's sale of it to either will be upheld only when the sale is conducted legally and with absolute fairness to the intestate's other heirs at law and when the amount bid is an adequate price for the property sold. Hall v. White, 215 Ga. 144, 109 S.E.2d 516 (1959) (decided under former Code 1933, § 113-1702).

Sale Generally (Cont'd)

Evidence supported leave to sell order for purpose of payment of debts and distribution. Veale v. Vandiver, 167 Ga. App. 865, 307 S.E.2d 749 (1983) (decided under former O.C.G.A. § 53-8-34).

Because counsel's in-court statements and the documents in the court's file supported the findings that an estate property was hazardous and that a buyer would assume liability for it, and because a daughter acquiesced in conduct of the hearing, the probate court properly allowed the sale of the property under O.C.G.A. § 53-8-34. In re Estate of Bell, 274 Ga. App. 581, 618 S.E.2d 194 (2005) (decided under former O.C.G.A. § 53-8-34).

When executor is clothed solely with power to sell, and there is nothing to indicate an intention on the part of the testator to authorize the executor to sell at private sale, then the executor must sell after advertising and at public outcry. When the intention of the testator is in doubt as to the mode of sale, the safe rule is to adhere to the mode of sale prescribed by law. To take the case out of the general rule requiring executors to sell at public sale, the intention of the testator should be plainly and distinctly expressed in the words of the power, or should be found by necessary implication from the language used in conferring such power. Bonner v. Bell, 206 Ga. 98, 55 S.E.2d 612 (1949) (decided under former Code 1933, § 113-1717).

Sales by public outcry. — In accordance with the intention of the legislature as appears from a consideration of a partial history of former O.C.G.A. § 53-8-34, subsection (b) (now subsection (c)) applies only to private sales by administrators and not to sales by public outcry. Duncan v. Baggett, 247 Ga. 609, 277 S.E.2d 733 (1981) (decided under former O.C.G.A. § 53-8-34).

Sale at public outcry. — Sales by executors, if not otherwise provided by will, must be at public outcry to highest bidder. The purchaser is bound to see that the executor is apparently proceeding under the forms prescribed by law. If power be given in a will to sell land or personal property, this only dispenses with the necessity of an order of the court of ordinary (now probate court), and if the will does not expressly or impliedly provide for a private sale, such sales must be public; otherwise such sales are void. Bonner v. Bell, 206 Ga. 98, 55 S.E.2d 612 (1949) (decided under former Code 1933, § 113-1717).

Sale by administrator of land which is in adverse possession of third party, and conveyance by deed in pursuance thereof, are void and convey no title. Porter v. La Grange Banking & Trust Co., 187 Ga. 528, 1 S.E.2d 441 (1939) (decided under former Code 1933, § 113-1714); Toombs v. Hilliard, 209 Ga. 755, 75 S.E.2d 801 (1953) (decided under former Code 1933, § 113-1714).

Void deeds. — Deeds by an administrator which are given while land is in the adverse possession of a third party, or without notice, are void and convey no title. Flournoy v. United States, 115 F.2d 220 (5th Cir. 1940) (decided under former Code 1933, § 113-1714).

Main reason that such sales are made void is that property, though actually belonging to the estate, would not likely bring the property's full value when held adversely to the estate and the administrator could not give possession. Porter v. La Grange Banking & Trust Co., 187 Ga. 528, 1 S.E.2d 441 (1939) (decided under former Code 1933, § 113-1714).

Burden of proof. — Issue is whether or not property is subject to such sale, and burden of proof is upon administrator. Griffin v. Comarite, 41 Ga. App. 667, 154 S.E. 375 (1930) (decided under former Civil Code 1910, § 4033).

When the proof submitted is sufficient to establish title in the intestate at the time of death, and there is nothing whatever to indicate that the property is held by an adverse claimant, it will be presumed that possession accompanies title. Griffin v. Cromartie, 41 Ga. App. 667, 154 S.E. 375 (1930) (decided under former Civil Code 1910, § 4033).

When it appears that administrator was in possession, burden is upon claimant to show title. Luttgen v. Andrews, 174 Ga. 778, 163 S.E. 892 (1932) (decided under former Civil Code 1910, § 4033).

Administrator cannot sell property of an intestate without order of court of ordinary (now probate court), and a sale without such order is void and passes no title. Porter v. La Grange Banking & Trust Co., 187 Ga. 528, 1 S.E.2d 441 (1939) (decided under former Code 1933, § 113-1714).

Selling off. — When the same people are administrators of a wife's estate and executors of the husband's estate, and having obtained from the ordinary (now probate judge) orders to sell the lands belonging to each estate, if the heirs and legatees enter into an agreement that the entire property may be offered and sold together at one time, and the lands belonging to both estates are by the executors and administrators so cried off and sold at public sale, the sale cannot on that ground be afterwards treated as invalid by one who entered into such agreement. Guthrie v. Moran, 192 Ga. 607, 15 S.E.2d 890 (1941) (decided under former Code 1933, § 113-1720).

If it would have been unlawful to sell various tracts of land subject to several different security deeds collectively under a single bid, it should be presumed that the administrator who sold the property, the estate holding the security, complied with the law and sold the tracts separately, until the contrary is shown, and a recital stating that the various tracts were all sold to an individual for a stated sum of money without more would not show that they were not sold separately and at prices aggregating the entire sum stated. Fraser v. Rummele, 195 Ga. 839, 25 S.E.2d 662 (1943) (decided under former Code 1933, § 113-1720).

Letters of administration granted to applicant therefor without causing citation to issue in conformity to law are wholly without legal force or effect. Powell v. Harrison, 180 Ga. 197, 178 S.E. 745 (1935) (decided under former Code 1933, § 113-1720).

Abiding by terms of sale required. — Administrators and other heirs to whom they sold at public sale are required to abide by terms of sale provided by court of ordinary (now probate court) and announced by the administrators at the sale. Adamson v. James, 233 Ga. 130, 210 S.E.2d 686 (1974) (decided under former Code 1933, § 113-1703).

Recital as prima facie evidence of facts recited. — A recital, in an administrator's deed, of a compliance with all of the requisites of the law necessary to be done after the order of sale is granted is prima facie evidence that these requisites were complied with. Davie v. McDaniel, 47 Ga. 195 (1872) (decided under former Code 1868, § 2520); Floyd v. Ricketson, 129 Ga. 668, 59 S.E. 909 (1907) (decided under former Civil Code 1895, § 3454). See also John Doe v. Roe, 4 Ga. 148, 48 Am. Dec. 216 (1848) (decided under former law).

Petition

Administrator alone is empowered to petition for authority to sell realty of a decedent when it is necessary for the payment of debts or for the purpose of distribution. Ireland v. Matthews, 129 Ga. App. 592, 200 S.E.2d 318 (1973) (decided under former Code 1933, § 113-1706). West v. Sharpe, 197 Ga. App. 140, 397 S.E.2d 616 (1990) (decided under former O.C.G.A. § 53-8-23).

Court of ordinary (now probate court) has no authority to order the administrator to sell realty in order to pay debts and to make distribution upon the application of one of the heirs. Ireland v. Matthews, 129 Ga. App. 592, 200 S.E.2d 318 (1973) (decided under former Code 1933, § 113-1706).

Objections to the application for leave to sell may be made by any person interested in the estate. Prine v. Mapp, 80 Ga. 137, 5 S.E. 66 (1888) (decided under former Code 1882, § 2559).

Objection should be made in the court of ordinary (now probate court). Grant v. Noel, 118 Ga. 258, 45 S.E. 279 (1903) (decided under former Code 1895, § 3450); Hobby v. Ford, 149 Ga. 176, 99 S.E. 624 (1919) (decided under former Civil Code 1910, § 4026).

Failure to file petition and notice of sale. — Trial court properly denied an estate administrator's petition for leave to recover and sell the estate's property as the administrator failed to publish notice of the petition and proposed sale, as required by former O.C.G.A. § 53-8-23, and

Petition (Cont'd)

personal service on the heirs in another proceeding to recover the real property did not satisfy the publication requirement. Huggins v. Powell, 293 Ga. App. 436, 667 S.E.2d 219 (2008) (decided under former O.C.G.A. § 53-8-23).

Valid order may not be collaterally attacked. — An order of a probate court granting an administrator of an estate the authority to sell land of the estate may not be collaterally attacked if the order is valid on its face. Lyday v. Burkes, 261 Ga. 465, 405 S.E.2d 472 (1991), cert. denied, 502 U.S. 1016, 112 S. Ct. 664, 116 L. Ed. 2d 755 (1992) (decided under former O.C.G.A. § 53-8-46).

Order

An administrator may sell the property of an intestate for the purpose of paying debts, after first obtaining an order from the court of ordinary (now probate court) for that purpose. Jernigan v. Radford, 182 Ga. 484, 185 S.E. 828 (1936) (decided under former Code 1933, § 113-1706).

Sale without order. — When it appears on the face of the record that there was no valid order to sell, purchasers are not protected. Fussell v. Dennard, 118 Ga. 270, 45 S.E. 247 (1903) (decided under former Civil Code 1895, § 3463).

An administrator cannot, without an order from the judge of the probate court, legally sell a promissory note payable to the administrator's intestate, which has come to the administrator's hands as assets. Hiatt v. Tumlin, 46 Ga. App. 105, 166 S.E. 836 (1932) (decided under former Civil Code 1910, § 4025).

Sale without any order from the ordinary (now probate judge) is void, and passes no title to the purchaser. Dowling v. Keen, 187 Ga. 394, 200 S.E. 789 (1939) (decided under former Code 1933, §§ 113-1705 and 113-1706).

Order as an adjudication — Before heirs are deprived of their right of inheritance, there not only must exist a necessity that the lands be sold by the administrator either to pay debts or to make distribution, the order granting leave to sell being evidence of such necessity, but also that the administrator actually sold the land; it is the sale under the order that divests the title. Sangster v. Toledo Mfg. Co., 193 Ga. 685, 19 S.E.2d 723 (1942) (decided under former Code 1933, § 113-1706).

Order by the ordinary's court (now probate court) is in effect not only leave to sell, but is an adjudication by a court of competent jurisdiction that it is necessary for the land to be administered for one or the other or both of the purposes indicated in former Code 1933, §§ 113-901 and 113-1706 (i.e., for payment of debts and distribution among the heirs) and that it is for the benefit of the heirs and creditors. Warren v. Warren, 104 Ga. App. 184, 121 S.E.2d 343 (1961) (decided under former Code 1933, § 113-1706).

When the estate consisted of approximately 50 acres with fractional interests as small as 1/280ths vested in great grandchildren of the testator, a division in kind was virtually impossible and the trial court did not err in appointing commissioners and directing a sale. Johnston v. Duncan, 227 Ga. 298, 180 S.E.2d 348 (1971) (decided under former Code 1933, § 113-1706).

Order is condition precedent to sale. — See Patterson v. Lemon, 50 Ga. 231 (1873) (decided under Ga. L. 1869, p. 13, § 1); Fussell v. Dennard, 118 Ga. 270, 45 S.E. 247 (1903) (decided under former Civil Code 1895, § 3450); Hollinshed v. Woodard, 124 Ga. 721, 52 S.E. 815 (1906) (decided under former Civil Code 1895, § 3450); Edwards v. Sands, 150 Ga. 11, 102 S.E. 426 (1920) (decided under former Civil Code 1910, § 4026).

Requirement that the order must specify the land "as definitely as possible" is directory only, and indefiniteness is not an objection which can be urged collaterally. Brooks v. Rooney, 11 Ga. 423, 56 Am. Dec. 430 (1852) (decided under Laws 1826, Cobb's 1851 Digest, p. 323); Davie v. McDaniel, 47 Ga. 195 (1872) (decided under former Code 1863, § 2518); Hayes v. Dickson, 148 Ga. 700, 98 S.E. 345 (1919) (decided under former Civil Code 1910, § 4026).

Specification of terms. — There is no specific requirement that an order granting leave to sell specify the terms of sale.

Adamson v. James, 233 Ga. 130, 210 S.E.2d 686 (1974) (decided under former Code 1933, § 113-1706).

Administrator is an agent, with limited authority, and the administrator can only acquire power to sell by complying with the requirements of law as to advertisement and citation. And the court in turn only has authority to confer this power after such notice has been given. Powell v. Harrison, 180 Ga. 197, 178 S.E. 745 (1935) (decided under former Code 1933, § 113-1706).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under Ga. L. 1943, p. 236, § 5, are included in the annotations for this Code section.

While word "trustee," used in broad sense, includes guardians, the law will not permit other than strict construction of the word, which will not include a guardian. 1960-61 Op. Att'y Gen. p. 247 (decided under Ga. L. 1943, p. 236, § 5).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Easements and Licenses, § 11. 26 Am. Jur. 2d, Eminent Domain, § 261. 31 Am. Jur. 2d, Executors and Administrators, §§ 614, 724 et seq., 727 et seq., 732, 737 et seq., 755, 765 et seq., 787, 794, 804 et seq., 812, 814, 815, 825, 872, 881.

C.J.S. — 29A C.J.S., Eminent Domain, § 263. 30A C.J.S., Equity, § 59 et seq. 34 C.J.S., Executors and Administrators, §§ 329, 358 et seq., 404, 407, 653, 654, 659 et seq., 671, 678 et seq., 700, 702 et seq., 728 et seq., 745 et seq., 757 et seq., 765 et seq.

ALR. — Right to exercise power of sale of real estate after time limited by will, 31 A.L.R. 1394.

Power of those who accept executorship or trusteeship to exercise right to sell real property conferred by will on several named as executors and trustees, some of whom fail to refuse to accept, 36 A.L.R. 826.

Right of personal representative or heir to sell burial lot owned by deceased, 76 A.L.R. 1371.

Liability of sureties on bond of executor or administrator c.t.a. in respect of proceeds of sale or real property which he was directed or empowered by will to sell, 91 A.L.R. 943.

Liability for debts of decedent's estate of property which has passed out of hands of beneficiary of estate in whose hands it was liable, 103 A.L.R. 1004.

Trustee's, executor's, administrator's, or guardian's purchase from or sale to corporation of which he is an officer or stockholder, as voidable or as ground for surcharging his account, 105 A.L.R. 449.

Liability to heirs, devisees, legatees, or distributees of executor or administrator or his bond in respect of invalid sale of property of the estate, 106 A.L.R. 429.

Void or voidable character of sale made in violation of statute providing that no representative making sale shall be interested therein, but confirmed by court, 111 A.L.R. 1362.

Expectant, conditional, or contingent nature of gift or bequest to person in specified relationship to decedent as preventing deduction or exemption in computing estate tax, 112 A.L.R. 266.

Construction and application of statutory provisions permitting the sale of homestead for purpose of paying decedent's debts or legacies, 116 A.L.R. 85.

Power of sale conferred on executor by testator as authorizing private sale, 11 A.L.R.2d 955.

Implied power of executor or testamentary trustee to sell real estate, 23 A.L.R.2d 1000.

Power of executor to create easements, 44 A.L.R.2d 573.

Power of executor or trustee with power to sell or to lease real property, or to do both, to give an option to purchase, 83 A.L.R.2d 1310.

Enforceability of contractual right, in which fiduciary has interest, to purchase

property of estate or trust, 6 A.L.R.4th 786.

53-8-14. Warranty; personal liability of personal representative.

(a) Regardless of whether a personal representative has the powers provided by paragraph (1) of subsection (b) of Code Section 53-12-261 or by the corresponding provision of any statute incorporated pursuant to subsection (d) of Code Section 53-12-263 or otherwise has similar such powers, and regardless of whether such powers are granted by a probate court or are enumerated in or incorporated by reference into a will by a testator, a personal representative may not bind the estate by any warranty in any conveyance or contract.

(b) A personal representative shall not be bound personally by any warranty in any conveyance or contract, unless the intention to create a personal liability is distinctly expressed.

History. — Code 1981, § 53-8-14, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-58/HB 865.

The 2020 amendment, effective January 1, 2021, rewrote this Code section, which read: "A personal representative may not bind the estate by any warranty in any conveyance or contract, nor shall a personal representative be personally bound by such covenant, unless the intention to create a personal liability is distinctly expressed."

COMMENT

This section carries forward the provisions of former OCGA Sec. 53-8-48.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 2522, former Code 1933, § 113-1713, and former O.C.G.A. § 53-8-48 are included in the annotations for this Code section.

Scope. — Deeds in which the named grantor was decedent's estate, and which were signed in the name of the estate and of the two executors, were deeds by the executors of the estate in their official capacity and purported to convey properties belonging to the estate, and were not the personal deeds of the individuals designated as executors. Harrison v. Harrison, 214 Ga. 393, 105 S.E.2d 214 (1958) (decided under former Code 1933, § 113-1713).

It was the rule at common law that neither an executor nor an administrator could bind the estate by warranty of title, and the language of this statute has been applied to administrators and executors equally, the inclusion of the statute doing no more than to limit the liability of the fiduciary in the fiduciary's individual capacity. Smith Realty Co. v. Hubbard, 124 Ga. App. 265, 183 S.E.2d 506 (1971) (decided under former Code 1933, § 113-1713).

Statute does not say that an administrator with the will annexed cannot by administrator's deed convey good and marketable title to real estate owned by the decedent, or that if the administrator did so the administrator would be subject to an action at law because in the sale contract the administrator had in the administrator's representative capacity signed a contract of sale containing a general warranty of title. Smith Realty Co. v. Hubbard, 124 Ga. App. 265, 183 S.E.2d 506 (1971) (decided under former Code 1933, § 113-1713).

If executor be given power by will to bind estate by warranty deed, such fact must appear in evidence; otherwise the executor is prevented from making such warranty. Clark v. Whitehead, 47 Ga. 516 (1873) (decided under former Code 1868, § 2522).

Language in will did not give power to bind estate. — Estate trustees who sold property of the estate lacked the power to bind the estate by a warranty of title, under a will giving the trustees "the power to do all things and execute all instruments as may be deemed necessary or proper . . .." Moss v. Twiggs, 260 Ga. 561, 397 S.E.2d 707 (1990) (decided under former O.C.G.A. § 53-8-48).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, § 790.

C.J.S. — 34 C.J.S., Executors and Administrators, § 775.

ALR. — Personal liability of trustee, executor, administrator, or guardian, as affected by terms of contract or form of signature, 138 A.L.R. 155.

53-8-15. Passage of title to heirs or beneficiaries; assent of personal representative.

(a) The title to all property of an estate being in the personal representative for the payment of debts and other purposes of administration, title to property in the estate does not pass to the heirs or beneficiaries until the personal representative assents thereto in evidence of the distribution of the property to them, except as otherwise provided in Code Section 53-2-7.

(b) Such assent may be express or may be presumed from the conduct of the personal representative. Assent should be evidenced in writing as a deed of conveyance to real property, bill of sale conveying tangible personal property, or an assignment or transfer of interests in intangible personal property.

(c) In the absence of prior assent, the discharge of a personal representative shall be conclusive evidence of the personal representative's assent.

(d) At any time after the lapse of one year from the date of qualification of the personal representative, an heir or beneficiary who is entitled to the distribution of property from an estate may, personally or by a guardian or conservator:

(1) Cite the personal representative in the probate court to show cause why assent should not be given after service of notice in accordance with Chapter 11 of this title; and

(2) Subject to Code Section 23-1-4, compel such assent by an equitable proceeding.

History. — Code 1981, § 53-8-15, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 42; Ga. L. 2020, p. 377, § 1-59/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (d), substituted "a guardian or conservator: (1) Cite" for "guardian, cite", and substituted "after service of notice in accordance with Chapter 11 of this title; and (2) Subject to Code Section 23-1-4," for "and may".

Law reviews. — For article advocating uniform treatment of the devolution of title, and abolition of distinctions based on the form of wealth or the fact of intestacy, see 10 Ga. L. Rev. 447 (1976). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 61 Mercer L. Rev. 385 (2009).

COMMENT

This section replaces former OCGA Secs. 53-2-108 through 53-2-110 and expands those sections to apply to all personal representatives, rather than only to executors.

JUDICIAL DECISIONS

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General Consideration
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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 2452, former Code 1882, §§ 2451 and 2452, former Civil Code 1895, § 3320, former Civil Code 1910, §§ 3895 and 3896, former Code 1933, §§ 113-801 and 113-802, and former O.C.G.A. §§ 53-2-108, 53-2-109, and 53-2-110 are included in the annotations for this Code section.

Statute applies with equal force to an administrator cum testamento annexo. Whatley v. Musselwhite, 189 Ga. 91, 5 S.E.2d 227 (1939) (decided under former Code 1933, § 113-801); Nash v. Williamson, 95 Ga. App. 616, 98 S.E.2d 239 (1957) (decided under former Code 1933, § 113-801).

All property of a testator being assets to pay debts, it may, if necessary, be sold for that purpose, regardless of any legacy or devise. Wood v. Bowden, 182 Ga. 329, 185 S.E. 516 (1936) (decided under former Code 1933, § 113-801).

Interests of the devisees in the realty is considered subject to the right of the executor to sell the real estate for the purpose of paying the debts of the estate and the expense of administration, or for the purpose of making distribution to the heirs or for both purposes. Otherwise, the authority to sell given the executor is meaningless. Williams v. Williams, 236 Ga. 133, 223 S.E.2d 109 (1976) (decided under former Code 1933, § 113-801).

Title vests in executors' pending sale of property. — Title to property devised by will, and to be divided among a group of persons upon the happening of a particular event, vests in the executors of the will pending the property's sale, for the purpose of paying debts of the testator, or for the purpose of distribution, in the absence of assent by the executors to the legacy. Whatley v. Musselwhite, 189 Ga. 91, 5 S.E.2d 227 (1939) (decided under former Code 1933, § 113-801).

An executor's assent to devise does not come within the meaning of Ga. L. 1955, p. 731, § 1 (see O.C.G.A. § 53-3-13), which was intended to offer protection to third-party purchasers of property in an estate against claims for year's support, and was not intended to exempt devises and legacies from year's support. Anderson v. Groover, 242 Ga. 50, 247 S.E.2d 851 (1978) (decided under former Code 1933, § 113-801).

Widow's application for year's support is not barred by executor's deed of assent as to the property conveyed therein by operation of Ga. L. 1955, p. 731, § 1 (see O.C.G.A. § 53-3-13). Anderson v. Groover, 242 Ga. 50, 247 S.E.2d 851 (1978) (decided under former Code 1933, § 113-801).

Assent to a devise is not void merely because it is made within 12 months after the appointment and qualification of the executor. Walker v. Horton, 184 Ga. 429, 191 S.E. 462 (1937) (decided under former Code 1933, § 113-801).

Petitioner's attack on assent held inappropriate. — When a petitioner was devised two tracts of land subject to the stipulation that the property not be sold, mortgaged, encumbered, or otherwise disposed of for a period of ten years; and the testator's widow executed a deed of assent which included the alienation restriction adopted from the will, the petitioner's attack on the deed of assent was inappropriate; petitioner's remedy lay in an attack on the enforcement or effect of the provisions of the will from which the petitioner's title was derived. Phillips v. Phillips, 260 Ga. 265, 392 S.E.2d 523 (1990) (decided under former O.C.G.A. § 53-2-108).

Partition appropriate despite lack of assent. — Son and coexecutor of mother's will, under which he and his brother, also his coexecutor, each received an undivided one half interest in property, had standing to bring a partition action in spite of his brother's refusal to assent, and partition was proper although the estate was still in probate. Clay v. Clay, 268 Ga. 40, 485 S.E.2d 205 (1997) (decided under former O.C.G.A. §§ 53-2-108 and 53-2-110).

Requirements of this statute were permissive or directory in effect and not imperative or mandatory. Hemphill v. Simmons, 120 Ga. App. 823, 172 S.E.2d 178 (1969) (decided under former Code 1933, § 113-802).

Process of probating a will in Georgia is essentially a formal validation of the property interests which came into existence upon the death of the testator. Jenkins v. United States, 428 F.2d 538 (5th Cir.), cert. denied, 400 U.S. 829, 91 S. Ct. 59, 27 L. Ed. 2d 59 (1970) (decided under former Code 1933, § 113-802).

Probate is title-accommodating rather than interest-creating. Jenkins v. United States, 428 F.2d 538 (5th Cir.), cert. denied, 400 U.S. 829, 91 S. Ct. 59, 27 L. Ed. 2d 59 (1970) (decided under former Code 1933, § 113-802).

Devisee receives an "inchoate title" subject to perfection when the executor assents to the devise. Jenkins v. United States, 428 F.2d 538 (5th Cir.), cert. denied, 400 U.S. 829, 91 S. Ct. 59, 27 L. Ed. 2d 59 (1970) (decided under former Code 1933, § 113-802).

Devisee possessing an "inchoate title" has a genuine beneficial interest in the property and a right of action against the executor of the estate if the executor has not given the executor's assent to the devise within one year after qualification as executor. Jenkins v. United States, 428 F.2d 538 (5th Cir.), cert. denied, 400 U.S. 829, 91 S. Ct. 59, 27 L. Ed. 2d 59 (1970) (decided under former Code 1933, § 113-802).

Devisee conveying property prior to assent of executor. — Devisee can execute a valid conveyance of the property prior to the assent of the executor; when the executor assents to the devise, the perfected title inures to the benefit of the grantee of the conveyance rather than the devisee-grantor. Jenkins v. United States, 428 F.2d 538 (5th Cir.), cert. denied, 400 U.S. 829, 91 S. Ct. 59, 27 L. Ed. 2d 59 (1970) (decided under former Code 1933, § 113-802).

Devisee under a will may make conveyances of the property devised at any time after the testator's death, subject only to subsequent perfection of the record title. Jenkins v. United States, 428 F.2d 538 (5th Cir.), cert. denied, 400 U.S. 829, 91 S. Ct. 59, 27 L. Ed. 2d 59 (1970) (decided under former Code 1933, § 113-802).

Effect of assent generally. — A legacy is not subject to be seized and sold for the debts of the legatee, until the executor has assented to it; or, at least, until all claims upon it of higher rank than the claim of the legatee have ceased to exist. Suggs v. Sapp, 20 Ga. 100 (1856) (decided under former law). See also Wilkinson & Wilson

General Consideration (Cont'd)

v. Chew, 54 Ga. 602 (1875) (decided under former law).

An executor's assent to a legacy under former Code 1933, §§ 113-801 and 113-802 divested the executor of the title to the property embraced therein and perfects the inchoate title of the legatee so as to give the latter a right of action to recover such property if held adversely to the executor. People's Nat'l Bank v. Cleveland, 117 Ga. 908, 44 S.E. 20 (1903) (decided under former Civil Code 1895, § 3320); Watkins v. Gilmore, 121 Ga. 488, 49 S.E. 598 (1904) (decided under former Civil Code 1895, § 3320).

When the assent of the executor is once given to a devise of land, it is generally irrevocable, although the assets of the estate prove insufficient to pay the debts of the estate. Citizens Bank v. Citizens & S. Bank, 160 Ga. 109, 127 S.E. 219 (1925) (decided under former Civil Code 1910, § 3896).

Assent of the executor to the legacy inures to the benefit of the remaindermen and perfects their title. Moore v. Turner, 148 Ga. 77, 95 S.E. 965 (1918) (decided under former Civil Code 1910, § 3896); Citizens Bank v. Citizens & S. Bank, 160 Ga. 109, 127 S.E. 219 (1925) (decided under former Civil Code 1910, § 3896).

Assent to a legacy places title in the legatee and is generally irrevocable once made. Parker v. Peavey, 198 Ga. App. 694, 403 S.E.2d 213 (1991) (decided under former O.C.G.A. § 53-2-109).

Trial court properly granted summary judgment in favor of a mineral rights owner in an action brought by a ranch seeking to extinguish the rights because the owner derived the interest from a will and, as both the devisee of the property under the will and as a co-executor of the estate, the owner had a legally enforceable interest in the reserved mineral rights. Cartersville Ranch, LLC v. Dellinger, 295 Ga. 195, 758 S.E.2d 781 (2014).

Beneficiaries not entitled to distribution. — Brother and sister were not entitled, under O.C.G.A. § 53-8-15(d), to an order requiring the executor to deed real property left to the brother, sister, and executor as a residual testamentary gift; a residual testamentary gift was a general testamentary gift that, under O.C.G.A. § 53-4-59, did not require the delivery of any particular property. Travis v. Travis, 279 Ga. 847, 621 S.E.2d 721 (2005).

Real party in interest claim waived. — Appellees' claim that the administrator of the estate of a property owner's mother, as legal title holder to the devised property at the time a suit challenging the grant of a special exception was filed, was the proper party to bring the action was waived as the appellees did not move to dismiss the action on the ground, and no action was to be dismissed on the ground that it was not prosecuted in the name of the real party in interest until a reasonable time had been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Hollberg v. Spalding County, 281 Ga. App. 768, 637 S.E.2d 163 (2006).

Cited in Jordon v. Miller, 47 Ga. 346 (1872); Johnson v. Porter, 115 Ga. 401, 41 S.E. 644 (1902); Chamblee v. Atlanta Brewing & Ice Co., 131 Ga. 554, 62 S.E. 1032 (1908); Grant v. Rose, 32 F.2d 812 (N.D. Ga. 1929); Cozart v. Mobley, 43 Ga. App. 630, 159 S.E. 749 (1931); Coastal Pub. Serv. Co. v. Mordecai, 49 Ga. App. 60, 174 S.E. 147 (1934); Lewis v. Patterson, 191 Ga. 348, 12 S.E.2d 593 (1940); Johnson v. City of Blackshear, 196 Ga. 652, 27 S.E.2d 316 (1943); Armstrong v. Merts, 76 Ga. App. 465, 46 S.E.2d 529 (1948); Whitlock v. Michael, 208 Ga. 229, 65 S.E.2d 797 (1951); May v. Braddock, 91 Ga. App. 853, 87 S.E.2d 365 (1955); United States v. Jenkins, 153 F. Supp. 636 (S.D. Ga. 1957); Brewton v. McLeod, 216 Ga. 71, 114 S.E.2d 409 (1960); Stone v. Stone, 218 Ga. 789, 130 S.E.2d 727 (1963); Dukes v. Cairo Banking Co., 220 Ga. 507, 140 S.E.2d 182 (1964); Rogers v. Rogers, 113 Ga. App. 370, 147 S.E.2d 811 (1966); Woodall v. First Nat'l Bank, 118 Ga. App. 440, 164 S.E.2d 361 (1968); Allan v. Allan, 236 Ga. 199, 223 S.E.2d 445 (1976); Moore v. Lindsey, 662 F.2d 354 (5th Cir. 1981); Moore v. Moore, 255 Ga. 308, 336 S.E.2d 804 (1985).

Assent Required to Pass Title

Interest of a devisee is an assignable property right, and can be the subject of a voluntary conveyance. Williams v. Williams, 236 Ga. 133, 223 S.E.2d 109 (1976) (decided under former Code 1933, § 113-801).

Legacy is not subject to be seized and sold for the debts of the legatee, until the executor has assented to it; or, at least, until all claims upon it of higher rank than the claim of the legatee, have ceased to exist. Spence v. Phillips, 172 Ga. 782, 158 S.E. 797 (1931) (decided under former Civil Code 1910, § 3895).

Title does not vest in a devisee until the executor of the estate gives assent to the devise. Jenkins v. United States, 428 F.2d 538 (5th Cir.), cert. denied, 400 U.S. 829, 91 S. Ct. 59, 27 L. Ed. 2d 59 (1970) (decided under former Code 1933, § 113-801).

Unclear to whom property devised. — Persons claiming title to land as heirs at law cannot prevail on their claim when it appears that their ancestor, from whom they claim by inheritance, left a will disposing of her estate, and it does not appear whether or to whom the property involved was devised, or whether, if devised, the legacy had been assented to. Hicks v. Hicks, 193 Ga. 382, 18 S.E.2d 763 (1942) (decided under former Code 1933, § 113-801).

Devisee receives only an "inchoate title" subject to perfection when the executor assents to the devise. Jenkins v. United States, 428 F.2d 538 (5th Cir.), cert. denied, 400 U.S. 829, 91 S. Ct. 59, 27 L. Ed. 2d 59 (1970) (decided under former Code 1933, § 113-801).

Although a devisee does not receive a perfected title at the moment of the testator's death, a devisee does receive the essence of interest under the will. Jenkins v. United States, 428 F.2d 538 (5th Cir.), cert. denied, 400 U.S. 829, 91 S. Ct. 59, 27 L. Ed. 2d 59 (1970) (decided under former Code 1933, § 113-801).

Assent may be withheld pending satisfaction of claims of higher rank. — Legacy does not vest in the legatee until the executor has assented to the legacy, or, at least, until the time has come when the executor ought to assent to it; and that time does not come until it is seen with reasonable certainty, that one will need the legacy to enable one to pay claims of a higher rank than the claim of a legatee. Register v. Harper, 177 Ga. 769, 171 S.E. 269 (1933) (decided under former Civil Code 1910, § 3895).

Satisfaction of debt owed to estate by devisee. — While it has been held that the legal representative may retain the share of an heir or devisee in payment of a debt due by the latter to the estate, rulings to this effect have reference to the power of an executor to withhold assent, and not to the validity or force of assent given. Walker v. Horton, 184 Ga. 429, 191 S.E. 462 (1937) (decided under former Code 1933, § 113-801).

Delay in vesting protects creditors. — Purpose of the delay in vesting of title is not to cut off or diminish any beneficial interest of any devisee, but is merely to ensure that the debts of the estate are paid and is a procedural device to protect the creditors. Jenkins v. United States, 428 F.2d 538 (5th Cir.), cert. denied, 400 U.S. 829, 91 S. Ct. 59, 27 L. Ed. 2d 59 (1970) (decided under former Code 1933, § 113-801).

Assent and delivery removes property from estate. — When under the terms of a will the executor assents to a devise and delivers the property to the life tenant, the title passes out of the estate, and when at the death of the life tenant an administrator is appointed and seeks to sell the property and distribute the proceeds, such an administration is void for lack of jurisdiction in the probate court; and, accordingly, in a suit by the remainderman for equitable partition, the trial court errs in directing a verdict for the defendants. Pope v. Stanley, 202 Ga. 180, 42 S.E.2d 488 (1947) (decided under former Code 1933, § 113-801).

Title to property remains in the executor until it assents to the devisee. After such assent is given the land is no longer a part of the estate. State Hwy. Dep't v. Stewart, 104 Ga. App. 178, 121 S.E.2d 278 (1961) (decided under former Code 1933, § 113-801).

Until the required assent by the executor, the legal title to the devised realty and bequeathed personalty of

Assent Required to Pass Title (Cont'd)

the testator is in the executor; and an executor is a trustee, having title to the devised realty as well as to the bequeathed personalty for the purposes of using the money to pay debts and legacies. Blake v. Black, 84 Ga. 392, 11 S.E. 494 (1890) (decided under former Code 1882, § 2451).

Personal representative holds the title for a limited purpose, and the executor is a trustee in a limited sense. Moore v. Turner, 148 Ga. 77, 95 S.E. 965 (1918) (decided under former Civil Code 1910, § 3895); Clay v. Clay, 149 Ga. 725, 101 S.E. 793 (1920) (decided under former Civil Code 1910, § 3895); City of Blakely v. Hilton, 150 Ga. 27, 102 S.E. 340 (1920) (decided under former Civil Code 1910, § 3895).

Duties of executor complete upon assent and delivery. — Even when the same person is expressly or by implication made trustee as well as executor, the administration of the executor does not end until there is a delivery, express or implied, to the trustee, upon assent of the executor, express or implied, to the legacy in trust. Robinson v. Georgia Sav. Bank & Trust Co., 185 Ga. 688, 196 S.E. 395 (1938) (decided under former Code 1933, § 113-801); Perdue v. McKenzie, 194 Ga. 356, 21 S.E.2d 705 (1942) (decided under former Code 1933, § 113-801).

When under a will an executor assents to a devise or legacy of a promissory note, the property is no longer part of the estate since by assenting the executor loses all control and interest in the property and the right to sue on the note passes to the devisee or legatee. Hemphill v. Simmons, 120 Ga. App. 823, 172 S.E.2d 178 (1969) (decided under former Code 1933, § 113-801).

Presumed Assent

Assent. — Administrator seeking to recover compensation for services as a trustee did not show that assets ever passed to the trust pursuant to assent under O.C.G.A. § 53-8-15(b). Payments made to benefit the beneficiaries began with a petition to invade the corpus of the estate, not the trust, and it could not be said that investments were consistent only with investments by a trustee. In re Estate of Moore, 292 Ga. App. 236, 664 S.E.2d 259 (2008).

Assent presumed when executor and devisee are same person. — When the devisees and executors are the same persons, and devisees dispose of the land in their individual capacity, the assent of the executors to the legacy will be presumed. Register v. Harper, 177 Ga. 769, 171 S.E. 269 (1933) (decided under former Code 1933, § 113-801).

Title of a legatee being inchoate until the consent of the executor, express or implied, no right of action by a legatee to recover adversely held property by trover or ejectment is shown, unless such assent appears, but the assent of an executor to a legacy will be presumed, where a devisee of certain land and the executor are the same person, and the devisee in the devisee's individual capacity has disposed of the land. Such an assent to a life tenant will inure also to the benefit of the remainderman in fee. Earle v. Barrett, 51 Ga. App. 514, 180 S.E. 855 (1935) (decided under former Code 1933, § 113-801).

When the devisee and the executor are the same person, and the devisee remains in possession of the real estate for five years, during which time the devisee returns it for taxation as the devisee's individual property, the assent of the executor to the devise will be presumed. Holcombe v. Stauffacher, 201 Ga. 38, 38 S.E.2d 818 (1946) (decided under former Code 1933, § 113-801).

When the devisee, and the executor are the same person, and the devisee remains in possession of the real estate for a number of years, during which time the devisee exercises acts of ownership, the assent of the executor to the devise will be presumed. Thornton v. Hardin, 205 Ga. 215, 52 S.E.2d 841 (1949) (decided under former Code 1933, § 113-801).

Assent presumed when legatee has possession of property. — Since there is a presumption that executors will perform their duties and will thus take care of estates entrusted to them, when nothing else appears, the assent of an executor to a legacy may be presumed or implied from

possession of the property by the legatee. Holcombe v. Stauffacher, 201 Ga. 38, 38 S.E.2d 818 (1946) (decided under former Code 1933, § 113-801).

Assent will not be presumed or implied. — An assent by an executor to a legacy, in derogation of the rights of creditors, will not be presumed or implied, in the absence of plain and unequivocal facts upon which such an implied assent is based. Wilson v. Aldenderfer, 183 Ga. 760, 189 S.E. 907 (1937) (decided under former Code 1933, § 113-801).

A finding that there had been express assent to the devise by a trust company as alternative executor named by the will (which executor succeeded the executor and preceded administrators de bonis non cum testamento annexo) was authorized by evidence of such executor's written consent to the allegations and prayers of a petition to the ordinary (now probate judge) by the devisee remainderman, including the plaintiff, wherein it was alleged that the estate had been fully administered and all debts had been paid except one or more mortgage debts not due and amply secured by real estate, and that the real estate had vested in the petitioners, who were then in possession of the real estate, and praying that the trust company be permitted to resign. Wilson v. Aldenderfer, 183 Ga. 760, 189 S.E. 907 (1937) (decided under former Code 1933, § 113-801).

Even in absence of express assent to transfer of real property to beneficiaries, a co-executor's participation in a prior settlement which resulted in the transfer, in the co-executor's individual capacity as a beneficiary, was conduct which showed the co-executor's assent by presumption or implication to the decree of title to the property in the beneficiaries. Baggett v. Baggett, 270 Ga. App. 619, 608 S.E.2d 688 (2004) (decided under former O.C.G.A. § 53-2-108).

Assent presumed from inaction of executor. — Assent of the executor to the vesting of the title to the real estate in the beneficiaries of the estate may be presumed from one's conduct in not recording such deed until some 15 months after receipt of the deed shortly after one attempted to convey the entire tract of realty. Cook v. Cook, 225 Ga. 779, 171 S.E.2d 568 (1969) (decided under former Code 1933, § 113-802).

Assent presumed from fraudulent acts of executor. — If the executors named in the will take possession of the money and fail to turn it over to the life tenant, but convert it to their own use, on the death of the life tenant, the remaindermen named in the will may bring an action against such executors individually for a recovery thereof without alleging in express terms that the executors assented to the devise, since under such conditions, assent to the devise will be presumed. Paulk v. Smith, 56 Ga. App. 53, 192 S.E. 68 (1937) (decided under former Code 1933, § 113-802 as it appeared prior to 1958).

Assent presumed from conduct of executor generally. — Assent of the executor may be presumed from the executor's conduct. Clay v. Clay, 149 Ga. 725, 101 S.E. 793 (1920) (decided under former Civil Code 1910, § 3896); Citizens Bank v. Citizens & S. Bank, 160 Ga. 109, 127 S.E. 219 (1925) (decided under former Civil Code 1910, § 3896).

Assent presumed from possession of property by legatee. — Assent of an executor to a legacy may be implied from the possession of the property by the legatee, and assent given to a tenant for life will enure to the benefit of the remainderman in fee. Jordan v. Thornton, 7 Ga. 517 (1849) (decided under former law); Moore v. Turner, 148 Ga. 77, 95 S.E. 965 (1918) (decided under former Civil Code 1910, § 3896).

Assent from possession to a legacy of personal property will not be implied solely from the circumstance that both legatee and executor, who sustain the relation of mother and son, live in the same house, when the legatee is not in exclusive possession of the personalty devised. Johnson v. Thomas, 144 Ga. 69, 86 S.E. 236 (1915) (decided under former Civil Code 1910, § 3896).

Since there is a presumption that executors will perform their duties and will thus take care of estates entrusted to them, when nothing else appears, the assent of an executor to a legacy may be presumed or implied from possession of

Presumed Assent (Cont'd)

the property by the legatee. Holcombe v. Stauffacher, 201 Ga. 38, 38 S.E.2d 818 (1946) (decided under former Code 1933, § 113-802).

Assent presumed when executor and devisee are same person. — When the devisee and the executor are the same person, and the demise is in the name of the devisee, the assent of the executor to the legacy will be presumed. Thursby v. Myers, 57 Ga. 155 (1876) (decided under former Code 1873, § 2452). See also Citizens Bank v. Citizens & S. Bank, 160 Ga. 109, 127 S.E. 219 (1925) (decided under former Civil Code 1910, § 3896).

When the devisees and executors are the same persons, and devisees dispose of the land in their individual capacity, the assent of the executors to the legacy will be presumed. Register v. Harper, 177 Ga. 769, 171 S.E. 269 (1933) (decided under former Code 1933, § 113-802).

Presumed assent by an executor to a bequest of household and kitchen furniture to a person during the person's life or until the person's remarriage, and thereafter to other named persons including the executor, would inure to the benefit of the conditional or contingent legatees, when the executor joined with such other legatees in bringing a trover action against the first legatee holding for life or until remarriage, and claimed title and right of possession of the bequeathed property under the legacy. Earle v. Barrett, 51 Ga. App. 514, 180 S.E. 855 (1935) (decided under former Code 1933, § 113-802).

Title of a legatee being inchoate until the consent of the executor, express or implied, no right of action by a legatee to recover adversely held property by trover or ejectment is shown, unless such assent appears, but the assent of an executor to a legacy will be presumed, when a devisee of certain land and the executor are the same person, and the devisee in one's individual capacity has disposed of the land. Such an assent to a life tenant will inure also to the benefit of the remainderman in fee. Earle v. Barrett, 51 Ga. App. 514, 180 S.E. 855 (1935) (decided under former Code 1933, § 113-802).

In suit in ejectment by remainderman claiming an undivided one-fourth interest under a devise in a will, against one claiming under a purchaser at a sale by administrators de bonis non cum testamento annexo, made for the purpose of paying debts and distribution, the evidence could not be taken to have proved a previous implied assent to the devise, by virtue of the fact that the life tenant, who, under the will had also been executor, had occupied the premises in dispute for three years, and while so doing had paid from one's individual resources certain items incurred for repairs to the property, when it was apparent that such executor had knowledge of the existence of debts for the payment of which the property was afterwards sold by a subsequently appointed representative of the estate. Wilson v. Aldenderfer, 183 Ga. 760, 189 S.E. 907 (1937) (decided under former Code 1933, § 113-802).

If the devisee and the executor are the same person, and the devisee remains in possession of the real estate for five years, during which time the executor returns the property for taxation as the executor's individual property, the assent of the executor to the devise will be presumed. Holcombe v. Stauffacher, 201 Ga. 38, 38 S.E.2d 818 (1946) (decided under former Code 1933, § 113-802).

When the devisee and the executor are the same person, and the devisee remains in possession of the real estate for a number of years, during which time the executor exercises acts of ownership, the assent of the executor to the devise will be presumed. Thornton v. Hardin, 205 Ga. 215, 52 S.E.2d 841 (1949) (decided under former Code 1933, § 113-802).

If the devisee or legatee is also the executor, the assent of the executor to the bequest will be presumed absent any contrary evidence. Hemphill v. Simmons, 120 Ga. App. 823, 172 S.E.2d 178 (1969) (decided under former Code 1933, § 113-802).

Assent presumed when executor discharged. — Court will presume the assent of an executor to a legacy when the executor has been discharged, and the life tenant has remained in possession of the land devised for some ten years thereafter.

Vaughn v. Howard, 75 Ga. 285 (1885) (decided under former Code 1882, § 2452).

Assent presumed upon payment of debts. — When the debts have been paid, an assent to the legacies would be implied. Webb v. Hicks, 117 Ga. 335, 43 S.E. 738 (1903) (decided under former Civil Code 1895, § 3320).

Assent presumed after lapse of time generally. — When an estate is given for life to the widow of the testator with remainder to seven children, after the lapse of 30 years and upwards, the courts will presume that the life estate has vested by the assent of the executor, and with it the remainder in the remaindermen. Coleman v. Lane, 26 Ga. 515 (1858) (decided under former law).

Residuary devisee has both title and the right of possession, according to the fact of the will, although assent of the executor (the executor having declined to qualify) be not affirmatively shown, the will having been probated more than 20 years; and although the devise of the residuum was after the payment of debts, etc., the existence of debts or charges upon the estate not being proved, the presumption after such a lapse of time being against their existence. Flemister v. Flemister, 83 Ga. 79, 9 S.E. 724 (1889) (decided under former Code 1882, § 2452).

Assent of an executor to a devise will be presumed after the lapse of more than 30 years and when a finding that such assent was given will necessarily constrain a verdict for the defendant, and the plaintiff fails to rebut the presumption of assent, it is not error to direct a verdict for the defendant. Phillips v. Smith, 119 Ga. 556, 46 S.E. 640 (1904) (decided under former Civil Code 1895, § 3320).

Provision of former Civil Code 1910, §§ 3895 and 3896 that a devise of land did not pass title until the devise has been assented to by the executors was for the purpose of keeping the property subject to the testator's debts, and, if from the lapse of time there was a presumption that there were no debts, the consent of the executors may be presumed, and the devisee may maintain ejectment to recover the land from an adverse claimant without proof of formal consent. Northrop v. Columbian Lumber Co., 186 F. 770 (5th Cir. 1911) (decided under former Civil Code 1910, § 3896).

Assent is not necessarily presumed from residence of the legatee or similar facts. Kittles v. Bolton, 200 Ga. App. 10, 406 S.E.2d 496, cert. denied, 200 Ga. App. 896, 406 S.E.2d 496 (1991) (decided under former O.C.G.A. § 53-2-109).

Even in absence of express assent to a transfer of real property to the beneficiaries, a co-executor's participation in a prior settlement which resulted in the transfer, in the co-executor's individual capacity as a beneficiary, was conduct which showed the co-executor's assent by presumption or implication to the decree of title to the property in the beneficiaries. Baggett v. Baggett, 270 Ga. App. 619, 608 S.E.2d 688 (2004) (decided under former O.C.G.A. § 53-2-109).

Effect of Assent upon Life Estate Remaindermen

Assent of an executor to the legacy of a tenant for life inures to the benefit of the remaindermen, and they may, at the termination of the life estate, take possession immediately. The executor can recover possession only when it is necessary for the executor to have it for the purpose of executing the will, when it provides for a sale or other act to be done in order to effect a division among the remaindermen. Miller v. Harris County, 186 Ga. 648, 198 S.E. 673 (1938) (decided under former Code 1933, § 113-801).

Remaindermen and legacy. — Presumed assent by an executor to a bequest of household and kitchen furniture to a person during the person's life or until the person's remarriage, and thereafter to other named persons including the executor, would inure to the benefit of the conditional or contingent legatees, where the executor joined with such other legatees in bringing trover action against the first legatee holding for life or until remarriage, and claimed title and right of possession of the bequeathed property under the legacy. Earle v. Barrett, 51 Ga. App. 514, 180 S.E. 855 (1935) (decided under former Code 1933, § 113-801).

In suit in ejectment by remainderman claiming an undivided one-fourth interest

Effect of Assent upon Life Estate Remaindermen (Cont'd)

under a devise in a will, against one claiming under a purchaser at a sale by administrators de bonis non cum testamento annexo, made for the purpose of paying debts and distribution, the evidence could not be taken to have proved a previous implied assent to the devise, by virtue of the fact that the life tenant, who, under the will had also been executor, had occupied the premises in dispute for three years, and while so doing had paid from her individual resources certain items incurred for repairs to the property, where it was apparent that such executor had knowledge of the existence of debts for the payment of which the property was afterwards sold by a subsequently appointed representative of the estate. Wilson v. Aldenderfer, 183 Ga. 760, 189 S.E. 907 (1937) (decided under former Code 1933, § 113-801).

If the executors named in the will take possession of the money and fail to turn it over to the life tenant, but convert it to their own use, on the death of the life tenant, the remaindermen named in the will may bring an action against such executors individually for a recovery thereof without alleging in express terms that the executors assented to the devise, since under such conditions, assent to the devise will be presumed. Paulk v. Smith, 56 Ga. App. 53, 192 S.E. 68 (1937) (decided under former Code 1933, § 113-801).

When, under the executor's assent to a devise for life with remainder over, the remainderman, after the death of the life tenant, becomes entitled to the immediate possession of the land, such land is no longer any part of the estate of the testator. Miller v. Harris County, 186 Ga. 648, 198 S.E. 673 (1938) (decided under former Code 1933, § 113-801).

Assent of an executor to a devise to a life tenant inures to the benefit of the remaindermen, and after such assent the vested interest of the remaindermen is subject to levy and sale, though the life estate is not terminated. Thornton v. Hardin, 205 Ga. 215, 52 S.E.2d 841 (1949) (decided under former Code 1933, § 113-801).

Irrevocability

Debts do not prevent assent. — Fact that there may have been debts does not prevent the executor from assenting to the legacy; and if assent is once given, it is generally irrevocable. Hemphill v. Simmons, 120 Ga. App. 823, 172 S.E.2d 178 (1969) (decided under former Code 1933, § 113-801); Dunagan v. Elder, 154 Ga. App. 728, 270 S.E.2d 18 (1980) (decided under former Code 1933, § 113-801).

Assent considered irrevocable; remedy of unpaid creditor. — As a general rule, an assent once given to a devise is irrevocable and perfects the inchoate title to the property in the devisee, if the assets of the estate may prove insufficient to pay the debts, in which case the remedy of an unpaid creditor is, generally, not to have the devised land subjected to a sale under an order of the ordinary (now probate judge), or under a judgment against the executor, but to follow the property into the hands of the devisee and there subject it at law or equity to the payment of the claim. Wilson v. Aldenderfer, 183 Ga. 760, 189 S.E. 907 (1937) (decided under former Code 1933, § 113-801).

Assent of an executor to a devise of land places title in the devisee, and assent once given is generally irrevocable. Walker v. Horton, 184 Ga. 429, 191 S.E. 462 (1937) (decided under former Code 1933, § 113-801); Miller v. Harris County, 186 Ga. 648, 198 S.E. 673 (1938) (decided under former Code 1933, § 113-801).

When after an assent to a devise the property is levied on to satisfy a judgment against the devisee, the legal representative cannot reclaim the property merely because the devisee is indebted to the estate, or there are debts against the estate, pending the settlement of which assent could have been withheld. Whatever may be the remedy of creditors of the estate or other devisees in such case, the assent is binding upon the legal representative so long as it stands; and whether or not it might be revoked for cause such as fraud, accident, or mistake, in the instant case there was nothing to show a revocation, nor was there any evidence that the legal representative was not fully aware of the condition of the estate at the time of

the assent, as found by the jury to have been given. Walker v. Horton, 184 Ga. 429, 191 S.E. 462 (1937) (decided under former Code 1933, § 113-801).

There being evidence to authorize the inference that due assent to the devise had been given, and no evidence of its revocation or of ground for revocation, a charge to the jury, without qualification, that an assent to a devise cannot be withdrawn, was harmless to the claimant, if erroneous. Walker v. Horton, 184 Ga. 429, 191 S.E. 462 (1937) (decided under former Code 1933, § 113-801).

Rights of Creditors

Rights of creditors superior to title of executor administering to oneself. — An exception to general rule that assent to a devise is irrevocable even if the assets of the estate prove insufficient to pay debts in that an executor is precluded from administering to oneself as against the rights of creditors of whose claims one has notice. Wilson v. Aldenderfer, 183 Ga. 760, 189 S.E. 907 (1937) (decided under former Code 1933, § 113-801).

Assent may not be capriciously withheld. — When it appears that the debts of the estate have been in fact paid, assent to legacies will be implied or should be ordered, since an executor cannot destroy a legacy by capriciously withholding assent. Moody v. McHan, 184 Ga. 740, 193 S.E. 240 (1937) (decided under former Code 1933, § 113-802).

Derogation of rights of creditors will not be presumed. — Since there is a presumption of law that executors act legally rather than illegally and do the things that they should do rather than those that they should not do, an assent by an executor to a legacy, in derogation of the rights of creditors, will not be presumed or implied, in the absence of plain and unequivocal facts upon which such an implied assent is based. Wilson v. Aldenderfer, 183 Ga. 760, 189 S.E. 907 (1937) (decided under former Code 1933, § 113-802).

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 1, 3, 11 et seq., 21, 504, 535, 649, 914, 915, 917, 919, 943, 973, 974. 80 Am. Jur. 2d, Wills, § 1493.

C.J.S. — 34 C.J.S., Executors and Administrators, §§ 332, 340, 396, 602 et seq., 639, 629.

ALR. — Duty and liability of executor (or administrator with will annexed) in respect of personal property specifically bequeathed, and not needed for payment of debts, 127 A.L.R. 1071.

Title of, or right to possession by, specific legatee prior to order or decree of distribution, 150 A.L.R. 91.

CHAPTER 9

MISSING PERSONS AND PERSONS BELIEVED TO BE DEAD

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53-9-21. Appointment of conservator.

Editor's notes. — This chapter was effective January 1, 1998, to the extent that no vested rights of title, year's support, succession, or inheritance are impaired, as provided by the version of Code Section 53-1-1 enacted by Ga. L. 1996, p. 504, § 10.

Ga. L. 1996, p. 504, § 10, effective January 1, 1998, repealed the Code sections formerly codified at this chapter, and enacted the current chapter. The former chapter consisted of §§ 53-9-1 through 53-9-47, and was based on Code 1933, §§ 113-2701a, 113-2702a, 113-2703a, 113-2704a, 113-2705a, 113-2706a, 113-2707a, 113-2708a, 113-2709a; Ga. L. 1947, p. 1131, §§ 1-7; Ga. L. 1947, p. 1134, §§ 1-7; Ga. L. 1972, p. 202, § 1; Ga. L. 1976, p. 1008, §§ 1-3; Ga. L. 1986, p. 982, § 24.

Law reviews. — For annual survey of law of wills, trusts, and administration of estates, see 40 Mercer L. Rev. 471 (1988).

ARTICLE 1

ADMINISTRATION OF ESTATE

53-9-1. Presumption or proof of death; presumption that missing person predeceased other deceased individual; perils or tragedies resulting in probable death.

(a) A domiciliary of this state who has been missing from the last known place of domicile for a continuous period of four years shall be presumed to have died; provided, however, that such presumption of death may be rebutted by proof. The date of death is presumed to be the end of the four-year period unless it is proved by a preponderance of the evidence that death occurred earlier.

(b) When any domiciliary of this state has been missing from the last known place of domicile for a continuous period of 12 months or more, the death of the individual may be proved by a preponderance of the evidence.

(c) Notwithstanding any proof of a date of death that is earlier than the end of the four-year period set out in subsection (a) of this Code section, the missing individual shall be deemed to have predeceased any other individual who has died prior to the date any petition for letters or other action on the missing individual's estate is filed and from whom the missing individual would have taken an interest in property as an heir or beneficiary or otherwise.

(d) When any domiciliary of this state has been exposed to a specific peril or tragedy resulting in probable death, the death of the individual may be proved by clear and convincing evidence at any time after such exposure.

History. — Code 1981, § 53-9-1, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2003, p. 332, § 1.

Cross references. — Presumptions, § 24-14-20 et seq.

Law reviews. — For survey article on wills, trusts, guardianships, and fiduciary administration for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003).

COMMENT

Subsection (a) of this section replaces former OCGA Sec. 53-9-1(a) and changes the date by which the presumption of death is established from seven years to four years. This subsection also indicates that a date of death earlier than the date at the end of the four-year period may be established. Subsection (b) retains the concept of the provision in former OCGA Sec. 53-9-1(a) that allowed a petition for letters to be filed after an absence of 12 months provided that death is proved by a preponderance of the evidence. Subsection (c) establishes that, regardless of what date of death is established within the four-year period, the missing individual is deemed to have predeceased any individual dying prior to the time of filing the petition and from whom the missing individual would have taken property by will or intestacy or otherwise.

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Absentees, § 6 et seq.

Am. Jur. Pleading and Practice Forms. — 8A Am. Jur. Pleading and Practice Forms, Death, § 168.

C.J.S. — 1 C.J.S., Absentees, §§ 8 et seq., 18.

ALR. — Administration on estate of one as absentee as affecting one not notified whose relationship to absentee had its inception after his disappearance, 26 A.L.R. 965.

Validity of by-law of mutual benefit association preventing recovery upon presumption of death from seven years' absence, 36 A.L.R. 982; 40 A.L.R. 1274.

Necessity and sufficiency of showing of search and inquiry by one relying on presumption of death from 7 years' absence, 99 A.L.R.2d 307.

53-9-2. Filing and contents of petition; publication of citation.

(a) A petition for administration of the estate, for the probate in common form or solemn form of the will, for year's support, or for an order that no administration is necessary may be filed for the estate of a missing individual whose death may be presumed or established in the probate court as provided in Code Section 53-9-1. The petition may be made by anyone who would be entitled to file such petition on the estate of the missing individual if the missing individual were known to be dead and shall be filed in the county in which the estate of the missing individual would be administered were the missing individual known to be dead.

(b) In addition to complying with all of the requirements for petitions pertaining to the administration of an estate or the probate of a will or year's support or an order that no administration is necessary, as appropriate, the petition regarding the estate of a missing individual who is believed to be dead shall set forth the circumstances under which the individual disappeared, what inquiry has been made as to the individual's whereabouts, and such evidence as shall be offered, if necessary, for the purpose of proving death by a preponderance of the evidence.

(c) If the court finds the petition to be in compliance with the requirements set forth in subsection (b) of this Code section, the court shall issue an order directing that a citation issue and be published once a week for four weeks in the official newspaper of the county in which the petition is made giving notice that on a date certain, which shall be at least 90 days after the first publication of such citation, evidence will be heard by the court concerning the alleged absence of the individual presumed to be dead and the circumstances and duration of such absence and requiring the missing individual, if alive, or any other person to produce and present to the court evidence that the missing individual is still in life. The publication of citation required by this subsection may be combined with any other service of notice required for the issuance of letters testamentary or letters of adminis-

tration, an order for year's support, or an order that no administration is necessary or directed by the court pursuant to Code Section 53-11-5. Such service of notice shall be made as provided in Chapter 11 of this title on all individuals who would be heirs if the missing individual were known to be dead. The order may also direct that the petitioner make a search for the missing individual and shall specify the manner in which the search is to be conducted to ensure that, in light of the circumstances of the particular case, a diligent and reasonable effort has been made to locate the missing individual. The order may prescribe any methods of search deemed by the judge to be adequate and appropriate, including but not limited to publishing notices in newspapers in appropriate locations and making inquiry of governmental agencies and of the missing individual's relatives and friends and at the missing individual's last place of abode or other appropriate places.

History. — Code 1981, § 53-9-2, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2011, p. 752, § 53/HB 142; Ga. L. 2020, p. 377, § 1-60/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (c), in the first sentence, substituted "citation issue and" for "notice", inserted "in the official newspaper of the county in which the petition is made", substituted "date certain" for "day stated", and substituted "such citation" for "the notice"; in the second sentence, substituted "publication of citation" for "notice", inserted "service of", substituted "testamentary or letters of administration," for "or", and added "or directed by the court pursuant to Code Section 53-11-5" at the end; and in the third sentence, substituted "Such service of" for "The" and substituted "made" for "served".

COMMENT

This section and the next section replace former OCGA Sec. 53-9-2.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-9-2 are included in the annotations for this Code section.

Presumption of death arising from seven years' absence of person from accustomed place of abode, unheard from, is not conclusive, may be rebutted by proof, and is ordinarily a question of fact to be determined by the jury. Mutual Life Ins. Co. v. Dickens, 44 Ga. App. 429, 161 S.E. 657 (1931) (decided under former law).

With respect to persons of whom no account can be given, presumption of duration of life ends at expiration of seven years from the time when the person was last known to be living. Mutual Life Ins. Co. v. Dickens, 44 Ga. App. 429, 161 S.E. 657 (1931) (decided under former law).

Later action. — Order of probate court under former O.C.G.A. § 53-9-2 establishing presumption of death of insured constituted a rebuttable presumption of law in later case involving action on life insurance policy. Ritter v. Prudential Ins. Co. of Am., 538 F. Supp. 398 (N.D. Ga. 1982) (decided under former O.C.G.A. § 53-9-2).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Absentees, §§ 1, 2, 17, 19.

C.J.S. — 1 C.J.S., Absentees, §§ 4, 5, 8 et seq, 18, 19, 20, 24, 25, 26.

ALR. — Validity of by-law of mutual benefit association preventing recovery upon presumption of death from seven years' absence, 36 A.L.R. 982; 40 A.L.R. 1274.

Presumption of death from absence as affected by fact that person was fugitive from justice, 44 A.L.R. 1488.

Presumption of death as evidence, 115 A.L.R. 404.

Form and sufficiency of proof of death in case of insured's disappearance, 26 A.L.R.2d 1073.

Necessity and sufficiency of showing of search and inquiry by one relying on presumption of death from 7 years' absence, 99 A.L.R.2d 307.

53-9-3. Hearing; finding of death.

At the hearing the probate court shall hear such evidence as shall be offered for the purpose of ascertaining whether a diligent and reasonable effort has been made to locate the missing individual and, if appropriate, such evidence that is offered to show that the missing individual is dead or alive. No person shall be disqualified from testifying by reason of being the spouse of the missing individual or having an interest in the estate of the missing individual. If the court finds that a diligent and reasonable effort has been made to locate the missing individual and that a presumption of death has been established and has not been rebutted as provided under subsection (a) of Code Section 53-9-1 or that death has been proved by a preponderance of the evidence as provided in subsection (b) of Code Section 53-9-1, the court shall enter an order finding that the missing individual is dead and specifying the date of death.

History. — Code 1981, § 53-9-3, enacted by Ga. L. 1996, p. 504, § 10.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-9-2 are included in the annotations for this Code section.

Presumption of death arising from seven years' absence of person from accustomed place of abode, unheard from, is not conclusive, may be rebutted by proof, and is ordinarily a question of fact to be determined by the jury. Mutual Life Ins. Co. v. Dickens, 44 Ga. App. 429, 161 S.E. 657 (1931) (decided under former law).

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RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Absentees, §§ 1, 2, 17, 19.

C.J.S. — 1 C.J.S., Absentees, §§ 4, 5, 8 et seq., 18, 19, 20, 24, 25, 26.

ALR. — Validity of by-law of mutual benefit association preventing recovery upon presumption of death from seven years' absence, 36 A.L.R. 982; 40 A.L.R. 1274.

Presumption of death from absence as affected by fact that person was fugitive from justice, 44 A.L.R. 1488.

Presumption of death as evidence, 115 A.L.R. 404.

Form and sufficiency of proof of death in case of insured's disappearance, 26 A.L.R.2d 1073.

Necessity and sufficiency of showing of search and inquiry by one relying on presumption of death from 7 years' absence, 99 A.L.R.2d 307.

53-9-4. Issuance of letters or order.

At any time after the entering of the order finding the missing individual to be dead, the probate court shall issue letters of administration or letters testamentary or an order granting year's support or an order that no administration is necessary in conformity with all of the requirements of the appropriate laws of this state on the estate of the missing individual and such letters or order, unless revoked, and all acts done in pursuance thereof and in reliance on such letters or order shall be as valid as if the missing individual were known to be dead.

History. — Code 1981, § 53-9-4, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section replaces former OCGA Sec. 53-9-3 and 53-9-5.

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 359, 361, 366, 367, 374 et seq., 396. 79 Am. Jur. 2d, Wills, § 736.

C.J.S. — 1 C.J.S., Absentees, §§ 1 et seq., 9. 95 C.J.S., Wills, §§ 472, 473.

53-9-5. Revocation of letters upon proof that missing individual is alive.

Upon petition of the missing individual, the probate court shall revoke the letters of administration or letters testamentary at any time on due and satisfactory proof that the missing individual is in fact alive. After such revocation, all the powers of the personal representative shall cease, but all receipts or disbursements of assets or other acts previously done by the personal representative shall remain valid, and the personal representative shall settle and account for the administration to the time of such revocation and shall transfer all assets

remaining to the missing individual or such individual's duly authorized agent or attorney.

History. — Code 1981, § 53-9-5, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward portions of former OCGA Sec. 53-9-6.

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Absentees, §§ 5, 6.

C.J.S. — 1 C.J.S., Absentees, §§ 1, 2, 3.

53-9-6. Recovery of property by missing individual.

At any time before the expiration of two years after letters or an order for year's support or an order that no administration is necessary is issued regarding the estate of the missing individual, any property received by any spouse or child or other purported heir or beneficiary of the missing individual may be recovered by the missing individual unless the property has been transferred for an adequate consideration to a bona fide purchaser, in which case the amount of the consideration received for such transfer may be recovered from the transferor. No action to recover any property from any spouse, child, or other purported heir or beneficiary or to recover any consideration received by such a person as a result of a transfer of property to a bona fide purchaser may be brought by a missing individual after the expiration of the two-year period set out in this Code section unless the missing individual is a minor, in which case the time for bringing such actions shall be extended to two years from the date the missing individual reaches the age of majority.

History. — Code 1981, § 53-9-6, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward portions of former OCGA Sec. 53-9-6 and establishes a two-year limit within which the missing individual must file any action to recover property transferred to a spouse, child or other person who took as an heir or beneficiary when the missing individual was believed to be dead.

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Absentees, §§ 5, 6.

C.J.S. — 1 C.J.S., Absentees, §§ 1, 2, 3.

53-9-7. Distribution of assets.

Before a distribution of any of the assets of the estate of a missing person is made to a spouse, child, or other purported heir or beneficiary within the two-year period set out in Code Section 53-9-6, such spouse, child, or other purported heir or beneficiary shall give security, to be approved by the probate court in such sum as the court shall direct but in no case less than the estimated value of the money or property distributed, conditioned that if the missing individual is in fact alive, the person giving security will deliver to the missing individual, on demand by such individual at any time within the two-year period, the assets received by the person giving such security or, if such assets have been transferred to a bona fide purchaser, the consideration received in such transfer, without interest. If any person entitled to receive such assets is unable to give security, the personal representative shall continue to hold such assets until:

(1) Security is given;

(2) The court orders the personal representative to deliver the assets to the person; or

(3) The two-year period has expired,

whichever occurs first, and in the meantime shall invest the assets in any investment that is authorized by law for personal representatives or that is authorized in the duly probated will of the missing individual and shall pay the income from such investments to the person or persons entitled to such assets quarterly or as otherwise directed by the court.

History. — Code 1981, § 53-9-7, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section replaces former OCGA Sec. 53-9-4.

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Absentees, §§ 1, 2, 15, 19.

C.J.S. — 1 C.J.S., Absentees, § 8 et seq.

53-9-8. Probate court judges allowed to hold certain funds for missing heir or beneficiary under decedent's will.

(a) The judges of the probate court, in their discretion, shall also be the depositories for and custodians of all moneys of any heir or beneficiary of any estate who cannot be located by the personal representative for moneys that may be distributed to the heir or

beneficiary. Any personal representative shall be authorized to pay over to the judge any such moneys; and the judge shall be authorized to take charge thereof as provided for in this Code section.

(b) The judge shall turn over to the Department of Revenue all custodial property held pursuant to this Code section 15 years after receipt by the judge of such property.

History. — Code 1981, § 53-9-8, enacted by Ga. L. 2006, p. 805, § 22/SB 534.

ARTICLE 2

CONSERVATORS

53-9-10. "Missing" defined; petition for conservator.

(a) For purposes of this article, an individual is deemed to be missing if:

(1) That individual is missing from the usual place of domicile and that individual's whereabouts are unknown to those persons who are likely to know;

(2) That individual was serving with the armed forces of the United States during any period in which a state of hostilities existed between the United States and any nation or power and the individual has been listed as missing in action, as interned in a neutral country, or as having been captured by the enemy; or

(3) That individual, whose whereabouts may or may not be known, has been kidnapped or is being held hostage or otherwise detained and is thus unable to exercise control over the management of that individual's estate.

(b) When a domiciliary of this state has been missing for a period of 60 days or more, or for a shorter period of time but in emergency circumstances that dictate the need for the immediate conservation of the domiciliary's estate, any person having an interest in the estate of the missing individual by reason of being an individual who would be an heir of the missing individual if the missing individual were dead, a creditor of the missing individual, or a person having legal custody of minors or incompetents who would be heirs of the missing individual may petition the probate court of the county in which the missing individual was domiciled for the appointment of a conservator of the estate of the missing individual.

History. — Code 1981, § 53-9-10, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section replaces former OCGA Sec. 53-9-20 (changing the time period from 90 days to 60 days) and former OCGA Sec. 53-9-40. This section adds that a conservator may be appointed in any case in which an individual is missing (whose whereabouts may or may not be known) under circumstances that make it impossible for that individual to manage his or her estate. Under former OCGA Sec. 53-9-40 et seq., the superior courts had jurisdiction over the estates of persons who were missing due to wartime activities. Under this new Article, the probate court has jurisdiction over the estate of any individual who is missing. Former OCGA Sec. 53-9-44 (relating to a petition for an order to take action in lieu of a full conservatorship) is repealed.

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Absentees, §§ 1, 2, 3, 6, 9.

Am. Jur. Pleading and Practice Forms. — 1 Am. Jur. Pleading and Practice Forms, Absentees, § 2.

C.J.S. — 1 C.J.S., Absentees, § 8 et seq.

53-9-11. Factors considered by court; qualifications.

(a) In determining whether to appoint a conservator of the estate of a missing individual, the probate court shall take into account any other existing arrangements for the management of the missing individual's property, such as powers of attorney or trusts, and may determine that no conservator need be appointed if such arrangements are sufficient under the circumstances.

(b) The probate court shall select as conservator of the estate of the missing individual that person who will best serve the interests of the estate, considering the following order of preferences:

(1) The surviving spouse, unless an action for divorce or separate maintenance was pending between the missing individual and the spouse at the time of the disappearance;

(2) One or more other heirs of the missing individual;

(3) Any eligible corporation, partnership, or other business association; or

(4) Any creditor of the estate.

In no event shall the court appoint as conservator a person who would not be eligible to serve as administrator of the estate of the missing individual if that individual were dead.

History. — Code 1981, § 53-9-11, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section had no counterpart in former Title 53. The section gives the probate court the discretion to select as conservator the person who would best serve the

interests of the estate. The list of persons whom the probate court may consider reflects the list of persons who may be appointed administrator of an estate that appears at OCGA Sec. 53-6-20. For provisions regarding the eligibility to serve as an administrator, see OCGA Sec. 53-6-2. This section also allows the court to refuse to appoint a conservator if other existing arrangements, such as powers of attorney or trusts, indicate that a conservator is not needed.

53-9-12. Contents of petition.

The petition shall set forth the name of the missing individual, that individual's place of domicile, the circumstances under which that individual came to be missing, the length of time the individual has been missing, what inquiry has been made as to the whereabouts of the individual, the fact that the missing individual would probably have communicated with the petitioner or some other person of whom inquiry has been made, the names, addresses, and ages or majority status of those individuals who would be heirs if the missing individual were dead, a description of the property owned by the missing individual and the estimated value of the estate, the circumstances that dictate the need for the appointment of a conservator, and whether any other arrangements, such as powers of attorney or trusts, exist for the management of the missing individual's estate.

History. — Code 1981, § 53-9-12, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section replaces former OCGA Secs. 53-9-21 and 53-9-41.

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Absentees, §§ 1, 2, 9.

C.J.S. — 1 C.J.S., Absentees, §§ 1 et seq., 8 et seq.

53-9-13. Procedure on petition; laws applicable to, and oath and bond of, conservator.

(a) Upon the filing of the petition, the procedure shall be the same as in petitions for the administration on the estates of decedents, with the individuals who would be the heirs of the missing individual if the missing individual were dead being treated as the heirs of the missing individual.

(b) The laws applicable to the administration of estates shall apply to the conservators of missing individuals except insofar as such laws may conflict with this article.

(c) Upon appointment, the conservator shall subscribe an oath as in the case of an administrator and shall give such bond as is required by law of guardians.

History. — Code 1981, § 53-9-13, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Secs. 53-9-22, 53-9-23, and 53-9-42 and requires conservators to give the same bond that is required of guardians.

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, §§ 1 et seq., 5, 6, 261, 312, 313, 362 et seq., 397.

C.J.S. — 1 C.J.S., Absentees, §§ 16, 17, 24, 25, 26.

53-9-14. Report of conservator; court order.

The conservator shall within 60 days after appointment make a written report to the probate court setting forth the condition of the estate of the missing individual, together with a schedule of any debts that may be owed by the missing person, an estimate of the income from the estate and the expenses necessary to its preservation, a statement showing the names, ages, and condition of any individuals who may have been dependent on the missing person for support, and a recommendation as to how the estate should be distributed. The court, after considering the report and making any further investigation the court may deem necessary, shall make such order as will most effectively tend to provide for the support of any individuals who may have been dependent upon the missing individual for support and for the handling of the property, including any business or business interest, owned by the missing person. The order may provide for the payment of those debts of the missing person as the court deems just and proper. An order of an appropriate court may allow the conservator to engage in such estate planning dispositions of the missing person's property as are authorized by Code Sections 29-3-36 and 29-5-36. The order may be modified in the discretion of the court at any time upon petition by the conservator, any individual dependent upon the missing individual for support, the guardian of any such individual, or any person having an interest in the property or in any business of the missing individual.

History. — Code 1981, § 53-9-14, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 43; Ga. L. 2004, p. 161, § 13.

Editor's notes. — Ga. L. 2004, p. 161, § 16, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2005, and all appointments of guardians of the person or property made pursuant to former Title 29 shall continue in effect and shall thereafter be governed by the provisions of this Act."

COMMENT

This section carries forward former OCGA Secs. 53-9-24 and 53-9-43 and expands those provisions to allow the probate court to direct how the property of the missing individual will be handled. This section also now authorizes the probate court to allow the conservator to engage in the same type of estate planning mechanisms as are allowed of guardians under OCGA Sec. 29-5-5.1.

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Absentees, §§ 1, 2, 9, 11 et seq.

C.J.S. — 1 C.J.S., Absentees, § 8 et seq.

53-9-15. Termination of conservatorship.

A missing person for whose estate a conservator has been appointed may at any time petition the probate court that has jurisdiction over the conservator for an order terminating the conservatorship. Upon a finding by the court that the petitioner is in fact the missing individual, the court shall enter an order terminating the conservatorship and directing the conservator to make a final return to the court and to pay over and deliver all funds and property in the conservator's hands to the missing individual.

History. — Code 1981, § 53-9-15, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section replaces former OCGA Secs. 53-9-26 and 53-9-46. OCGA Secs. 53-9-27 and 53-9-47 (relating to approvals of final returns by conservators) are repealed.

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Absentees, §§ 3, 5, 18, 19. 31 Am. Jur. 2d, Executors and Administrators, § 1043.

C.J.S. — 1 C.J.S., Absentees, § 8 et seq.

53-9-16. Final return; delivery of funds or property to personal representative.

If the missing individual is declared legally dead and the missing individual's will is probated or administration is had upon the individual's estate, the conservator shall, within 60 days after demand by the personal representative of the missing individual's estate, make a final return to the probate court which has jurisdiction over the conservator and pay over and deliver all of the funds or property in the conservator's hands to such personal representative.

History. — Code 1981, § 53-9-16, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section replaces former OCGA Secs. 53-9-25 and 53-9-45.

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Executors and Administrators, § 1043.

C.J.S. — 1 C.J.S., Absentees, § 8 et seq.

ARTICLE 3

NONDOMICILIARIES

53-9-20. Presumption or proof of death.

If an individual who is domiciled outside this state and possessed of any interest in or claim to or against real or personal property or cause of action located in this state shall have been absent for a period of time under circumstances whereby, pursuant to the law of the place in which the individual is domiciled, the individual is presumed to be dead, and a court of competent jurisdiction in the place of domicile has entered a final order or decree that the individual is presumed to be dead, the provisions of this title shall apply in every respect as if the individual in fact had died. If the individual shall have been absent for a period of not less than four years and shall not have been declared dead in the domiciliary jurisdiction, the individual may be declared dead in this state pursuant to the provisions of Article 1 of this chapter, as if a domiciliary of this state, for purposes of the property interests or claims or causes of action located in this state.

History. — Code 1981, § 53-9-20, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This Article has no counterpart in former OCGA Title 53. The purpose of this Article is to provide for the application of the rules relating to individuals believed to be dead and missing individuals to nondomiciliaries for purposes of the management and distribution of property or causes of action located in Georgia.

53-9-21. Appointment of conservator.

If an individual domiciled outside this state is possessed of any interest in or claim to or against any real or personal property or cause of action located in this state and would, if a domiciliary, be deemed to be missing in accordance with the provisions of Code Section 53-9-10 or if a conservator or any person serving in a similar capacity shall have

been authorized to handle the property of the individual in the jurisdiction in which the individual is domiciled, the probate court may appoint a conservator of all of the interests or claims or causes of action located in this state and give direction as to the conservation of the property and its use in the interest of the missing individual or that individual's dependents, obligees, or successors in interest. The court shall mold such order in aid of any similar orders from the jurisdiction in which the individual is domiciled, may appoint the domiciliary conservator as the conservator in this state, and may authorize delivery of property to the domiciliary conservator. Except as the court may otherwise direct, the proceedings shall conform to the provisions of Article 2 of this chapter.

History. — Code 1981, § 53-9-21, enacted by Ga. L. 1996, p. 504, § 10.

CHAPTER 10

SIMULTANEOUS DEATH

Sec.
53-10-1. Short title.
53-10-2. Disposition of property upon simultaneous deaths where devolution depends on priority of death.
53-10-3. Disposition of property upon simultaneous death of beneficiary and another individual where interest depends on survival.
53-10-4. Disposition of property upon simultaneous death of joint owners.
53-10-5. Applicability of chapter.
53-10-6. Uniformity of law.

Editor's notes. — This chapter was effective January 1, 1998, to the extent that no vested rights of title, year's support, succession, or inheritance are impaired, as provided by the version of Code Section 53-1-1 enacted by Ga. L. 1996, p. 504, § 10.

Ga. L. 1996, p. 504, § 10, effective January 1, 1998, repealed the Code sections formerly codified at this chapter, and enacted the current chapter. The former chapter consisted of §§ 53-10-1 through 53-10-4, and was based on Ga. L. 1945, p. 167, §§ 1-7; Ga. L. 1958, p. 355, §§ 1-7; Ga. L. 1959, p. 111, § 1; Ga. L. 1984, p. 937, § 6.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Proof of Survivorship in Common Disaster, 56 POF3d 255.

U.L.A. — Uniform Simultaneous Death Act (U.L.A.) § 1 et seq.

53-10-1. Short title.

This chapter may be cited as the "Uniform Simultaneous Death Act in Georgia."

History. — Code 1981, § 53-10-1, enacted by Ga. L. 1996, p. 504, § 10.

Law reviews. — For comment, "The Common Disaster: The Fifth Circuits Error in Estate of Carter v. United States and the Glitch in the 'Tax on Prior Transfer' Credit in Valuing Life Estates Created in a Common Disaster," see 40 Emory L.J. 1269 (1991).

COMMENT

This section carries forward former OCGA Sec. 53-11-1.

RESEARCH REFERENCES

U.L.A. — Uniform Simultaneous Death Act (U.L.A.) § 8.

53-10-2. Disposition of property upon simultaneous deaths where devolution depends on priority of death.

When the title to property or the devolution of property depends upon priority of death and there is no sufficient evidence that the individuals have died other than simultaneously, the property of each individual shall be disposed of as if that individual had survived, except as provided otherwise in this chapter.

History. — Code 1981, § 53-10-2, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-11-2.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-11-2 are included in the annotations for this Code section.

Burden of proof on party challenging simultaneous death. — The Simultaneous Death Act becomes applicable if the order of the decedents' deaths cannot be determined by sufficient evidence. Consistent with this interpretation, the burden is on the party whose claim depends upon survivorship to prove by a preponderance of the evidence that the person upon whom his or her claim depends survived the other decedent. Fiumefreddo v. Scudder, 252 Ga. 279, 313 S.E.2d 683 (1984) (decided under former O.C.G.A. § 53-11-2).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Descent and Distribution, §§ 46, 47. 80 Am. Jur. 2d, Wills, §§ 1455, 1456.

C.J.S. — 25A C.J.S., Death, §§ 6, 7, 15, 16. 26B C.J.S., Descent and Distribution, §§ 6 et seq., 83, 84. 96 C.J.S., Wills, §§ 1033 et seq., 1243, 1341, 1348. 97 C.J.S., Wills, §§ 1803, 1811 et seq.

U.L.A. — Uniform Simultaneous Death Act (U.L.A.) § 1.

53-10-3. Disposition of property upon simultaneous death of beneficiary and another individual where interest depends on survival.

If property is so disposed of that the right of a beneficiary to succeed to any interest in such property is conditional upon surviving another individual and both individuals die and there is no sufficient evidence that the two have died other than simultaneously, the beneficiary shall be deemed not to have survived. If there is no sufficient evidence that two or more beneficiaries have died otherwise than simultaneously and property has been disposed of in such a way that at the time of their deaths each beneficiary would have been entitled to the property if that beneficiary had survived the others, the property shall be divided into as many equal portions as there were such beneficiaries and these

portions shall be distributed respectively to those who would have taken in the event that each such beneficiary survived.

History. — Code 1981, § 53-10-3, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-11-3.

RESEARCH REFERENCES

Am. Jur. 2d. — 22A Am. Jur. 2d, Death, §§ 35, 36. 23 Am. Jur. 2d, Descent and Distribution, §§ 46, 47. 80 Am. Jur. 2d, Wills, §§ 1455, 1456.

C.J.S. — 25A C.J.S., Death, §§ 6, 7, 15, 16. 26B C.J.S., Descent and Distribution, §§ 6 et seq., 83, 84. 96 C.J.S., Wills, §§ 1033 et seq., 1243, 1341, 1348 et seq. 97 C.J.S. Wills, §§ 1803, 1811 et seq.

U.L.A. — Uniform Simultaneous Death Act (U.L.A.) § 2.

53-10-4. Disposition of property upon simultaneous death of joint owners.

If any stocks, bonds, bank deposits, or other intangible property shall be owned so that one of two joint owners is entitled to the whole on the death of the other and both owners die and there is no sufficient evidence that the two joint owners have died otherwise than simultaneously, these assets shall be distributed one-half as if one joint owner had survived and one-half as if the other joint owner had survived. If there are more than two joint owners and there is no sufficient evidence that all have died other than simultaneously, these assets shall be divided into as many equal shares as there are joint owners and these portions shall be distributed respectively to those who would have taken in the event that each joint owner had survived.

History. — Code 1981, § 53-10-4, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-11-4.

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Descent and Distribution, §§ 46, 47.

C.J.S. — 25A C.J.S., Death, §§ 6, 7, 15, 16. 26B C.J.S., Descent and Distribution, §§ 6 et seq., 83, 84. 96 C.J.S., Wills, §§ 1033 et seq., 1243, 1341, 1348 et seq. 97 C.J.S., Wills, §§ 1803, 1811 et seq.

U.L.A. — Uniform Simultaneous Death Act (U.L.A.) § 1.

ALR. — Jurisdiction and power of equity to subject legacy, devise, or distributive share in estate to claim of creditor of legatee devisee, or distributee, 123 A.L.R. 1293.

53-10-5. Applicability of chapter.

This chapter shall not apply in the case of wills, trusts, deeds, contracts of insurance, or any other situation where provision is made for distribution of property different from that provided in this chapter or where provision is made for a presumption as to survivorship that results in a distribution of property different from that provided in this chapter.

History. — Code 1981, § 53-10-5, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2020, p. 377, § 1-61/HB 865.

The 2020 amendment, effective January 1, 2021, substituted "that results" for "which results" in this Code section.

COMMENT

This section carries forward former OCGA Sec. 53-11-5.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-11-5 are included in the annotations for this Code section.

Cited in Fiumefreddo v. Scudder, 252 Ga. 279, 313 S.E.2d 683 (1984).

RESEARCH REFERENCES

C.J.S. — 25A C.J.S., Death, §§ 6, 7, 15, 16.

U.L.A. — Uniform Simultaneous Death Act (U.L.A.) § 6.

53-10-6. Uniformity of law.

This chapter shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those states which enact it.

History. — Code 1981, § 53-10-6, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section carries forward former OCGA Sec. 53-11-6.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-11-6 are included in the annotations for this Code section.

Cited in Fiumefreddo v. Scudder, 252 Ga. 279, 313 S.E.2d 683 (1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 73 Am. Jur. 2d, Statutes, § 236 et seq.

C.J.S. — 82 C.J.S., Statutes, § 505 et seq.

U.L.A. — Uniform Simultaneous Death Act (U.L.A.) § 7.

CHAPTER 11

PROCEEDINGS IN PROBATE COURT

Sec.
53-11-1. Applicability of, and compliance with, provisions.
53-11-2. "Guardian" defined; persons represented; appointment; successors; guardian named in petitions.
53-11-3. Personal service; generally.
53-11-4. Service of notice where person or residence unknown, or resides outside state.
53-11-5. Additional service of citation or other notice.
53-11-6. Waiver or acknowledgment of service of citation or other notice; consent to granting of relief or entry of order.
53-11-7. Officers authorized to administer oath or affirmation or affidavit.
53-11-8. Verification of petitions.
53-11-9. Issuance of citation upon filing of petition; contents; meaning; definitions; caveat or objection.
53-11-10. Date by which objections must be filed or on which hearing will be held.
53-11-11. Authentication or exemplification of document.

Editor's notes. — This chapter was effective January 1, 1998, to the extent that no vested rights of title, year's support, succession, or inheritance are impaired, as provided by the version of Code Section 53-1-1 enacted by Ga. L. 1996, p. 504, § 10, as amended by Ga. L. 1997, p. 1352, § 1.

Ga. L. 1996, p. 504, § 10, effective January 1, 1998, repealed the Code sections formerly codified at this chapter, and enacted the current chapter. The former chapter consisted of §§ 53-11-1 through 53-11-6, and was based on Ga. L. 1966, p. 606, §§ 1-5, 7.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Proof of Survivorship in Common Disaster, 56 POF3d 255.

53-11-1. Applicability of, and compliance with, provisions.

Except as otherwise specifically provided, the provisions of this chapter shall apply to any proceeding in the probate court that arises under Chapters 1 through 10, 12, and 13 of this title. Compliance with the provisions of this chapter shall be deemed to be sufficient for proceedings in the probate court arising under Chapters 1 through 10, 12, and 13 of this title except as otherwise provided in those chapters and in Chapter 11 of Title 9 and Chapter 9 of Title 15.

History. — Code 1981, § 53-11-1, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 26; Ga. L. 2020, p. 377, § 1-62/HB 865.

The 2020 amendment, effective January 1, 2021, inserted ", 12, and 13" twice in this Code section.

Law reviews. — For article comment-

ing on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

COMMENT

This Chapter provides uniform provisions governing proceedings in the probate court relating to testate and intestate estates and year's support. The provisions of this Chapter supplement but do not supersede the provisions of the Georgia Civil Practice Act (Title 9, Chapter 11) or the provisions of Title 15 that relate to the probate courts.

JUDICIAL DECISIONS

Cited in In re Estate of Ehlers, 289 Ga. App. 14, 656 S.E.2d 169 (2007).

53-11-2. "Guardian" defined; persons represented; appointment; successors; guardian named in petitions.

(a) As used in this Code section, the term "guardian" means the guardian ad litem appointed by the probate court who may represent a single party or more than one party or a class of parties with common or nonadverse interests, including the estates of one or more deceased heirs that have no personal representative; provided, however, that the court may determine for the purpose of the particular proceeding that the natural guardian, if any, or the testamentary guardian, if any, or the duly constituted conservator of the property, if any, or the duly constituted guardian of the person, if any, has no conflict of interest and thus may represent for the purpose of the proceeding a party who is not sui juris, who is unborn, or who is unknown.

(b) When a party to a proceeding in the probate court is not sui juris, is unborn, or is unknown, such party shall be represented in the proceeding by a guardian. When a party to a proceeding in the probate court is a deceased heir whose estate has no personal representative, such deceased heir's estate may be represented in the proceeding by a guardian. Service upon or notice to a guardian shall constitute service upon or notice to the party represented, and except as provided in subsection (a) of Code Section 15-9-17, no additional service upon or notice to such party shall be required. Waivers, acknowledgments, consents, answers, objections, or other documents executed by the guardian shall, except as otherwise provided in Code Section 15-9-17, be binding upon the party represented.

(c) Whenever a guardian ad litem is appointed, the court may limit the appointment or may at any time for cause appoint a successor. Unless the appointment is limited by the court, the guardian ad litem first appointed with respect to any proceeding involving the administration of the estate shall continue to serve with respect to such

proceeding on behalf of the party represented until a successor is appointed, the party represented becomes sui juris, or the court terminates the appointment.

(d)(1) In every petition filed in the probate court, the petitioner shall specify the name of each party who requires a guardian and the name and address of any person who is acting as guardian of the party. A copy of the letters appointing the guardian shall be attached to the petition or the petition shall allege such facts as shall show the authority of such guardian to act.

(2) The authority of a guardian to act may be established under paragraph (1) of this subsection by showing:

(A) Compliance by a foreign guardian of a minor with the filing requirements of subsection (b) of Code Section 29-2-74 or of Code Section 29-2-76;

(B) Compliance by a foreign conservator of the property of a minor with the filing requirements of subsection (b) of Code Section 29-3-115 or of Code Section 29-3-117;

(C) Compliance by a foreign guardian of an adult with the filing requirements of subsection (b) of Code Section 29-4-95 or of Code Section 29-4-97;

(D) Compliance by a foreign conservator of the property of an adult with the filing requirements of subsection (b) of Code Section 29-5-135 or of Code Section 29-5-137; or

(E) The registration and recording of a guardianship order or conservatorship order from another state under Article 4 of Chapter 11 of Title 29.

(3) Notwithstanding the provisions of paragraphs (1) and (2) of this subsection, the probate court may take judicial notice of the issuance of the letters appointing such conservator or guardian, and of the authority of such conservator or guardian to act, in the manner provided by Chapter 2 of Title 24.

History. — Code 1981, § 53-11-2, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 27; Ga. L. 1998, p. 1586, § 44; Ga. L. 2019, p. 693, § 41/HB 70; Ga. L. 2020, p. 377, § 1-63/HB 865.

The 2019 amendment, effective January 1, 2020, substituted "conservator" for "guardian" in the middle of the proviso of subsection (a); in subsection (b), substituted "such" for "that" in the first sentence, in the second sentence, added a comma following "represented" and inserted "except as provided in subsection (a) of Code Section 15-9-17," in the middle, and inserted ", except as otherwise provided in Code Section 15-9-17," in the third sentence; and substituted the present provisions of subsection (d) for the former provisions, which read: "In every petition filed in the probate court, the petitioner shall specify the name of each party who requires a guardian and the name and address of any person who is acting as guardian of the party. A copy of

the letters appointing the guardian shall be attached to the petition or the petition shall allege such facts as shall show the authority of such guardian to act; provided, however, that the probate court may take judicial notice of the issuance of such letters or of such authority."

The 2020 amendment, effective January 1, 2021, inserted ", including the estates of one or more deceased heirs that have no personal representative" in subsection (a); added the second sentence in subsection (b); and redesignated subparagraphs (d)(2)(i) through (d)(2)(v) as (d)(2)(A) through (d)(2)(E).

Cross references. — Appointment of guardians ad litem generally, § 9-11-17(c). Guardians ad litem and appraisers for year's support in probate court proceedings, Uniform Rules for the Probate Courts, Rule 23.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

COMMENT

This section clarifies that, in all proceedings relating to testate or intestate estates or Year's Support, parties who are legally incapable of acting on behalf of themselves shall be represented by a guardian. The term "guardian" means a guardian ad litem appointed by the probate judge for the proceeding. However, the probate judge may determine that someone who is already acting as guardian (a natural guardian, guardian of the property, or guardian of the person) may represent the party in the proceeding if the interests of the guardian and the party are not in conflict. Some examples of cases where the interests of the guardian and the party represented may be in conflict include cases when the guardian is also a personal representative of the decedent, the propounder of any purported will of the decedent, an heir, a beneficiary under the will of the decedent, or other interested party or cases where the probate court finds for any reason that the interests of the guardian for purposes of a particular proceeding are not common and nonadverse to the interests of the party represented. This section does not abrogate any provision of Title 29, such as the provisions of Section 29-4-2(d) requiring the natural guardian to post bond in certain cases where a minor's claim arises under a personal injury lawsuit. All petitions filed in the probate court will include the names of those parties who require a guardian and will indicate the identity of any person who is already acting as guardian. A copy of the letters of guardianship or other evidence of authority should be attached to or included in the petition. However, the probate court may take judicial notice of these letters.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 3860, and former Code 1933, § 113-608, are included in the annotations for this Code section.

Appointment of guardian. — Probate court properly reappointed an individual to act as guardian ad litem of unknown heirs in connection with a decedent's will and a declaratory judgment action commenced by a disqualified beneficiary, as there was nothing that prohibited such appointment, and the unknown heirs were entitled to representation pursuant to O.C.G.A. § 53-11-2(b). In re Estate of Robertson, 271 Ga. App. 785, 611 S.E.2d 680 (2005).

Trial court did not err in refusing to declare an order appointing a guardian ad litem void based on the appointment occurring before the probate court judge was recused from the case as only orders made by the probate court judge after the recusal were null and void and the probate court judge appointed the guardian ad litem before the recusal motion was filed. In re Estate of Sands-Kadel, 292 Ga. App. 343, 665 S.E.2d 46 (2008).

Settlement agreement set aside. — Because the probate court erred in finding that a settlement agreement between

heirs to their decedent parent's estate was enforceable, given that a disabled sibling's interests were not represented, and no evidence was presented that a non-disabled sibling assented to or participated in the agreement, the court erred in approving the agreement, warranting a finding that the agreement be set aside. Freeman v. Covington, 282 Ga. App. 113, 637 S.E.2d 815 (2006).

Cited in Summerour v. Fortson, 174 Ga. 862, 164 S.E. 809 (1932); Griffin v. Suber, 191 Ga. 269, 12 S.E.2d 621 (1940).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Courts, § 98. 39 Am. Jur. 2d, Guardian and Ward, § 13. 80 Am. Jur. 2d, Wills, § 986.

C.J.S. — 43 C.J.S., Infants, § 321 et seq. 95 C.J.S., Wills, §§ 536, 537.

ALR. — Factors considered in making election for incompetent to take under or against will, 3 A.L.R.3d 6.

Time within which election must be made for incompetent to take under or against will, 3 A.L.R.3d 119.

53-11-3. Personal service; generally.

(a) Except as otherwise prescribed by law or directed by the probate judge, a party in interest who is a resident of this state is entitled to personal service of any petition and citation for proceedings that are subject to the provisions of this chapter.

(b) Except as otherwise provided in this Code section, personal service shall be made by delivery of a copy of the petition and citation by the sheriff or some other lawful officer at least 30 days before the hearing except that, if waived in writing or if shortened by the probate court upon good cause shown, the 30 day provision shall not apply. An entry of such service shall be made on the original and the copy for the party served.

(c) A party who is in the military service may be served by any commissioned officer who shall file with the probate court a certificate stating that copies of the petition and citation were served in person.

(d) Individuals who are not sui juris shall be served as provided in this chapter or as provided in Code Section 15-9-17.

(e) When personal service is required by this Code section, unless otherwise directed by the probate court, service may be made by registered or certified mail or statutory overnight delivery if the petitioner so requests in the petition. The court shall cause a copy of the petition and the citation to be sent by registered or certified mail or statutory overnight delivery with return receipt requested and with delivery restricted to addressee only. If the return receipt is not signed by the addressee, dated at least 30 days before the date specified in the citation, except where shortened by the court upon good cause shown, and received by the court before the date specified in the citation for the filing of objections, service shall be made as otherwise required by this Code section.

History. — Code 1981, § 53-11-3, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1998, p. 1586, § 45; Ga. L. 2000, p. 1589, § 3; Ga. L. 2020, p. 377, § 1-64/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (b), in the first sentence, substituted "30" for "ten" and substituted "or if shortened by the probate court upon good cause shown, the 30 day" for ", the ten day" and in subsection (e), in the last sentence, substituted "30" for "ten" and inserted "except where shortened by the court upon good cause shown,".

Cross references. — Service of process generally, § 9-11-4.

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the Act shall be applicable with respect to notices delivered on or after July 1, 2000.

COMMENT

This section provides general provisions for personal service. Unless a specific law or the probate judge directs otherwise, personal service is required for all parties in interest who are residents of Georgia. This section reflects the provisions of former OCGA Sec. 53-3-14.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-607, and former O.C.G.A. § 53-3-14 are included in the annotations for this Code section.

Notification of probate by publication insufficient when absent heir is member of armed forces. — In the probate of a will in solemn form, the absence from the state, at the time of probate, of an heir at law who resided within the state, solely because of service in the armed forces of the United States, does not change one's domicile or residence so as to authorize service on that person of a notice of probate by publication. Foster v. Foster, 207 Ga. 519, 63 S.E.2d 318 (1951) (decided under former Code 1933, § 113-607).

Service upon an attorney who may represent a person is not service upon the person so as to give a court jurisdiction of the person where personal service is required. Souter v. Carnes, 229 Ga. 220, 190 S.E.2d 69 (1972) (decided under former Code 1933, § 113-607).

RESEARCH REFERENCES

Am. Jur. 2d. — 80 Am. Jur. 2d, Wills, § 808 et seq.

C.J.S. — 95 C.J.S., Wills, §§ 545 et seq., 557.

53-11-4. Service of notice where person or residence unknown, or resides outside state.

(a) Except as otherwise prescribed by law or directed by the probate judge pursuant to Code Section 53-11-5, the provisions of this Code section shall apply in cases when a person to be served with notice of a proceeding covered by this chapter has a known current residence address outside this state, or whose current residence address is unknown.

(b) Unless all such persons have known current residence addresses, the probate court shall order service of notice to be perfected by

publication of the citation in the newspaper in which sheriff's advertisements are published in the county in which the petition is made. The citation shall be published once a week for four weeks prior to the date on which objections must be filed. The records of the court shall show the persons served with notice and the character of such service of notice. The published citation shall be directed to the person to be served with such notice.

(c) If the current residence address of such a person is known, the court shall cause service of notice to be made by mailing by certified or registered mail or statutory overnight delivery, return receipt requested, a copy of the petition and the citation.

(d) When service of notice by publication is ordered by the court pursuant to this Code section, compliance with the provisions of this Code section relating to a person to be served with notice who is known but whose current residence address is unknown shall be equivalent to personal service of a copy of the petition and citation when the fact appears in the records of the court showing the persons served with notice and the character of such service of notice. In the case of a known person whose current residence address is unknown, that person's name shall appear in the records of the court, and such records shall confirm compliance with this Code section as to that person. In any case in which service of notice by publication is granted by the court, one order for service of notice by publication shall be sufficient and the published citation shall be directed as provided in subsection (b) of this Code section.

History. — Code 1981, § 53-11-4, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 28; Ga. L. 2000, p. 1589, § 4; Ga. L. 2002, p. 1316, § 6; Ga. L. 2020, p. 377, § 1-65/HB 865.

The 2020 amendment, effective January 1, 2021, inserted "with notice of a proceeding covered by this chapter" in subsection (a); in subsection (b), inserted "of notice" in the first sentence, in the third sentence, substituted "served with notice" for "notified" and "such service of notice" for "the notice given", and inserted "with such notice" at the end of the last sentence; substituted "the court shall cause service of notice to" for "service shall" in subsection (c); and, in subsection (d), in the first sentence, inserted "of notice", inserted "by the court", substituted "served with notice" for "notified" twice, and substituted "such service of notice" for "the notice given", in the second sentence, substituted "confirm" for "show as to that person's" and inserted "as to that person" at the end, and in the last sentence, inserted "of notice", "by the court" and "service of notice by".

Cross references. — Service of process generally, § 9-11-4.

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the Act shall be applicable with respect to notices delivered on or after July 1, 2000.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

COMMENT

This section provides general procedures for serving persons who are unknown, whose residence is unknown, who are not residents of Georgia, or who reside outside Georgia under circumstances that make it difficult to determine whether they are legal residents of Georgia. This section reflects the provisions of former OCGA Sec. 53-3-14.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-607, and former O.C.G.A. § 53-3-14 are included in the annotations for this Code section.

Reasonable diligence in ascertaining heirs required. — Legislature undoubtedly meant that before a propounder might correctly state that heirs were "unknown," the propounder must have exercised at least some reasonable diligence in ascertaining the heirs, and may not simply rely upon the propounder's personal knowledge without reasonable inquiry. Oakley v. Anderson, 235 Ga. 607, 221 S.E.2d 31 (1975) (decided under former Code 1933, § 113-607).

Notification of probate by publication insufficient when absent heir is member of armed forces. — In the probate of a will in solemn form, the absence from the state, at the time of probate, of an heir at law who resided within the state, solely because of service in the armed forces of the United States, does not change one's domicile or residence so as to authorize service on that person of a notice of probate by publication. Foster v. Foster, 207 Ga. 519, 63 S.E.2d 318 (1951) (decided under former Code 1933, § 113-607).

Service upon an attorney who may represent a person is not service upon the person so as to give a court jurisdiction of the person where personal service is required. Souter v. Carnes, 229 Ga. 220, 190 S.E.2d 69 (1972) (decided under former Code 1933, § 113-607).

Cited in In re Estate of Ehlers, 289 Ga. App. 14, 656 S.E.2d 169 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 80 Am. Jur. 2d, Wills, § 808 et seq.

C.J.S. — 95 C.J.S., Wills, §§ 545 et seq., 557.

53-11-5. Additional service of citation or other notice.

On the motion of any party in interest or on its own motion, the probate court may direct any additional service of citation or other notice or extend the time to respond with respect to any proceedings covered by this chapter as the judge may determine to be proper in the interests of due process and reasonable opportunity for any party or interest to be heard.

History. — Code 1981, § 53-11-5, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 29; Ga. L. 2020, p. 377, § 1-66/HB 865.

The 2020 amendment, effective January 1, 2021, substituted "On the motion of any party in interest or on its own motion, the probate court" for "The probate judge", and substituted "service of citation or other notice" for "service or notice" in this Code section.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313

(1997). For annual survey of wills, trusts, guardianships, and fiduciary administration, see 58 Mercer L. Rev. 423 (2006).

COMMENT

This section gives the probate judge discretion to require such additional service in the interests of due process.

JUDICIAL DECISIONS

Discretion to extend time for responses or objections to will. — Before a will was probated, O.C.G.A. §§ 53-11-5 and 53-11-10(a) provided a probate court with discretion to extend the time for the filing of responses or objections to the will in order to preserve the interests of justice; the probate court properly extended the time for the decedent's widow to object or raise a claim under O.C.G.A. § 53-4-48 and to assert the statutory right to an intestate share after the initial acknowledgment and assent to the petition to probate the will which did not name the intestate as a beneficiary. English v. Ricart, 280 Ga. 215, 626 S.E.2d 475 (2006).

Notice of amendment to year's support. — In a probate matter, the trial court erred by dismissing an executor's objection to the setting aside of certain real property as a year's support in favor of an estate as the executor had filed an objection within 15 days of the default order amending the year's support order, pursuant to O.C.G.A. § 9-11-55(a), and by paying costs. The provisions of § 9-11-55(a) relating to the opening of default judgments as a matter of right within 15 days of default applied to a year's support proceedings in probate court. In re Estate of Ehlers, 289 Ga. App. 14, 656 S.E.2d 169 (2007).

53-11-6. Waiver or acknowledgment of service of citation or other notice; consent to granting of relief or entry of order.

(a) Service of citation or other notice may be waived or acknowledged before or after the filing of the petition. The waiver or acknowledgment shall be in a writing signed by the person to be served with notice or some person authorized by the person to be served with such notice, shall be sworn to or affirmed before the probate court or a notary public, and shall be filed with the probate court.

(b) Except as otherwise prescribed by law, the written consent of a party to the granting of any relief or the entry of any order sought in a proceeding covered by this chapter, whether executed before or after the filing of the petition, shall constitute a waiver and acknowledgment of service of notice of the proceedings, waiver of any other or further citation or service of notice, entry of appearance, answer admitting all allegations of fact set forth in the petition as true and correct, and consent to the granting of the relief or the order sought.

(c) A person in military service, regardless of age, shall be permitted to make any waiver, acknowledgment, or consent described in this Code section.

History. — Code 1981, § 53-11-6, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 30; Ga. L. 1998, p. 1586, § 46; Ga. L. 2020, p. 377, § 1-67/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (a), in the first sentence, substituted "Service of citation or other notice" for "Service or notice", in the second sentence, inserted "with notice" and inserted "with such notice"; and, in subsection (b), inserted "covered by this chapter,", substituted "service of notice of" for "notice and service of", and substituted "any other or further citation or service of notice" for "citation".

Law reviews. — For annual survey of law of wills, trusts, and administration of estates, see 38 Mercer L. Rev. 417 (1986). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997).

COMMENT

This section sets forth general provisions for the waiver or acknowledgement of service or notice and the consent to any relief or order sought in a petition filed in the probate court. This section repeals the requirement of former OCGA Sec. 53-5-80 that all acknowledgements of service be attested by a notary public or the clerk of the probate court.

JUDICIAL DECISIONS

Effect of assent. — It was proper to dismiss without a hearing a caveat to a will based on lack of testamentary capacity because it was clear that the caveator's allegations were fatally deficient. The caveator had not sought to set aside the probate court's order probating the will; by signing a letter of assent, the caveator had consented to the immediate probate of the will, which established, among other things, that the testator had sufficient mental capacity; and although the caveator contended that distribution of the estate should be governed by an alleged contract between the parties, the caveator had not appealed the probate court's finding that the court lacked subject matter jurisdiction to consider the alleged contract. In re Estate of Brice, 288 Ga. App. 449, 654 S.E.2d 420 (2007).

Request for a jury trial. — Probate court did not err in denying as untimely a child's demand for a jury trial because the child's first filing was on May 12 when the child's written and notarized acknowledgment of and assent to the petition for probate was filed with the petition for probate, and the written and notarized assent to the probate of a testator's will constituted an answer, a pleading; therefore, the child's written demand for a jury trial had to be filed by June 11, making untimely the child's demand filed on July 25. Simmons v. Harms, 287 Ga. 176, 695 S.E.2d 38 (2010).

53-11-7. Officers authorized to administer oath or affirmation or affidavit.

An oath or affirmation or affidavit required or allowed to be made before or attested by a notary public may be made before any notary public or other officer authorized to administer oaths by the state in which the oath or affirmation or affidavit is made. The oath or affirmation or affidavit, if made outside this state, shall have the same force and effect as if it had been made before an officer of this state authorized to administer oaths. The official attestation of the officer before whom the oath or affirmation or affidavit is made shall be

prima-facie evidence of the official character of the officer and that the officer was authorized by law to administer oaths.

History. — Code 1981, § 53-11-7, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section provides that a notary public or other officer who is authorized to administer oaths in the state in which an oath or affirmation or affidavit is made shall constitute a "notary public" for the purposes of this Title. This section reflects the provisions of OCGA Sec. 9-10-113.

53-11-8. Verification of petitions.

Every petition filed in the probate court shall be verified by the oath of the petitioner and shall be sworn to or affirmed before the probate court or a notary public.

History. — Code 1981, § 53-11-8, enacted by Ga. L. 1996, p. 504, § 10.

COMMENT

This section requires the verification of every petition filed in a probate court that relates to testate estates, intestate estates, and year's support. The verification may be sworn or affirmed before the probate judge, the clerk of the probate court or any notary public. For general provisions relating to notaries public, see Code Sec. 53-11-7. For general rules regarding the filing of petitions in the probate court, see OCGA Secs. 15-9-86 and 15-9-86.1.

53-11-9. Issuance of citation upon filing of petition; contents; meaning; definitions; caveat or objection.

(a) Upon the filing of a petition, a citation shall be issued by the court and addressed to the persons required to be served with notice or who otherwise are to be served with notice; provided, however, that if all such persons have acknowledged service of notice and assented to the petition, no such citation need issue. Such citation shall state that any objection must be made in writing and shall designate the date on or before which objections must be filed in the probate court. Such citation also shall state whether the hearing will take place on a certain date or be specially scheduled for a later date. With respect to all proceedings under this title, any such citation may state that if no objections are filed the petition may be granted without a hearing.

(b) For purposes of this chapter, the words "citation" and "notice" shall have the same meaning unless the context otherwise requires.

(c) Wherever appearing in this title with respect to proceedings in the probate court covered by this chapter:

(1) The terms "service of notice," "given notice," "due notice," "notified," and similar words and phrases of the same import shall mean service of petition and citation in a manner provided by applicable law, and shall include acknowledgment or waiver of such service and such service upon a guardian ad litem or other appropriate representative, unless the context otherwise requires;

(2) The terms "the official county newspaper," "the newspaper in which sheriff's advertisements are published," "the official newspaper of the county in which the petition is made," "the official newspaper of the county in which the personal representative qualified," and similar words and phrases of the same import shall mean the journal or newspaper qualified or designated as the official legal organ of the county of the probate court having jurisdiction in such proceeding pursuant to Code Section 9-13-142;

(3) The terms "published," "publication," "service by publication," "notice shall be published," and similar words and phrases of the same import shall mean publication in the official legal organ described in paragraph (2) of this subsection unless the context otherwise requires;

(4) The term "beneficiary" shall include devisee and legatee unless the context otherwise requires;

(5) Any hearing called for in any proceeding shall be within the court's sound discretion and shall not be required if no caveat or objection is timely filed and thereafter maintained unless the context otherwise requires; and

(6) Any requirement that no caveat or objection be filed:

(A) Shall be satisfied by the dismissal or withdrawal of all caveats or objections so filed unless the context otherwise requires; and

(B) May, in the court's sound discretion, be satisfied by the failure of any party served with notice to file a caveat or objection in a timely manner unless the context otherwise requires.

History. — Code 1981, § 53-11-9, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 31; Ga. L. 1998, p. 1586, § 47; Ga. L. 2020, p. 377, § 1-68/HB 865; Ga. L. 2021, p. 922, § 53/HB 497.

The 2020 amendment, effective January 1, 2021, in subsection (a), in the first sentence, inserted "by the court and", substituted "with notice or who otherwise are to be served with" for "or entitled to", inserted "that", substituted "such persons" for "parties", inserted "of notice", and inserted "such"; inserted "Such" for "The" in the second and third sentences, and substituted "any such citation" for "the citation, if any," in the last sentence; and added subsection (c).

The 2021 amendment, effective May 10, 2021, part of an Act to revise, modernize, and correct the Code, substituted "The terms" for "The term" at the beginning of paragraphs (c)(1), (c)(2), and (c)(3).

Law reviews. — For article commenting on the 1997 amendment of this Code

section, see 14 Ga. St. U.L. Rev. 313 (1997).

COMMENT

This section states the general requirement, upon the filing of a petition, a citation shall be issued, addressed to parties who are entitled to notice or service upon the filing of a petition. The citation will require that the objections be made in writing and will give the date by which objections must be filed. In addition, the citation is designed to inform the parties whether a hearing will be held on a date that is named in the citation or on a date to be later specified by the court. For a list of proceedings in which the petition may be granted without a hearing if no objections are filed, see OCGA Sec. 15-9-86.1. The requirements of subsection (b) reflect those of former OCGA Sec. 53-3-14(c).

JUDICIAL DECISIONS

Year's support. — In a probate matter, the trial court erred by dismissing an executor's objection to the setting aside of certain real property as a year's support in favor of an estate as the executor had filed an objection within 15 days of the default order amending the year's support order, pursuant to O.C.G.A. § 9-11-55(a), and by paying costs. The provisions of § 9-11-55(a) relating to the opening of default judgments as a matter of right within 15 days of default applied to a year's support proceedings in probate court. In re Estate of Ehlers, 289 Ga. App. 14, 656 S.E.2d 169 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 80 Am. Jur. 2d, Wills, § 808 et seq.

C.J.S. — 95 C.J.S., Wills, §§ 545 et seq., 557.

53-11-10. Date by which objections must be filed or on which hearing will be held.

(a) Except as otherwise prescribed by law or as shortened by the judge upon good cause shown or directed by the judge pursuant to Code Section 53-11-5 with respect to any particular proceeding, the date on or before which any person is required to file any objection shall be not fewer than 30 days after the date such person is personally served with notice. For a person within the continental United States who is served with notice by registered or certified mail or statutory overnight delivery, return receipt requested, the date on or before which any objection is required to be filed by such person shall not be fewer than 30 days from the date of mailing of such service of notice; provided, however, that if a return receipt from any recipient is received by the court within 30 days from such date of mailing of such service of notice, the date on or before which any objection is required to be filed by such recipient shall be 30 days from the date of receipt of such service of notice shown on such return receipt. For a person outside the continental United States who is served with notice by registered or certified mail or statutory overnight delivery, return receipt requested, the date

on or before which any objection is required to be filed by such person shall not be fewer than 30 days from the date the service of the citation is mailed by the court; provided, however, that if the return receipt from any such recipient is received by the court during such 30 day period the date on or before which any objection is required to be filed by such recipient shall not be earlier than 30 days from the date of such recipient's receipt of such service of notice shown on such return receipt. For a person served with notice by publication, the date on or before which any objection is required to be filed shall be no earlier than the first day of the week following such service by publication of citation once each week for four weeks.

(b) Except as otherwise prescribed by law or directed by the judge with respect to any particular proceeding, the date on which any required hearing shall be held shall be the date by which any objection is required to be filed or such later date as the probate court may specify. When the matter is set for hearing on a date that was not specified in the citation, the probate court shall serve by first-class mail a notice of the date, time, and place of the hearing to the petitioner and all parties who have filed responses to the petition at the addresses given by them in their pleadings.

History. — Code 1981, § 53-11-10, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 1997, p. 1352, § 32; Ga. L. 2000, p. 1589, § 3; Ga. L. 2020, p. 377, § 1-69/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (a), in the first sentence, inserted "as shortened by the judge upon good cause shown or", substituted "person" for "objection", substituted "file any objection" for "be filed", substituted "fewer than 30 days" for "less than ten days", substituted "such" for "the", and inserted "with notice" at the end, in the second sentence, substituted "a person" for "persons", substituted "is served with notice" for "are served", inserted "which" twice, inserted "by such person", substituted "fewer than 30 days" for "less than 13 days", inserted "of such service of notice" three times, substituted "30 days from such" for "13 days from the", and substituted "30" for "ten"; in the third sentence, inserted "with notice", inserted "which", inserted "by such person", substituted "fewer" for "less", inserted "service of the", inserted "by the court", inserted "such", substituted "30 days" for "ten days", and substituted "such recipient's receipt of such service of notice" for "receipt", and in the last sentence, inserted "with notice", substituted "earlier" for "sooner", and substituted "such service by publication of citation" for "publication"; and in subsection (b), in the last sentence, substituted "serve" for "send", substituted "date, time, and place" for "time", and substituted "filed responses to the petition" for "served responses".

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the Act shall be applicable with respect to notices delivered on or after July 1, 2000.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 313 (1997). For survey article on wills, trusts, guardianships, and fiduciary administration, see 60 Mercer L. Rev. 417 (2008).

COMMENT

This section states the general requirement, upon the filing of a petition, a citation shall be issued, addressed to parties who are entitled to notice or service

upon the filing of a petition. The citation will require that the objections be made in writing and will give the date by which objections must be filed. In addition, the citation is designed to inform the parties whether a hearing will be held on a date that is named in the citation or on a date to be later specified by the court. For a list of proceedings in which the petition may be granted without a hearing if no objections are filed, see OCGA Sec. 15-9-86.1. The requirements of subsection (b) reflect those of former OCGA Sec. 53-3-14(c).

JUDICIAL DECISIONS

Discretion to extend time for responses or objections to will. — Before a will was probated, O.C.G.A. §§ 53-11-5 and 53-11-10(a) provided a probate court with discretion to extend the time for the filing of responses or objections to the will in order to preserve the interests of justice; the probate court properly extended the time for the decedent's widow to object or raise a claim under O.C.G.A. § 53-4-48 and to assert the statutory right to an intestate share after the initial acknowledgment and assent to the petition to probate the will which did not name her as a beneficiary. English v. Ricart, 280 Ga. 215, 626 S.E.2d 475 (2006).

Timely objections to amendment of year's support order. — In a probate matter, the trial court erred by dismissing an executor's objection to the setting aside of certain real property as a year's support in favor of an estate as the executor had filed an objection within 15 days of the default order amending the year's support order, pursuant to O.C.G.A. § 9-11-55(a), and by paying costs. The provisions of § 9-11-55(a) relating to the opening of default judgments as a matter of right within 15 days of default applied to a year's support proceedings in probate court. In re Estate of Ehlers, 289 Ga. App. 14, 656 S.E.2d 169 (2007).

Caveat timely filed by estate administrator. — Caveat filed by the court-appointed estate administrator was not untimely because, although the testator's children were represented by guardians ad litem and the petition to probate the will was served on the children no later than February 5, 2008, the estate remained unrepresented until an administrator was appointed on May 29, 2008; within 24 hours after appointment, the administrator filed a caveat to the will; and the administrator's objection to the proceeding in probate court was filed no later than 10 days after the date the person filing the objection was personally served. Hobbs v. Winfield, 302 Ga. 23, 805 S.E.2d 74 (2017).

53-11-11. Authentication or exemplification of document.

Whenever it is required that a document to be filed in the probate court be authenticated or exemplified, such requirement shall be met by complying with the provisions of Code Section 24-9-922 and such full faith and credit shall be given to the document as is provided in that Code section.

History. — Code 1981, § 53-11-11, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2011, p. 99, § 100/HB 24; Ga. L. 2015, p. 5, § 53/HB 90.

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

CHAPTER 12

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53-12-184. Effect of Code Sections 53-12-180 through 53-12-183 on powers of the courts or the Attorney General.

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53-12-191. Automatic amendment of governing instrument of private foundation trust or charitable trust as to distribution of trust funds.
53-12-192. Amendment of governing instrument of private foundation trust, charitable trust, or split-interest trust to exclude application of Code Section 53-12-190 or 53-12-191.
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53-12-194. Effect of Code Sections

Sec.
53-12-190 through 53-12-193 as to forfeiture or reversion of trust property or failure of trust.
53-12-195. Effect of Code Sections 53-12-190 through 53-12-193 on powers of courts and Attorney General.

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53-12-200. Capacity of trustee.
53-12-201. Appointment and vacancies.
53-12-202. Acceptance.
53-12-203. Trustee's bond.
53-12-204. Cotrustees generally.

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53-12-210. Compensation of trustee.
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53-12-212. Extra compensation.
53-12-213. Reimbursement of expenses.
53-12-214. Compensation from business enterprise.

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53-12-220. Resignation of trustee.
53-12-221. Removal of trustee.

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53-12-231. Final accounting.
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53-12-240. Duties generally.
53-12-241. Duty of prudent administration.
53-12-242. Duty to inform as to existence of trust.
Sec.
53-12-243. Duty to provide reports and accounts.
53-12-244. Duty to distribute income.
53-12-245. No duty to investigate resources.
53-12-246. Duty to avoid conflict of interest.
53-12-247. Duty of impartiality.

Part 2

Trustees' Powers

53-12-260. Discretionary powers.
53-12-261. Powers of trustee; limitation based on fiduciary duties.
53-12-262. Powers of corporate fiduciaries.
53-12-263. Incorporation of powers by reference.
53-12-264. Granting of powers by qualified beneficiaries.

Part 3

Trustee as Beneficiary

53-12-270. Exercise of power by trustee who is also a beneficiary.

Part 4

Certification of Trusts

53-12-280. Certification of trust by trustee.

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53-12-290. How securities to be registered by corporate trustee.
53-12-291. Registration where two or more fiduciaries are acting jointly.
53-12-292. Deposit of securities in clearing corporation.

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53-12-300. Accountable to beneficiary; breach of trust.
53-12-301. Actions for breach of trust.
53-12-302. Damages for breach of trust; interest.
53-12-303. Relief of liability.
53-12-304. Liability of successor trustee.
53-12-305. Liability of cotrustee.

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53-12-306. Action against cotrustee.
53-12-307. Limitation of actions.
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53-12-321. Foreign entities acting as trustees.
53-12-322. Acting as fiduciary; establishment of place of business prohibited; certificate of authority required.
53-12-323. Filing statement with Secretary of State; appointment of agent for service.

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Part 1

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53-12-340. Investment standard.
53-12-341. Concentrated holdings and diversification.
53-12-342. Duties at inception of trusteeship.
53-12-343. Reviewing compliance.
53-12-344. Language invoking application of article.
53-12-345. Delegation.

Part 2

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53-12-362. Conversion to unitrust.
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53-12-364. Express total return unitrusts.

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53-12-380. Short title.
Sec.
53-12-381. Definitions.

Part 2

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53-12-390. Payment of interest on pecuniary amount.
53-12-391. Payment of expenses.

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53-12-401. Apportionment of receipts and disbursements when decedent dies or income interest begins.
53-12-402. Apportionment when income interest ends.

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53-12-410. Character of receipts.
53-12-411. Distribution from trust or estate.
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53-12-420. Principal receipts.
53-12-421. Rental property.
53-12-422. Obligation to pay money.
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53-12-424. Insubstantial allocations not required.
53-12-425. Deferred compensation, annuities, and similar payments.
53-12-426. Liquidating asset.
53-12-427. Minerals, water, and other natural resources.
53-12-428. Timber.
53-12-429. Property not productive of income.
53-12-430. Derivatives and options.

Sec.
53-12-431. Asset-backed securities.

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53-12-450. Disbursements from income.
53-12-451. Disbursements from principal.
53-12-452. Transfers from income to principal for depreciation.
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53-12-454. Income taxes.
53-12-455. Adjustments between principal and income because of taxes.

Article 18

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53-12-500. Definitions.
53-12-501. Application of article; construction of trust instrument.
53-12-502. Authority, procedures, and powers of trust directors.
53-12-503. Role of directors; petitioning court for instructions.
53-12-504. Directed trustees; role; trustee's duty as to directed trustee; petitioning court for instructions.
53-12-505. Relief from duty and liability.
53-12-506. Statutory provisions applicable to trust directors; defenses available to trust directors; personal jurisdiction; term "trustee" includes trust director where required or permitted.

Cross references. — Taxation of fiduciaries, § 48-7-22.

Editor's notes. — Ga. L. 1991, p. 810, repealed and reenacted the former chapter, effective July 1, 1991. The former chapter consisted of Code Sections 53-12-1 through 53-12-156, and was based on Ga. L. 1855-56, p. 228, § 5; Code 1863, § 3292; Code 1868, § 3304; Code 1873, § 3380; Code 1882, § 3380; Civil Code 1895, § 3205; Civil Code 1910, § 3789; Code 1933, §§ 108-504, 108-608, 108-609, 108-610; Ga. L. 1950, p. 310, § 1; Ga. L. 1961, p. 207, §§ 5, 6; Ga. L. 1971, p. 428, §§ 1, 2; Ga. L. 1971, p. 430, §§ 1-3; Ga. L. 1971, p. 643, §§ 1-3; Ga. L. 1973, p. 844, §§ 1, 2; Ga. L. 1974, p. 440, § 7; Ga. L. 1975, p. 1527, § 3; Ga. L. 1977, p. 719, § 1; Ga. L. 1980, p. 472, § 1; Ga. L. 1981, Ex. Sess., p. 8; Ga. L. 1982, p. 3, § 53; Ga. L. 1983, p. 884, § 4-1; Ga. L. 1984, p. 22, § 53; Ga. L. 1987, p. 191, § 9; Ga. L. 1988, p. 13, § 53; Ga. L. 1988, p. 1939, § 1; Ga. L. 1989, p. 14, § 53; Ga. L. 1989, p. 946, §§ 116-118; Ga. L. 1990, p. 667, § 2.

Ga. L. 2010, p. 579, § 1, effective July 1, 2010, repealed the Code sections formerly codified at this chapter and enacted the current chapter. The former chapter consisted of Code Sections 53-12-1 through 53-12-7 (Article 1), 53-12-20 through 53-12-28 (Article 2), 53-12-50 through 53-12-59 (Article 3), 53-12-70 through 53-12-74 (Article 4), 53-12-90 through 53-12-94 (Article 5), 53-12-110 through 53-12-133 (Article 6), 53-12-150 through 53-12-153 (Article 7), 53-12-170 through 53-12-173, 53-12-173.1, and 53-12-174 through 53-12-176 (Article 8), 53-12-190 through 53-12-199 (Article 9), 53-12-210 through 53-12-219 (Article 10), 53-12-230 through 53-12-234 (Article 11), 53-12-250 through 53-12-264 (Article 12), 53-12-280 through 53-12-290 (Article 13), 53-12-300 through 53-12-302 (Article 14), 53-12-320 through 53-12-330 (Article 15), 53-12-350 through 53-12-394 (Article 16), relating to trusts, and was based on Ga. L. 1991, p. 810, § 1; Ga. L. 1992, p. 1053, § 1; Ga. L. 1992, p. 1438, § 3; Ga. L. 1996, p. 504, §§ 4, 11-14; Ga. L. 1998, p. 1323, § 1; Ga. L. 1999, p. 81, § 53; Ga. L. 2000, p. 1589, § 3; Ga. L. 2002, p. 788, § 1; Ga. L. 2002, p. 854, § 1; Ga. L. 2002, p. 1316, § 7; Ga. L. 2003, p. 794, § 1; Ga. L. 2004, p. 161, § 14; Ga. L. 2005, p. 583, §§ 2-6/HB 406; Ga. L. 2006, p. 805, § 23/SB 534.

Table of Comparable Provisions for Chapter 12 of Title 53
Former Code Sections to Revised Code Sections

This table lists each Code section in the former version of Chapter 12 of this title as such existed on June 30, 2010, and comparable provisions in the version of Chapter 12 which became effective July 1, 2010. It is intended to assist the user who is familiar with the former chapter to find comparable new provisions.

1991 Trust Act	2010 Trust Code
Article 1	
53-12-1	53-12-1
53-12-2	53-12-2
53-12-3	53-12-1
53-12-4	53-12-6
53-12-5	53-12-7
53-12-6	53-12-201(b)
53-12-7	53-12-3
Article 2	
53-12-20	53-12-20
53-12-21	53-12-21
53-12-22	53-12-23
53-12-23	53-12-22(a)
53-12-24	53-12-200
53-12-25	53-12-26
53-12-26	none
53-12-27	53-12-27
53-12-28	53-12-80
Article 3	
53-12-50	53-12-150
53-12-51	53-12-151
53-12-52	53-12-152
53-12-53	53-12-153
53-12-54	53-12-154
53-12-55	53-12-155
53-23-56	53-12-156
53-12-57	53-12-157
53-12-58	53-12-158
53-12-59	53-12-159
Article 4	
53-12-70	53-12-100
53-12-71	53-12-101
53-12-72	53-12-102
53-12-73	53-12-103
Article 5	
53-12-90	53-12-2(5)
53-12-91	53-12-130
53-12-92	53-12-131
53-12-93	53-12-132
53-12-94	53-12-133
Article 6	
Part 1	
53-12-110	53-12-170
53-12-111	53-12-170
53-12-112	53-12-171
53-12-113	53-12-172
53-12-114	53-12-173
53-12-115	53-12-174
53-12-116	none
Part 2	
53-12-120	53-12-180
53-12-121	53-12-181
53-12-122	53-12-182
53-12-123	53-12-184
53-12-124	53-12-190
53-12-125	53-12-191
53-12-126	53-12-192
53-12-127	53-12-194
53-12-128	53-12-195
53-12-129	53-12-193
53-12-130	53-12-183
53-12-131	none
53-12-132	53-12-184, 53-12-194
53-12-133	53-12-184, 53-12-195
Article 7	
53-12-150	53-12-40
53-12-151	53-12-41
53-12-152	53-12-63, 53-12-64
53-12-153	53-12-62
Article 8	
53-12-170	53-12-201

1991 Trust Act	2010 Trust Code
53-12-171	53-12-202
53-12-172	53-12-204
53-12-173	53-12-210, 53-12-211
53-12-173.1	53-12-214
53-12-174	53-12-203
53-12-175	53-12-220
53-12-221	53-12-221
Article 9	
53-12 190	53-12-240, 53-12-243, 53-12-244
53-12-191	53-12-300
53-12-192	53-12-301
53-12-193	53-12-302
53-12-194	53-12-303
53-12-195	53-12-304
53-12-196	53-12-305
53-12-197	53-12-306
53-12-198	53-12-307
53-12-199	53-12-308
Article 10	
53-12-210	53-12-381
53-12-211	53-12-247, 53-12-360
53-12-212	53-12-420, 53-12-421, 53-12-422, 53-12-423
53-12-213	53-12-400, 53-12-401, 53-12-402
53-12-214	53-12-410
53-12-215	53-12-422
53-12-216	53-12-412
53-12-217	53-12-426, 53-12-427
53-12-218	53-12-428
53-12-219	53-12-450, 53-12-451, 53-12-452, 53-12-453, 53-12-454
53-12-220	53-12-361
53-12-221	53-12-362
53-12-222	53-12-363
Article 11	
53-12-230	53-12-261(a)
53-12-231	53-12-263
53-12-232	53-12-261, 53-12-262
53-12-233	none
53-12-234	53-12-264

1991 Trust Act	2010 Trust Code
Article 12	
53-12-250	none
53-12-251	none
53-12-252	none
53-12-253	none
53-12-254	none
53-12-255	none
53-12-256	none
53-12-257	none
53-12-258	none
53-12-259	none
53-12-260	none
53-12-261	none
53-12-262	none
53-12-263	53-7-45
53-12-264	none
53-12-265	53-12-270
Article 13	
53-12-280	none
53-12-281	none
53-12-282	none
53-12-283	none
53-12-284	none
53-12-285	none
53-12-286	none
53-12-287	53-12-340, 53-12-429
53-12-288	none
53-12-289	none
Article 14	
53-12-300	53-12-290
53-12-301	53-12-291
53-12-302	53-12-292
Article 15 (Repealed by Ga. L. 1998, p. 1323, § 1)	
Article 16 Part 1	
53-12-350	none
53-12-351	none

1991 Trust Act	2010 Trust Code
53-12-352	none
53-12-353	none
Part 2	
53-12-370	53-12-320, 53-12-323
53-12-371	53-12-320
53-12-372	none
53-12-373	none
53-12-374	none
53-12-375	none
53-12-376	none
Part 3	
53-12-390	53-12-2(4)
53-12-391	53-12-320, 53-12-321
53-12-392	53-12-322, 53-12-323
53-12-393	53-12-323
53-12-394	53-12-323

Revised Code Sections to Former Code Sections

This table lists each Code section in the version of Chapter 12 of this title which became effective July 1, 2010, and comparable provisions in the former version of Chapter 12 as such existed on June 30, 2010.

2010 Trust Code	1991 Trust Act
Article 1	
53-12-1	53-12-1, 53-12-3
53-12-2	53-12-2
53-12-3	53-12-7
53-12-4	none
53-12-5	none
53-12-6	53-12-4
53-12-7	53-12-5
Article 2	
53-12-20	53-12-20
53-12-21	53-12-21
53-12-22	53-12-23, 53-4-68
53-12-23	53-12-22
53-12-24	none
53-12-25	none
53-12-26	53-12-25
53-12-27	53-12-27
53-12-28	none
Article 3	
53-12-40	53-12-150
53-12-41	53-12-151
53-12-42	none
53-12-43	none
53-12-44	none
53-12-45	none
Article 4	
53-12-60	none
53-12-61	none
53-12-62	53-12-153
53-12-63	53-12-152(b)
53-12-64	53-12-152(a)
53-12-65	none
Article 5	
53-12-80	53-12-28
53-12-81	none
53-12-82	none
53-12-83	none
Article 6	
Part 1	
53-12-100	53-12-70
53-12-101	53-12-71
53-12-102	53-12-72
53-12-103	53-12-73
Part 2	
53-12-120	none
Article 7	
53-12-130	53-12-91
53-12-131	53-12-92
53-12-132	53-12-93
53-12-133	53-12-94
Article 8	
53-12-150	53-12-50

2010 Trust Code	1991 Trust Act
53-12-151	53-12-51
53-12-152	53-12-52
53-12-153	53-12-53
53-12-154	53-12-54
53-12-155	53-12-55
53-12-156	53-12-56
53-12-157	53-12-57
53-12-158	53-12-58
53-12-159	53-12-59
Article 9	
53-12-170	53-12-110, 53-12-111
53-12-171	53-12-112
53-12-172	53-12-113
53-12-173	53-12-114
53-12-174	53-12-115
53-12-175	none
Article 10	
Part 1	
53-12-180	53-12-120
53-12-181	53-12-121
53-12-182	53-12-122
53-12-183	53-12-130
53-12-184	53-12-123, 53-12-133
Part 2	
53-12-190	53-12-124
53-12-191	53-12-125
53-12-192	53-12-126
53-12-193	53-12-129
53-12-194	53-12-127, 53-12-132
53-12-195	53-12-128, 53-12-133
Article 11	
Part 1	
53-12-200	53-12-24
53-12-201	53-12-170, 53-12-6
53-12-202	53-12-171
53-12-203	53-12-174
53-12-204	53-12-172
Part 2	
53-12-210	53-12-173
53-12-211	53-12-173
53-12-212	none
53-12-213	none
53-12-214	53-12-173.1
Part 3	
53-12-220	53-12-175
53-12-221	53-12-176
Article 12	
53-12-230	53-7-73, 53-12-190(b)
53-12-231	53-7-73, 53-12-190(b)
53-12-232	none
Article 13	
Part 1	
53-12-240	53-12-190(a)
53-12-241	none
53-12-242	none
53-12-243	53-12-190(b)
53-12-244	53-12-190(c)
53-12-245	none
53-12-246	53-12-173
53-12-247	53-12-211(b)
Part 2	
53-12-260	none
53-12-261	53-12-230, 53-12-232
53-12-262	53-12-232
53-12-263	53-12-231
53-12-264	53-12-234
Part 3	
53-12-270	53-12-265
Part 4	
53-12-280	none
Part 5	
53-12-290	53-12-300
53-12-291	53-12-301
53-12-292	53-12-302
Article 14	
53-12-300	53-12-191
53-12-301	53-12-192
53-12-302	53-12-193
53-12-303	53-12-194
53-12-304	53-12-195
53-12-305	53-12-196
53-12-306	53-12-197
53-12-307	53-12-198

2010 Trust Code	1991 Trust Act
53-12-308	53-12-199
Article 15	
53-12-320	53-12-391, 53-12-370, 53-12-371
53-12-321	53-12-391
53-12-322	53-12-392
53-12-323	53-12-392, 53-12-393, 53-12-394
Article 16	
Part 1	
53-12-340	53-12-287
53-12-341	none
53-12-342	none
53-12-343	none
53-12-344	none
53-12-345	53-12-290
Part 2	
53-12-360	53-12-211
53-12-361	53-12-220
53-12-362	53-12-221
53-12-363	53-12-222
53-12-364	none
Article 17	
Part 1	
53-12-380	none
53-12-381	53-12-210
Part 2	
53-12-390	none
53-12-391	53-12-219(e)
Part 3	
53-12-400	53-12-213
53-12-401	53-12-213
53-12-402	53-12-213
Part 4	
Subpart 1	
53-12-410	53-12-214
53-12-411	none
53-12-412	53-12-216
Subpart 2	
53-12-420	53-12-212(b)
53-12-421	53-12-212(a)
53-12-422	53-12-212(a), 53-12-215
53-12-423	53-12-212(b)
53-12-424	none
53-12-425	none
53-12-426	53-12-217
53-12-427	53-12-217
53-12-428	53-12-218
53-12-429	53-12-287(d)
53-12-430	none
53-12-431	none
Article 18	
53-12-450	53-12-219
53-12-451	53-12-219
53-12-452	53-12-219
53-12-453	53-12-219
53-12-454	53-12-219
53-12-455	none

Law reviews. — For annual survey of law of wills, trusts, and administration of estates, see 40 Mercer L. Rev. 471 (1988). For annual survey of wills, trusts, and administration of estates law, see 41 Mercer L. Rev. 411 (1989). For annual survey of wills, trusts, and administration of estates, see 42 Mercer L. Rev. 491 (1990). For article, "The Georgia Trust Act," 28 Ga. St. B.J. 95 (1991). For annual survey of wills, trusts, and administration, see 43 Mercer L. Rev. 457 (1991). For annual survey article on law of wills, trusts, and administration of estates, see 45 Mercer L. Rev. 475 (1993). For annual survey of law on wills, trusts, guardianships, and fiduciary administration, see 62 Mercer L. Rev. 365 (2010).

For note on 1991 revision of this chapter, see 8 Ga. St. U.L. Rev. 201 (1992).

COMMENT

Code Revision Committee Note on Comments.

The comments appearing in this chapter have been prepared under the supervision of the Georgia Trust Code Revision Committee of the Fiduciary Law Section of the State Bar of Georgia and are included in the Official Code of Georgia Annotated at the request of the Committee. The comments were prepared by Anne S. Emanuel, Associate Professor at Georgia State University College of Law, reporter to the Georgia Trust Code Revision Committee, and were reviewed by the

members of the Committee: William J. Linkous, Jr. and James H. Morgan, Jr., Co-Chairmen; Henry L. Bowden, Jr., Subcommittee Chairman; Michael D. Alembik, A. Kimbrough Davis, Herbert Elsas, John M. Graham, Barbara C. Hipple, S. Davis Laney, Joseph C. Miller, Jeffrey Pennell, James C. Rehburg, and Albert P. Reichert, Jr. They were presented to the General Assembly, in substantially this form, as part of the explanation for the changes proposed from prior law, and to clarify the meaning of the Act. Neither the General Assembly of Georgia nor the Code Revision Commission of the State of Georgia has participated in the drafting of these comments or has reviewed the comments for their content. The comments should not be considered to constitute a statement of legislative intention by the General Assembly of Georgia nor do they have the force of statutory law.

RESEARCH REFERENCES

ALR. — Eligibility for welfare benefits as affected by claimant's status as trust beneficiary, 21 A.L.R.4th 729.

ARTICLE 1

GENERAL PROVISIONS

53-12-1. Short title; effect on existing trusts.

(a) This chapter shall be known and may be cited as "The Revised Georgia Trust Code of 2010."

(b) Except to the extent it would impair vested rights and except as otherwise provided by law, the provisions contained in this chapter shall apply to any trust regardless of the date such trust was created.

History. — Code 1981, § 53-12-1, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2010, "This chapter" was substituted for "This Act" at the beginning of subsection (a).

Law reviews. — For article, "'Rarely Utilized': The Georgia Business Trust Code," see 14 Ga. St. B.J. 12 (2008). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 65 Mercer L. Rev. 295 (2013). For article, "Self-Settled Asset Protection Trusts in Georgia," see 23 Ga. St. B. J. 17 (Feb. 2018).

JUDICIAL DECISIONS

Retroactive application prohibited. — Rights of the decedent's surviving spouse were already vested when the Revised Georgia Trust Code of 2010 (Revised Code), O.C.G.A. § 53-12-1 et seq., was enacted because under the terms of the amended trust agreement, the surviving spouse's rights to the trust assets took effect upon the decedent's death before the Revised Code took effect. Accordingly, any new obligation imposed by the Revised Code that would have impaired the surviving spouse's right to possession could not be applied retroactively. Rose v. Waldrip, 316 Ga. App. 812, 730 S.E.2d 529 (2012), cert. denied, No. S12C1888, 2012 Ga. LEXIS 981 (Ga. 2012).

Retroactive applicability of statute of limitations. — Revised Georgia Trust Code's provisions apply to any trust irrespective of the date the trust was created, with two exceptions: to the extent it would

impair vested rights, and except as otherwise provided by law. There is no vested right in a statute of limitation, and to the extent that Mayfield v. Heiman, 317 Ga. App. 322, (2012), suggests that O.C.G.A. § 53-12-307(a) does not apply retroactively, that suggestion is non-binding dicta. Smith v. SunTrust Bank, 325 Ga. App. 531, 754 S.E.2d 117 (2014).

Jury instruction on standard of care. — In a breach of trust action, the trial court did not apply an incorrect standard of care in that a co-trustee could only be held liable if the co-trustee failed to act in good faith because if there was any error, the error was created by the co-trustee since the co-trustee consented to the instructions given and failed to request a charge that clearly set forth what the co-trustee asserted to be the proper standard for acts performed with absolute discretion. Reliance Trust Co. v. Candler, 294 Ga. 15, 751 S.E.2d 47 (2013).

53-12-2. Definitions.

As used in this chapter, the term:

(1) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1) of the federal Internal Revenue Code of 1986.

(2) "Beneficiary" means a person for whose benefit property is held in trust, regardless of the nature of the interest, and includes any beneficiary, whether vested or contingent, born or unborn, ascertained or unascertained.

(3) "Express trust" means a trust as described in Code Section 53-12-20.

(4) "Foreign entity" means:

(A) Any financial institution whose deposits are federally insured which is organized or existing under the laws of any state of the United States, other than Georgia, or any subsidiary of such financial institution;

(B) Any other corporation organized or existing under the laws of any state of the United States, other than Georgia, and chartered or licensed under the laws of such state; and

(C) Any federally chartered financial institution whose deposits are federally insured having its principal place of business in any state of the United States, other than Georgia, or any subsidiary of such financial institution.

(5) "Implied trust" means a resulting trust as described in Code Section 53-12-130 or a constructive trust as described in Code Section 53-12-132.

(6) "Nonresident" means an individual who does not reside in Georgia.

(7) "Person" means an individual, corporation, partnership, association, joint-stock company, business trust, unincorporated organi-

zation, limited liability company, or other legal entity, including any of the foregoing acting as a fiduciary.

(8) "Private foundation" means a private foundation as defined in Section 509 of the federal Internal Revenue Code.

(9) "Property" means any type of property, whether real or personal, tangible or intangible, legal or equitable, and shall include digital assets and electronic communications, as such terms are defined in Code Section 53-13-2.

(10) "Qualified beneficiary" means a living individual or other existing person who, on the date of determination of beneficiary status:

(A) Is a distributee or permissible distributee of trust income or principal;

(B) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) of this paragraph terminated on that date without causing the trust to terminate; or

(C) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

The Attorney General has the rights of a qualified beneficiary with respect to a charitable trust as defined in Code Section 53-12-170, and a person appointed to enforce a trust created for the care of an animal under Code Section 53-12-28 also has the rights of a qualified beneficiary.

(11) "Settlor" means the person who creates the trust, including a testator in the case of a testamentary trust.

(12) "Spendthrift provision" means a provision in a trust instrument that prohibits transfers of a beneficiary's interest in the income or principal or both.

(13) "Trust" means an express trust or an implied trust but shall not include trusts created by statute or the Constitution of Georgia.

(14) "Trust instrument" means the document, including any testamentary instrument, that contains the trust provisions.

(15) "Trust property" means property the legal title to which is held by the trustee. The term also includes choses in action, claims, and contract rights, including a contractual right to receive death benefits as the designated beneficiary under a policy of insurance, contract, employees' trust, or other arrangement.

(16) "Trustee" means the person or persons holding legal title to the property in trust.

History. — Code 1981, § 53-12-2, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 551, § 6/SB 134; Ga. L. 2017, p. 193, § 28/HB 143; Ga. L. 2018, p. 1089, § 7/SB 301.

Law reviews. — For article on the 2018 amendment of this Code section, see 35 Ga. St. U. L. Rev. 204 (2018).

For note discussing problems with profits generated by escrow account, and proposing federal legislative reform, see 10 Ga. St. B.J. 618 (1974).

For comment on First Nat'l Bank & Trust Co. v. Roberts, 187 Ga. 472, 1 S.E.2d 12 (1939), see 1 Ga. B.J. 50 (1939).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, §§ 3732 and 3739, former Code 1933, §§ 108-104, 108-105, 108-106, and 108-108, former O.C.G.A. §§ 53-12-2, 53-12-20, and 53-12-26, and former Code Section 53-12-90 of the 1991 Trust Act are included in the annotations for this Code section.

Trust is an equitable obligation, either express or implied, resting upon a person by reason of a confidence reposed in that person, to apply or deal with property for the benefit of some other person, or for the benefit of oneself and another or others, according to such confidence. Smith v. Francis, 221 Ga. 260, 144 S.E.2d 439 (1965) (decided under former O.C.G.A. § 53-12-2).

Beneficial interest, when property is held in trust, is in some other person than one holding title. Wright v. Piedmont Eng'r & Constr. Corp., 106 Ga. App. 401, 126 S.E.2d 865 (1962) (decided under former O.C.G.A. § 53-12-2).

Trust fund may exist notwithstanding that beneficiaries may not be in existence at time of its creation or be specifically named. Carmichael Tile Co. v. Yaarab Temple Bldg. Co., 182 Ga. 348, 185 S.E. 504 (1936) (decided under former O.C.G.A. § 53-12-2).

Property that can be subject of trust. — Every kind of valuable property, both real and personal, that can be assigned at law may be a subject matter of trust. Carmichael Tile Co. v. Yaarab Temple Bldg. Co., 182 Ga. 348, 185 S.E. 504 (1936) (decided under former O.C.G.A. § 53-12-2).

Beneficiary was not the settlor of a trust created by one's father on the basis of one's subsequent contribution of property to the corpus of the trust. Ivey v. Ivey, 266 Ga. 143, 465 S.E.2d 434 (1996) (decided under former O.C.G.A. § 53-12-2).

Parent of trust beneficiaries has no standing as an interested person. — Parent 1 of children who were beneficiaries of an inter vivos trust established by parent 2 that covered any part of the children's expenses not met by parent 2's support payments after the divorce of the parents had no individual standing to pursue an action for breach of the trust agreement, removal of a trustee, or appointment of a receiver under former O.C.G.A. § 53-12-176 on the ground that parent 1 routinely provided funds for the support of the children; parent 1 was not an interested person as defined in former O.C.G.A. § 53-12-2 (see O.C.G.A. § 53-12-2) because support payments belonged to the children and not to parent 1, the obligation to support the children was that of both parents and not of the trust,

and parent 1's provision of funds to support the children gave parent 1 no interest in or claim against the trust. Richards v. Richards, 281 Ga. 285, 637 S.E.2d 672 (2006) (decided under former O.C.G.A. § 53-12-2).

Trust estates. — Estates may be created not for benefit of grantee but for use of some other person; they are termed trust estates; no formal words are necessary to create such an estate and whenever a manifest intention is exhibited that another person shall have the benefit of the property the grantee shall be declared a trustee. Finch v. Miller, 178 Ga. 37, 172 S.E. 25 (1933) (decided under former O.C.G.A. § 53-12-2).

Introduction of evidence. — Parties in an action to establish a trust are entitled to introduce, and the jury is entitled to consider, as tending to prove the intention of the parties, evidence relating to the nature and circumstances of the transactions and the conduct and declarations of the parties. Epps v. Wood, 243 Ga. 835, 257 S.E.2d 259 (1979) (decided under former O.C.G.A. § 53-12-2).

Release and indemnification agreement did not meet definition of trust instrument. — Trial court erred in ruling that the release provisions were facially void under the limits on trust instruments imposed by former O.C.G.A. § 53-12-194 and were not subject to enforcement through a breach of contract claim because the release and indemnification agreement did not meet the definition of a trust instrument set forth in former O.C.G.A. § 53-12-2 (see O.C.G.A. § 53-12-2), and the beneficiaries and trustee executed them long after the creation of the trust and several years after the settlor's death. Heiman v. Mayfield, 300 Ga. App. 879, 686 S.E.2d 284 (2009) (decided under former O.C.G.A. § 53-12-2).

Constructive trust may only be an implied trust because all express trusts must be in writing under Georgia law. Gooden v. Buffalo Sav. Bank, 21 Bankr. 456 (Bankr. N.D. Ga. 1982) (decided under former O.C.G.A. § 53-12-2).

Insufficient proof of the existence of an implied trust. — Because a former husband did not present proof of the existence of an implied resulting trust under former O.C.G.A. §§ 53-12-2(3), 53-12-90, 53-12-91, and 53-12-92 (see O.C.G.A. §§ 53-12-2, 53-12-130, and 53-12-131), the trial court did not err when the court granted judgment notwithstanding the verdict to the executor and the beneficiaries. Burnett v. Holroyd, 278 Ga. 470, 604 S.E.2d 137 (2004) (decided under former O.C.G.A. § 53-12-2).

An express trust cannot be created by parol and engrafted on an absolute deed. An express trust may not be impressed by parol evidence upon a deed. Fowler v. Montgomery, 254 Ga. 118, 326 S.E.2d 765 (1985) (decided under former O.C.G.A. § 53-12-2).

Trusts are implied: (1) whenever the legal title is in one person, but the beneficial interest, either from the payment of the purchase money or other circumstances, is either wholly or partially in another; (2) when, from any fraud, one person obtains the title to property which rightly belongs to another; and (3) when, from the nature of the transaction, it is manifest that it was the intention of the parties that the person taking the legal title shall have no beneficial interest. Hemphill v. Hemphill, 176 Ga. 585, 168 S.E. 878 (1933) (decided under former Civil Code 1910, §§ 3732 and 3739).

Implied trusts are divided into two categories: resulting trusts and constructive trusts, and sometimes it is exceedingly difficult to differentiate between the two; but ordinarily distinctions are unnecessary since both are implied trusts and are governed by the same rules. Hancock v. Hancock, 205 Ga. 684, 54 S.E.2d 385 (1949) (decided under former Code 1933, §§ 108-104 and 108-106).

Implied trusts are either resulting or constructive, the latter arising if there is fraudulent conduct and no intent of the parties is involved. The implied resulting trust is based on the intention of the parties. Hall v. Higgison, 222 Ga. 373, 149 S.E.2d 808 (1966) (decided under former Code 1933, § 108-106).

Generally, trusts arising under the first and third classification are resulting trusts, while those arising under the second classification are constructive trusts. Not infrequently in the case of resulting

General Consideration (Cont'd)

trusts no fraud exists, such trusts resting primarily on an implication of law from the nature of the transaction; but generally, if not necessarily, the element of fraud is present in constructive trusts. Hancock v. Hancock, 205 Ga. 684, 54 S.E.2d 385 (1949) (decided under former Code 1933, §§ 108-104 and 108-106).

Constructive trust is an implied trust, and it has long been the rule in this state that implied trusts are not within the statute of frauds. Williams v. Whitfield, 242 Ga. 639, 250 S.E.2d 486 (1978) (decided under former Code 1933, § 108-106).

Procedure when trust fails entirely. — When the trust fails entirely, and the properties have to be sold as all parties agree is the case, then except for the amount set aside for charitable items, the testator has died intestate as to the excess in proceeds from that sale, and these funds must be held in a resulting trust for the heirs at law of the testator only. Green v. Austin, 222 Ga. 409, 150 S.E.2d 346 (1966) (decided under former law).

Introduction of evidence concerning declarations of the parties. — Parties in an action to establish a trust are entitled to introduce, and the jury is entitled to consider, as tending to prove the intention of the parties, evidence relating to the nature and circumstances of the transactions and the conduct and declarations of the parties. Epps v. Wood, 243 Ga. 835, 257 S.E.2d 259 (1979) (decided under former Code 1933, § 108-101 et seq.).

Under Georgia law, real property can be contributed as an asset to a partnership by oral agreement; each partner then holds an equitable interest in the assets, regardless of who holds legal title. Darby v. United States, 496 F. Supp. 943 (S.D. Ga. 1980) (decided under former Code 1933, § 108-106).

Principle of equitable division of property in a divorce action, according to the equitable interests of the parties, does not supplant the implied trust doctrine. Harrell v. Harrell, 249 Ga. 170, 290 S.E.2d 906 (1982) (decided under former Code 1933, § 108-116).

Existence of an implied trust is a question for the jury when there was considerable evidence that the brother was made the beneficiary of a policy for the benefit of the minor children and it was error to dismiss an action to establish the trust. Conner v. Conner, 250 Ga. 27, 295 S.E.2d 739 (1982) (decided under former Code 1933, §§ 108-104 and 108-106).

Payment of purchase money and transfer must be at same time. — If the payment of the purchase money and the transfer to the record owner do not take place at or near the same time, no implied trust is created. Nelson v. United States, 821 F. Supp. 1496 (M.D. Ga. 1993) (decided under former O.C.G.A. § 53-12-26).

No constructive trust found. — When a deceased has allowed a life insurance policy to lapse in derogation of a divorce decree and has acquired a new policy and designated a new beneficiary, this, without more, will not give rise to a constructive trust. Weiner v. Goldberg, 251 Ga. 470, 306 S.E.2d 660 (1983) (decided under former O.C.G.A. § 53-12-26).

Proceeds from sale of marital property. — Proceeds from the sale of real property belonging to a husband and wife, ordered sold after their divorce, were subject to a trust in the hands of the husband and the mere passage of the proceeds through one year's support proceedings did not divest equity of the power to enforce the trust. The probate court was not authorized to set aside any year's support property to the deceased husband's new wife. Kelly v. Johnston, 258 Ga. 660, 373 S.E.2d 7 (1988) (decided under former O.C.G.A. § 53-12-26).

Sufficiency of evidence. — See Lee v. Lee, 260 Ga. 356, 392 S.E.2d 870 (1990) (decided under former O.C.G.A. § 53-12-26).

Implied trust created. — When the contract of rescission was executed, the equity in the house and lot reverted to the vendor (in an exchange of property), and it became impressed with a trust, and the vendee held the property for the benefit of the vendor as an implied trust. Eller v. McMillan, 174 Ga. 729, 163 S.E. 910 (1932) (decided under former Civil Code 1910, §§ 3732 and 3739).

Cited in Macy v. Hays, 163 Ga. 478, 136 S.E. 517 (1927); Hubbard v. Bibb Brokerage Co., 44 Ga. App. 1, 160 S.E. 639

(1931); Hibble v. Mutual Oil Co., 175 Ga. 381, 165 S.E. 219 (1932); Joseph v. Citizens & S. Nat'l Bank, 210 Ga. 111, 78 S.E.2d 193 (1953); Erskine v. Klein, 218 Ga. 112, 126 S.E.2d 755 (1962); Tyler v. Borland, 157 Ga. App. 332, 277 S.E.2d 325 (1981); Claxton v. Small Bus. Admin. of United States, 525 F. Supp. 777 (S.D. Ga. 1981); Young v. Hinton, 163 Ga. App. 692, 295 S.E.2d 150 (1982); United States v. Williams, 581 F. Supp. 756 (N.D. Ga. 1982); Palmer v. Forrest, Mackey & Assocs., 251 Ga. 304, 304 S.E.2d 704 (1983); Georgia Farm Bureau Mut. Ins. Co. v. Smith, 179 Ga. App. 399, 346 S.E.2d 848 (1986); Wasson v. Waid, 188 Ga. App. 177, 372 S.E.2d 508 (1988); Dixon v. Murphy, 259 Ga. 643, 385 S.E.2d 408 (1989); Eason v. Farmer, 261 Ga. 675, 409 S.E.2d 509 (1991); Canadyne-Georgia Corp. v. NationsBank, 183 F.3d 1269 (11th Cir. 1999); Rose v. Waldrip, 316 Ga. App. 812, 730 S.E.2d 529 (2012); Ansley v. Raczka-Long, 293 Ga. 138, 744 S.E.2d 55 (2013).

Separation of Legal Title from Beneficial Interest

An implied trust may arise from the payment of a portion of the purchase money. A trust of this kind does not arise from, or depend upon, any agreement between the parties. It results from the fact that one person's money has been invested in land, and the conveyance taken in the name of another. It is a mere creature of equity. Hudson v. Evans, 198 Ga. 775, 32 S.E.2d 793 (1945) (decided under former Code 1933, §§ 108-106 and 108-108); McCollum v. McCollum, 202 Ga. 406, 43 S.E.2d 663 (1947) (decided under former Code 1933, § 108-106).

An implied trust results from the fact that one person's money has been invested in land, and the conveyance taken in the name of another. Bullard v. Bullard, 214 Ga. 122, 103 S.E.2d 570 (1958) (decided under former Code 1933, § 108-116); Wells v. Wells, 216 Ga. 384, 116 S.E.2d 586 (1960) (decided under former Code 1933, § 108-116).

Creation of purchase money resulting trust generally. — Resulting trust which arises solely from the payment of the purchase price is not created, unless the purchase money is paid either before or at the time of the purchase. Trusts implied from the payment of the purchase money or a part thereof must result, if at all, at the time of the execution of the conveyance. Hall v. Edwards, 140 Ga. 765, 79 S.E. 852 (1913) (decided under former Civil Code 1910, § 3739); Tanner v. Hinson, 155 Ga. 838, 118 S.E. 680 (1923) (decided under former Civil Code 1910, § 3739).

Person in whose favor a trust is claimed to result must have paid the purchase money as one's own. If one merely advances the whole or a part of the purchase money as a loan, no implied trust arises. Magid v. Byrd, 164 Ga. 609, 139 S.E. 61 (1927) (decided under former Code 1910, § 3739).

When the purchase money for property is paid by one and the legal title taken in the name of another the person named in the conveyance is but a trustee of the one who paid the consideration. Hibble v. Mutual Oil Co., 175 Ga. 381, 165 S.E. 219 (1932) (decided under former Civil Code 1910, § 3739); McCollum v. McCollum, 202 Ga. 406, 43 S.E.2d 663 (1947) (decided under former Civil Code 1910, § 3739); Lominick v. Lominick, 213 Ga. 53, 96 S.E.2d 587 (1957) (decided under former Civil Code 1910, § 3739).

To set up and establish such implied trust, it is only necessary to allege and prove that one person furnished all or a portion of the purchase money of the land, and that the deed was taken in the name of the person to whom the money was so furnished. Hemphill v. Hemphill, 176 Ga. 585, 168 S.E. 878 (1933) (decided under former Civil Code 1910, § 3739).

An implied trust results from the fact that one person's money has been invested in land and conveyance taken in the name of another and such implied trust may arise from the payment of a portion of the purchase money. Hemphill v. Hemphill, 176 Ga. 585, 168 S.E. 878 (1933) (decided under former Civil Code 1910, § 3739).

Ordinarily, when the parties are not closely related and one party pays the purchase price of property and has the conveyance made to another, an inference arises, even in the absence of knowledge of the conveyance by the grantee, that the

Separation of Legal Title from Beneficial Interest (Cont'd)

conveyance is in trust for the payor; and a resulting trust may be established, even without proof of an agreement, understanding, or obligation on the part of the grantee to hold or reconvey. Williams v. Thomas, 200 Ga. 767, 38 S.E.2d 603 (1946) (decided under former Code 1933, § 108-106).

In order to set up an implied resulting trust in favor of one paying the purchase money when the title is placed in another, it is indispensable that it be shown that the purchase price was paid by the beneficiary of the trust at or before the time the conveyance was made, or that it be shown, other than by a void parol agreement, that it was the intent and purpose of the parties. Such an intent may be established by proof of an initial payment, by the one claiming the benefit of the trust, at or before the time the title is conveyed to another. Loggins v. Daves, 201 Ga. 628, 40 S.E.2d 520 (1946) (decided under former Code 1933, §§ 108-104 through 108-106); Hall v. Higgison, 222 Ga. 373, 149 S.E.2d 808 (1966) (decided under former Code 1933, § 108-106).

Resulting trust which arises solely from the payment of the purchase price is not created, unless the purchase money is paid either before or at the time of the purchase. Trusts implied from the payment of the purchase money or a part thereof must result, if at all, at the time of the execution of the conveyance. But when a trust is created at the time of the execution of the conveyance, the recovery or decree must be in proportion to the total amount of purchase money paid by the one seeking to establish the trust. Estes v. Estes, 205 Ga. 814, 55 S.E.2d 217 (1949) (decided under former Code 1933, § 108-106).

Trusts implied from the payment of the purchase money or a part thereof must result, if at all, at the time of the execution of the conveyance, when there is, in obtaining such conveyance, no fraud or concealment to the injury of the person paying such purchase money. Johnson v. Johnson, 210 Ga. 795, 82 S.E.2d 831 (1954) (decided under former Code 1933, § 108-106).

Trust of a legal estate results to the person who advances the purchase money or on whose behalf the money is advanced; when the money is advanced by way of loan to the purchaser, and the title is taken in the name of the lender as security, a trust results to the purchaser. Lominick v. Lominick, 213 Ga. 53, 96 S.E.2d 587 (1957) (decided under former Code 1933, § 108-106).

In order to prove an implied resulting trust in favor of one paying purchase money where title is placed in another it must be shown that the purchase price was paid by the beneficiary of the trust at or before the time the conveyance was made, or it must be shown that it was the intent and purpose of the parties at the time of the conveyance that the one claiming the benefit of the trust should pay the purchase money. Georgian Villa, Inc. v. City Nat'l Bank, 10 Bankr. 79 (Bankr. N.D. Ga. 1981) (decided under former Code 1933, § 108-106).

Intention of parties is the essential element of an implied resulting trust. Georgian Villa, Inc. v. City Nat'l Bank, 10 Bankr. 79 (Bankr. N.D. Ga. 1981) (decided under former law).

Intent may be established by proof of initial payment by one claiming benefit of the trust at or before the time title is conveyed to another. Georgian Villa, Inc. v. City Nat'l Bank, 10 Bankr. 79 (Bankr. N.D. Ga. 1981) (decided under former law).

Devisee's legally protected interest in devised property, depending on context, is labeled inchoate title, equitable title, or beneficial interest. Moore v. Lindsey, 662 F.2d 354 (5th Cir. 1981) (decided under former Code 1933, § 108-106).

There are certain well-established rules of law which must be met in order to create a trust. First, it must be shown that the money was not a loan. In order for a trust to result from paying only a part of the purchase money, the actual amount must be proven. It is indispensable that the purchase money be paid before or at the time of the purchase. Reed v. Reed, 217 Ga. 303, 122 S.E.2d 253 (1961) (decided under former Code 1933, § 108-106).

"The person in whose favor a trust is

claimed to result must pay the purchase money as his own; if he merely advances it as a loan, no trust will result." So, while it is true that M. did retain the physical custody of the policy, and advanced the money with which to pay the premiums, yet these premiums were charged against the insured on the insured's general account with that firm and no implied trust was created. The mere physical custody of the policy would not, of itself create a trust. Johnston v. Coney, 120 Ga. 767, 48 S.E. 373 (1904) (decided under former Code 1895, § 3159).

When a husband took the wife's distributive share and applied it to buying land from her father's estate with her full knowledge and consent, not as her agent, but for himself, borrowing the remainder of the money to finish paying for it, taking title in his own name, no implied trust as to a part of the land will be implied in favor of the wife; it will be treated as a gift. Stokes v. Clark, 131 Ga. 583, 62 S.E. 1028 (1908) (decided under former Code 1895, § 3159).

An implied trust results from the fact that one person's money has been invested in land and the conveyance taken in the name of another. Such implied trust may arise from the payment of a portion of the purchase money. Berry v. Brunson, 166 Ga. 523, 143 S.E. 761 (1928) (decided under former Civil Code 1910, § 3739).

To set up and establish an implied trust, it is necessary only to allege and prove that one person furnished all or a portion of the purchase money for the land, and that the deed was taken in the name of the person to whom the money was furnished. Barnes v. Barnes, 230 Ga. 226, 196 S.E.2d 390 (1973) (decided under former Code 1933, § 108-116).

Substitution of own funds for those received immaterial. — When a trust would be implied from payment of the purchase price of land with money furnished by another person, a trust will be implied if, after receiving the money to buy the land, the recipient uses the money for other purposes, and, substituting one's own money for that furnished to the recipient, pays for the land, intending to make the payment for the other person. Banks v. Bradwell, 140 Ga. 640, 79 S.E. 572 (1913) (decided under former Code 1910, §§ 3739 and 3780).

Payment in services sufficient. — When X. and Y. bought land together, X. paying X's part in certain services, but the title was taken in Y. for a special purpose, an implied trust existed in favor of X. Swift v. Nevius, 138 Ga. 229, 75 S.E. 8 (1912) (decided under former Civil Code 1910, § 3739).

Trusts are implied whenever the legal title is in one person, but the beneficial interest, either from the payment of the purchase money or other circumstances, is either wholly or partially in another. Eller v. McMillan, 174 Ga. 729, 163 S.E. 910 (1932) (decided under former Civil Code 1910, §§ 3732 and 3739).

In determining the real source of purchase money for properties courts look to the substance of the transactions in which the properties were bought rather than to their form. When one half of the purchase money is fairly attributable to one party, courts award to that party a one-half interest in the properties under the theory of a purchase money resulting trust. Crymes v. Crymes, 240 Ga. 721, 242 S.E.2d 30 (1978) (decided under former Code 1933, § 108-106).

Statute rendered inapplicable upon divestment of legal title. — Principle that a trust is implied when the purchase price is paid by one and the legal title is placed in another does not apply when the person who paid the purchase money to acquire legal title in an undivided one-half interest in the land later divests oneself of one's legal title by a warranty deed. Murrah v. First Nat'l Bank, 225 Ga. 613, 170 S.E.2d 399 (1969) (decided under former Code 1933, § 108-106).

Issue of resulting trust in equitable property division a jury question. — In an action for equitable property division to establish deceased wife's estate's interest in a land tract titled in her husband's name, the issue of the existence of a resulting trust is for the jury to determine. Owens v. Owens, 248 Ga. 720, 286 S.E.2d 25 (1982) (decided under former Code 1933, § 108-116).

Evidence of Intent

Practice in former marriage. — When a husband maintained that his practice with a former wife relative to legal and beneficial ownership was understood by his present wife, and that the practice was continued with her consent, evidence of the similar arrangement in the former marriage was relevant to illuminate the nature of transactions growing out of this marriage. Harrell v. Harrell, 249 Ga. 170, 290 S.E.2d 906 (1982) (decided under former Code 1933, § 108-116).

Insufficient evidence of a resulting trust. — To the extent that a jury could find that decedent did not intend defendant to be the beneficial as well as the legal owner of an entire certificate account, a resulting trust was not implied. Hopkins v. Moore, 207 Ga. App. 383, 427 S.E.2d 853 (1993) (decided under former O.C.G.A. § 53-12-90).

Trial court properly granted summary judgment to a parent and trustee of the parent's trust in a suit brought by a child to obtain a half interest in certain real property by the imposition of a resulting trust as there was no dispute that no consideration was paid by the child for the property when the property was acquired. Rosado v. Rosado, 291 Ga. App. 670, 662 S.E.2d 761 (2008) (decided under former O.C.G.A. § 53-12-90).

Fraud

Trust is implied, when from any fraud, one person obtains title to property which rightfully belongs to another. Jansen v. Jansen, 180 Ga. 318, 178 S.E. 654 (1935) (decided under former Civil Code 1910, § 3739).

Essential ingredient which gives rise to a constructive trust is fraud, and if the question involves a deed to land, and the legal title to the land is sought to be recovered by the enforcement of an oral agreement to reconvey the land, fraud must have existed contemporaneously with the acquisition of the land by the one who is sought to be charged as trustee ex maleficio. Bennett v. Bennett, 212 Ga. 128, 91 S.E.2d 29 (1956) (decided under former Code 1933, § 108-106).

An implied trust arises wherever a person acquires the legal title to land or other property by means of an intentionally false and fraudulent verbal promise to hold the property for a certain specified purpose; and after having thus fraudulently obtained title, one retains, uses, and claims the property absolutely as one's own, so that the whole transaction by means of which the ownership is obtained is in fact a scheme of actual deceit. Jansen v. Jansen, 180 Ga. 318, 178 S.E. 654 (1935) (decided under former Civil Code 1910, § 3739).

If by a false and fraudulent oral promise, which one intends at the time of making the promise afterwards to violate, the vendee of two contiguous parcels of land, which one has contracted for by separate and distinct contracts, induces the vendor to convey to one both parcels by one and the same absolute unconditional deed, one paying for one parcel, but not for the other, equity by reason of one's fraud will fasten upon one a constructive trust in behalf of the vendor, as to the parcel not paid for, although the two parcels are not described in the deed as several tracts, but both together are treated as one tract. Jansen v. Jansen, 180 Ga. 318, 178 S.E. 654 (1935) (decided under former Civil Code 1910, § 3739).

When a conveyance absolute in form is made to one person, but when the circumstances show that the real intention of the parties was not to make an absolute conveyance but a conveyance with restrictions or reservations, when it is alleged and appears that there was fraud on the part of the grantee to induce the execution of the deed, a court of equity will set up an implied trust in the property, by construing the conveyance so as to do full justice to the parties as their interests may appear and in such cases the courts have held that to allow an oral agreement to be set up which restricts the original instrument does not contravene the statute of frauds, since the jurisdiction of the court is predicated upon the fraud of the grantee; and the parol evidence rule does not exclude oral testimony which tends to establish the fraud and show the real intention of the parties. Jansen v. Jansen, 180 Ga. 318, 178 S.E. 654 (1935) (decided under former Civil Code 1910, § 3739).

When land is purchased by one with the money of others, under an agreement and understanding that title is to be taken in the name of all, and the one procures a deed to the land but causes the deed to be made to oneself alone, an implied trust will arise in favor of the others as to an undivided interest in the land. Chapman v. Faughnan, 183 Ga. 114, 187 S.E. 634 (1936) (decided under former Code 1933, §§ 108-106 and 108-107).

Evidence that the petitioner had an agreement with the defendant whereby they were to jointly buy the land sued for, that the petitioner delivered the petitioner's half of the purchase money to the defendant, and trusted the defendant to pay the purchase money and obtain a deed conveying the land to the defendant and the petitioner jointly, that the petitioner had received one-half of the proceeds from the sale and lease of timber on the land, that the defendant had stated to two other persons that the petitioner owned an undivided one-half interest in the land, but that the defendant, in violation of the agreement, procured a deed of conveyance of the land in which the defendant alone was named as grantee, was sufficient to show an implied trust and to authorize a verdict in favor of the petitioner for the recovery of an undivided one-half interest in the land. Crosby v. Rogers, 197 Ga. 616, 30 S.E.2d 248 (1944) (decided under former law).

Under the evidence as to the existence of a partnership between the petitioner and the defendant and their agreement to jointly purchase the land involved, and evidence that the petitioner paid one-half of the purchase money and trusted the defendant to close the deal and obtain a conveyance naming them both as grantees, the defendant could not obtain an interest in the land antagonistic to that of the petitioner; and when the defendant procured a deed, in the defendant's own name only, equity would annul the conveyance and decree title in the petitioner to the petitioner's share. Crosby v. Rogers, 197 Ga. 616, 30 S.E.2d 248 (1944) (decided under former law).

When temporary administrator brought an equitable action alleging that the administrator's intestate had purchased certain real estate and had agreed to place title jointly in the defendant's name in order to secure a debt owed defendant, and that defendant was to reconvey title to deceased and had refused to reconvey the half interest held in her name, the temporary administrator has alleged an implied trust in favor of the estate of the intestate from the facts and circumstances. Royal v. Lane, 214 Ga. 375, 104 S.E.2d 901 (1958) (decided under former Code 1933, §§ 108-104 and 108-106).

Code expressly recognizes a trust which arises ex maleficio and a trustee ex maleficio. Cordovano v. State, 61 Ga. App. 590, 7 S.E.2d 45 (1940) (decided under former Code 1933, § 108-107).

Statute expressly recognizes trusts which arise ex maleficio; such a trust occurs whenever a person acquires the legal title to land or other property by means of an intentionally false and fraudulent verbal promise to hold the property for a certain specified purpose. Smith v. Harvey-Given Co., 182 Ga. 410, 185 S.E. 793 (1936).

When defendant obtained money by fraud and trickery ("the telegram racket") in order to prevent the defendant from taking advantage of defendant's own wrong, a naked, constructive, ex maleficio trust would be imposed by operation of law upon the property thus obtained even though it was contrary to the defendant's intention and will, and the defendant became a trustee ex maleficio for such property; the defendant was trustee ex maleficio of a naked ex maleficio trust, which required no action on defendant's part beyond the turning over or returning of the money to the beneficiary, the victim. Cordovano v. State, 61 Ga. App. 590, 7 S.E.2d 45 (1940) (decided under former Code 1933, §§ 108-104 and 108-106).

When one by a trick, or a fraud, or other wrongful act, obtained money from the trustee of the victim, one was, unless one had some other or better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would have otherwise had it. Cordovano v. State, 61 Ga. App. 590, 7 S.E.2d 45 (1940) (decided under former Code 1933, §§ 108-106 and 108-107).

Allegation of positive fraud required. — Complainant who seeks relief

Fraud (Cont'd)

based on the doctrine of trusts ex maleficio must allege more than the breach of a verbal promise. There must be an unequivocal allegation of positive fraud accompanying the promise, by means of which the acquisition of the legal title was consummated. General allegations as to an entire course of fraudulent conduct are not sufficient in the absence of a specific averment that the promise was made to be broken. Mays v. Perry, 196 Ga. 729, 27 S.E.2d 698 (1943) (decided under former Code 1933, § 108-107).

Must allege specific facts. — Inasmuch as the doctrine of trusts ex maleficio with respect to land can never be applied when there is nothing more than a broken verbal promise (otherwise the statute or frauds would be virtually abrogated), and since in order for such a promise to be the basis of a constructive trust, it must have been made with the intention of being broken and for the purpose of thereby obtaining title, a person who seeks relief on account thereof must unequivocally allege the particular facts constituting the fraud relied on to vitiate the transaction. Mays v. Perry, 196 Ga. 729, 27 S.E.2d 698 (1943) (decided under former Code 1933, § 108-107).

Unaccepted offer does not give rise to implied contract. — An unaccepted offer of compromise made by a fraud-feasor to enter into a written settlement with an insurer for an unspecified amount, without more, does not give rise to an implied trust, resulting or constructive, pending acceptance of the offer, even if the settlement is to be paid from a specified fund. Aetna Life Ins. Co. v. Weekes, 241 Ga. 169, 244 S.E.2d 46 (1978) (decided under former Code 1933, §§ 108-104 and 108-105).

Duress is a species of fraud. O'Callaghan v. Bank of Eastman, 180 Ga. 812, 180 S.E. 847 (1935) (decided under former Code 1933, § 108-117).

Statute of frauds is inoperative as a protection and support of fraud, and equity will declare a constructive trust in respect of property acquired by fraudulent oral promises of a vendee, which the vendee intends at the time of making to violate. Mays v. Perry, 196 Ga. 729, 27 S.E.2d 698 (1943) (decided under former Code 1933, §§ 108-105 and 108-107).

Nature of Transaction

When one purchasing property places title in another for one's own convenience, an implied trust exists. Belch v. Sprayberry, 97 Ga. App. 47, 101 S.E.2d 870 (1958) (decided under former Code 1933, § 108-112).

An implied trust results from the fact that one person's money has been invested in land and the conveyance taken in the name of another. Barnes v. Barnes, 230 Ga. 226, 196 S.E.2d 390 (1973) (decided under former Code 1933, § 108-116).

Implied trust created between spouses. — When the husband buys land with money which is the separate estate of his wife, and takes the title in his own name, in the absence of any evidence that the wife had given or loaned her money to him, the law raises an implied trust in favor of the wife, and makes the husband her trustee holding the property in trust for her sole use and benefit. Hemphill v. Hemphill, 176 Ga. 585, 168 S.E. 878 (1933) (decided under former Code 1910, § 3739).

Implied trust created. — When a deed to realty is executed to two grantees, one of whom pays a part of both the initial and subsequent payments to retire a loan on the property, and such payments amount to more than that one's portion of the undertaking, an implied trust upon the interest of the other grantee is established in proportion to the amount of purchase money paid thereon. Estes v. Estes, 205 Ga. 814, 55 S.E.2d 217 (1949) (decided under former Code 1933, § 108-106).

When an initial payment is made by one at the time of the execution of the conveyance taken in the name of another, this would support the establishment of a trust in the payor, and subsequent payments made by the payor should be considered to fix the extent of the trust interest. Estes v. Estes, 205 Ga. 814, 55 S.E.2d 217 (1949) (decided under former Code 1933, § 108-106).

Resulting trust created. — If the plaintiff's money was used to purchase the land in question and the other was

raised by loans, and the lender was secured by a mortgage or security deed, and it was the understanding that while a deed was to be taken from the vendor conveying to the defendants, the land was to be the property of the petitioner, then a resulting trust was created, and the beneficial interest in the property was in the plaintiff. Parlin v. McClure, 169 Ga. 576, 150 S.E. 835 (1929) (decided under former Civil Code 1910, § 3739).

Trust created in favor of parent. — If a mother buys lands with her own funds, and causes the title to be made to her son under an understanding and agreement that the property is to be hers, and that the son will make to her such conveyance as she may require, a trust in favor of the mother will be implied. Parlin v. McClure, 169 Ga. 576, 150 S.E. 835 (1929) (decided under former Civil Code 1910, § 3739).

Constructive trust. — When a grantee holds property impressed with a constructive trust in favor of the grantor, and conveys such property to another, who has notice and knowledge of the circumstances creating the constructive trust, the latter takes the property subject to the equities of the original grantor, and is a proper party in a suit seeking to impress the property with a constructive trust. Hancock v. Hancock, 205 Ga. 684, 54 S.E.2d 385 (1949) (decided under former Code 1933, §§ 108-104 and 108-106).

Incompletely Declared Uses

Failure of declared uses. — When a trust was expressly created by the terms of the testator's will, the uses declared being for the use and benefit of named persons until they reached 21 years of age, but when the will became effective, these persons were already more than 21 years of age, the uses entirely failed, and a resulting trust arose for the benefit of the heirs at law of the testator. First Nat'l Bank v. Stewart, 215 Ga. 141, 109 S.E.2d 606 (1959) (decided under former Code 1933, § 108-106).

Resulting trust will be implied for the benefit of the testator, which of course means the testator's estate, rather than for the benefit of the testator's heirs or next of kin when the testator's will contains a residuary clause which disposes of all the rest or residue of the testator's estate, a trust having been created in another provision of the testator's will but no express disposition of the remainder thereafter having been made. Stephens v. Stephens, 218 Ga. 671, 130 S.E.2d 208 (1963) (decided under former Code 1933, §§ 108-112 and 108-114).

Equitable Basis of Implied Trusts

An implied trust never arises out of a contract or agreement between the parties, but arises by implication of law from their acts and conduct apart from any contract. It is only necessary to allege and prove that one person furnished the purchase money for the land in controversy, and that the deed was taken in the name of the person to whom the money was so furnished. No presumption of a gift or loan arises. Hudson v. Evans, 198 Ga. 775, 32 S.E.2d 793 (1945) (decided under former Code 1933, §§ 108-106 and 108-108); Epps v. Epps, 209 Ga. 643, 75 S.E.2d 165 (1953) (decided under former Code 1933, § 108-106).

When the principal executes, without reading them, written instruments which had been prepared by the agent in which the principal is named grantee, and the agent thereafter conveys to a third person a part of the property so conveyed to the agent, and claims the rest of the property as purchaser under the deeds executed by the principal, a court of equity will decree an implied trust upon the proceeds derived from the sale of the property to the third person and upon the property remaining in the agent, and will enforce an accounting between the parties. Smith v. Harvey-Given Co., 182 Ga. 410, 185 S.E. 793 (1936) (decided under former Code 1933, § 108-108).

An implied trust results from the fact that one person's money has been invested in land, and the conveyance taken in the name of another. It is a mere creature of equity. McCollum v. McCollum, 202 Ga. 406, 43 S.E.2d 663 (1947) (decided under former Code 1933, § 108-106).

An implied trust may arise from a payment of a portion of the purchase money. An express oral promise by the grantee to hold in trust for another will not operate

Equitable Basis of Implied Trusts (Cont'd)

to defeat a resulting trust, where, on the special equities growing out of the transaction, the law would, in the absence of such agreement, imply a trust. Wells v. Wells, 216 Ga. 384, 116 S.E.2d 586 (1960) (decided under former Code 1933, § 108-105).

If an agent places money in the hands of a bank to be delivered to the agent's principal, a trust arises in favor of the latter, and acceptance of the money with notice of its ultimate destination creates a duty on the part of the bank to devote it to the purpose intended, and equity will enforce the trust, and if those funds are mingled with its general assets, and go to swell its general estate, the trust therefor attaches to the entire estate, even though the specific funds cannot be traced. Salzburger Bank v. Standard Oil Co., 173 Ga. 722, 161 S.E. 584 (1931) (decided under former Civil Code 1910, § 3739).

Agency being established, the agent will be held to be a trustee as to any profits, advantages, rights, or privileges under any contract made and obtained within the scope and by reason of such agency; and when the agent invests such profits in property or places the property to the agent's credit in a bank, the agent will be held to hold the property as trustee for the principal, and the latter can maintain in a court of equity an action to trace such profits into such investments, and to enjoin the agent or the agent's donee from selling, disposing of, or incumbering any such profits or any property in which the property has been invested. Smith v. Harvey-Given Co., 182 Ga. 410, 185 S.E. 793 (1936) (decided under former Civil Code 1910, §§ 3739 and 3780).

Constructive trust arises not from the intent of the parties, but by equity with respect to property acquired by fraud, or although acquired without fraud, when it is against equity that the property should be retained by the one who holds the property. Aetna Life Ins. Co. v. Weekes, 241 Ga. 169, 244 S.E.2d 46 (1978) (decided under former Code 1933, §§ 108-104 and 108-105).

Constructive trusts are such as are raised by equity in respect of property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that the property should be retained by the one who holds the property. Pittman v. Pittman, 196 Ga. 397, 26 S.E.2d 764 (1943) (decided under former Code 1933, § 108-105); Wages v. Wages, 202 Ga. 155, 42 S.E.2d 481 (1947) (decided under former Code 1933, § 108-106); Bateman v. Patterson, 212 Ga. 284, 92 S.E.2d 8 (1956) (decided under former Code 1933, § 108-106); Hodges v. Hodges, 213 Ga. 689, 100 S.E.2d 888 (1957) (decided under former Code 1933, §§ 108-104 and 108-106).

Constructive trust is not created by any words either expressly or impliedly evincing a direct intention to create a trust, but by the construction of equity in order to satisfy the demands of justice. Wages v. Wages, 202 Ga. 155, 42 S.E.2d 481 (1947) (decided under former Code 1933, § 108-106).

Assuming that the remedies at law are inadequate, if a plaintiff proves that a defendant promised to repay a loan and did so without a present intent to perform, the plaintiff can enforce either a constructive trust or an equitable lien on the fund, and, further, if a plaintiff proves that the fraudulently procured funds were used by the defendant to purchase other property, the plaintiff can reach the other property by a proceeding in equity, and can enforce a constructive trust or an equitable lien. Middlebrooks v. Lonas, 246 Ga. 720, 272 S.E.2d 687 (1980) (decided under former Code 1933, § 108-106).

Abolition of the vendor's equitable lien did not dispense with the natural equity acquired by the purchaser through payment of the purchase money, as the law recognizes that title is held in trust for the purchaser. Horner v. Savannah Valley Enters., Inc., 234 Ga. 371, 216 S.E.2d 113 (1975) (decided under former Code 1933, § 108-106).

Although there was no purchase money resulting trust created under former O.C.G.A. §§ 53-12-90 and 53-12-91 (see O.C.G.A. §§ 53-12-2 and 53-12-130), a decedent's mother was entitled to an equity interest in property of the deceased

daughter because a constructive trust was established under former O.C.G.A. § 53-12-93 (see O.C.G.A. § 53-12-132) and there was evidence of a gift of land under O.C.G.A. § 23-2-132, as an exception to the statute of frauds, in that the mother lived on the property, made valuable improvements, and paid meritorious consideration. Oliver v. 4708 Old Highgate Entry, No. 1:07-cv-2117-ODE, 2009 U.S. Dist. LEXIS 73002 (N.D. Ga. Apr. 21, 2009) (decided under former O.C.G.A. § 53-12-90).

When funds are embezzled, the victim can trace such funds into the property in which the embezzler invested the funds and obtain an equitable lien on such property. First Nat'l Bank v. Hill, 406 F. Supp. 351 (N.D. Ga. 1975), vacated on other grounds, 412 F. Supp. 422 (N.D. Ga. 1976) (decided under former Code 1933, §§ 108-106 and 108-107).

Purchaser from one whose title is subject to the equity of another, and who has notice of such equity, takes the land burdened with the equity. In the hands of any but an innocent purchaser of the property, the fiduciary character clings to the property. Parlin v. McClure, 169 Ga. 576, 150 S.E. 835 (1929) (decided under former Civil Code 1910, § 3739).

Clean hands doctrine. — Equity may declare a trust to exist under the circumstances specified by law, but will not do so at the insistence of a party who lacks clean hands with respect to those matters concerning which the party seeks relief. Griggs v. Griggs, 242 Ga. 96, 249 S.E.2d 566 (1978) (decided under former Code 1933, § 108-106).

It is not improper for one spouse to deed property to the other spouse so as to minimize or eliminate estate tax liability, but it is improper for the parties to agree that notwithstanding such deed and claimed tax reduction the grantee holds the property in trust for the benefit of the grantor. A grantor in such a situation lacks clean hands. Griggs v. Griggs, 242 Ga. 96, 249 S.E.2d 566 (1978) (decided under former Code 1933, § 108-106).

Insufficient proof of the existence of an implied trust. — Because a former husband did not present proof of the existence of an implied resulting trust under former O.C.G.A. §§ 53-12-2(3), 53-12-90, 53-12-91, and 53-12-92 (see O.C.G.A. § 53-12-132), the trial court did not err when the court granted judgment notwithstanding the verdict to the executor and the beneficiaries. Burnett v. Holroyd, 278 Ga. 470, 604 S.E.2d 137 (2004) (decided under former O.C.G.A. § 53-12-90).

Constructive trust not proper if payments were gifts or voluntary payments. — Assuming that a widow's counterclaim against her late husband's two siblings for failure to continue mortgage payments on a home that the husband had bought for another sibling was for a constructive trust on the property, the widow was not entitled to summary judgment because the familial gift presumption applicable to purchase money resulting trusts could apply, or the husband's contributions toward the home could be considered gifts or voluntary payments. Roberts v. Smith, 341 Ga. App. 823, 801 S.E.2d 915 (2017).

Statute of Limitations

Suit to enforce implied trust must be brought within seven years. — By analogy to the doctrine that an action for the recovery of land can be defeated by prescriptive title resulting from possession for seven years under color of title, an action to enforce an implied trust must generally be brought within seven years from the time the action accrues. Richards v. Richards, 209 Ga. 839, 76 S.E.2d 492 (1953) (decided under former law).

Limitation period begins to run only upon notice of adverse possession. — As long as a person who is in possession of the property of another, using the property for the owner's benefit, recognizes the latter's ownership, no lapse of time will bar the owner from asserting the owner's title as against the person in possession. Before any lapse of time will be a bar to the owner, it must appear that the person in possession has given notice or there must be circumstances shown which would be equivalent to notice, to the owner that the person in possession claims adversely to the owner. In such a case the statute will begin to run from the date of such notice. Until the owner has such notice, the owner has the right to

Statute of Limitations (Cont'd)

treat the possession of the other person as the person's own. Parlin v. McClure, 169 Ga. 576, 150 S.E. 835 (1929) (decided under former law).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, §§ 128, 130.

C.J.S. — 90 C.J.S., Trusts, §§ 2, 12.

ALR. — Rights and remedies of one who advances money to purchase real estate under an oral agreement by the vendee to give a mortgage thereon as security, 18 A.L.R. 1098.

Grantee's oral promise to grantor as giving rise to trust, 35 A.L.R. 280; 45 A.L.R. 851; 80 A.L.R. 195; 129 A.L.R. 689; 159 A.L.R. 997.

Rights of parties under oral agreement to buy land or bid it in at judicial sale for another, 42 A.L.R. 10; 135 A.L.R. 232; 27 A.L.R. 1285.

Remedy of one whose money is fraudulently used in the purchase or improvement of real property, 43 A.L.R. 1415; 47 A.L.R. 371; 778 A.L.R. 1269.

Person taking under probate of forged or fraudulent will as trustee ex maleficio, 52 A.L.R. 779.

Devise or legacy upon promise of devisee or legatee that another shall benefit as creating trust, 66 A.L.R. 156; 155 A.L.R. 106.

Gift or trust by deposit of funds belonging to depositor in a bank account in the name of himself and another, 66 A.L.R. 881.

May unconsummated intention to make a gift of personal property be made effective as a voluntary trust, 96 A.L.R. 383; 123 A.L.R. 1335.

Effect of deed in which the word "trustee" follows the name of grantee, but does not set out terms of trust or name the beneficiary, 137 A.L.R. 460.

Attorney as trustee for purpose of running of statute of limitations against claim for money or property received or collected by him, 151 A.L.R. 1388.

Devise or legacy upon promise of devisee or legatee that another shall benefit as creating trust, 155 A.L.R. 106.

Gift or trust by deposit in bank in another's name or in depositor's own name in trust for another, as affected by lack of knowledge on part of such other person, 157 A.L.R. 925; 168 A.L.R. 1324.

Grantee's oral promise to grantor as giving rise to trust, 159 A.L.R. 997.

Constructive trust against one holding merely bond for deed or other executory contract and not legal title, 173 A.L.R. 1275.

Doctrine of constructive trust or unjust enrichment as applicable between owner and one who fraudulently procures tax certificates, 175 A.L.R. 700.

Purported conveyance or transfer, based on consideration, which is ineffective to transfer the property, as subject of constructive trust, based on transferor's duty to complete the transfer, 12 A.L.R.2d 961.

Constructive trust with respect to partnership personal property assets knowingly received from individual partner for payment of his private debt, 45 A.L.R.2d 1211.

Imposition or declaration of constructive or resulting trust in United States saving bonds, 51 A.L.R.2d 163.

Testamentary nature of life insurance trust, 53 A.L.R.2d 1112.

Validity and effect of gift for charitable purposes which excludes otherwise qualified beneficiaries because of their race or religion, 25 A.L.R.3d 736.

Imposition of constructive trust in property bought with stolen or embezzled funds, 38 A.L.R.3d 1354.

Determination of property rights between local church and parent church body: modern view, 52 A.L.R.3d 324.

Trusts: merger of legal and equitable estates where sole trustees are sole beneficiaries, 7 A.L.R.4th 621.

Power of trustee in bankruptcy to defeat rights of beneficiary of constructive trust under § 544(a) of Bankruptcy Code (11 USCS § 544(a)), 96 A.L.R. Fed. 100.

53-12-3. Survival of common law and equity.

Except to the extent that the principles of common law and equity governing trusts are modified by this chapter or another provision of law, those principles remain the law of this state.

History. — Code 1981, § 53-12-3, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Cited in McPherson v. McPherson, 307 Ga. App. 548, 705 S.E.2d 314 (2011).

53-12-4. Law governing the validity of the trust.

(a) As to real property, the validity of a trust shall be determined by the law of the situs of the real property.

(b) As to all other property, the validity of a trust shall be determined by:

(1) The law of the jurisdiction designated in the trust instrument unless the effect of the designation is contrary to the public policy of the jurisdiction having the most significant relationship to the matter at issue; or

(2) In the absence of an effective designation in the trust instrument, the law of the jurisdiction having the most significant relationship to the matter at issue.

History. — Code 1981, § 53-12-4, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Cited in Reeves v. Newman, 287 Ga. 317, 695 S.E.2d 626 (2010).

53-12-5. Law governing the meaning and effect of trust provisions.

The meaning and effect of the trust provisions shall be determined by:

(1) The law of the jurisdiction designated in the trust instrument unless the effect of the designation is contrary to the public policy of the jurisdiction having the most significant relationship to the matter at issue; or

(2) In the absence of an effective designation in the trust instrument, the law of the jurisdiction having the most significant relationship to the matter at issue.

History. — Code 1981, § 53-12-5, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 752, § 53/HB 142.

Law reviews. — For annual survey on wills, trusts, guardianships, and fiduciary administration, see 66 Mercer L. Rev. 231 (2014).

53-12-6. Jurisdiction.

(a) Trusts are peculiarly subjects of equity jurisdiction. Suits by or against a trustee that sound at law may be filed in a court of law.

(b) Actions concerning the construction or administration of a trust or for a court to take any actions authorized by the provisions of this chapter shall be maintained in superior court, except as otherwise provided in Code Section 15-9-127.

(c) Any action by or against the trustee or to which the trustee is a party may be maintained in any court having jurisdiction over the parties and the subject matter, except as otherwise provided in subsection (b) of this Code section or in Code Section 15-9-127.

History. — Code 1981, § 53-12-6, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2020, p. 377, § 1-70/HB 865.

The 2020 amendment, effective January 1, 2021, substituted "that sound" for "which sound" in subsection (a); in subsection (b), substituted "construction or administration of a trust or for a court to take any actions authorized by the provisions of this chapter" for "construction, administration, or internal affairs of a trust" and inserted a comma after "superior court"; and, in subsection (c), inserted a comma after "subject matter", inserted "otherwise", and added "or in Code Section 15-9-127" at the end.

Law reviews. — For note, "Trusts: Creditors' Claims Against Beneficiaries of Spendthrift and Support Trusts," see 3 Ga. St. B.J. 356 (1967).

JUDICIAL DECISIONS

Analysis

General Consideration
Statute of Limitations

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, §§ 3779 and 3786, former Code 1933, §§ 108-117 and 108-501, former O.C.G.A. §§ 53-12-1 and 53-12-150, and former O.C.G.A. § 53-12-4 of the 1991 Trust Act are included in the annotations for this Code section.

Effect of section. — Former Code 1933, § 108-501 created a method, unknown to the common law, by which a person having a claim against a trust estate for services rendered to the estate, for articles of property or money furnished for the use of the estate, or any claim for the payment of which a court of equity would render the estate liable, may pursue directly the assets of the estate itself. In such actions the trustee is made defendant. A judgment rendered in such pro-

ceeding does not impose liability upon the trustee personally, but binds only the trust estate. Oberdorfer v. Smith, 102 Ga. App. 336, 116 S.E.2d 308 (1960) (decided under former Code 1933, § 108-501).

Trustees as only necessary parties. — Claim against a trust estate "for services rendered to said estate, or for articles or property or money furnished for the use of said estate, or any claim for the payment of which a court of equity would render said estate liable," may be enforced in a court of law, and in such a case the trustees are the only necessary parties. Zeigler v. Perry, 37 Ga. App. 647, 141 S.E. 426 (1928) (decided under former Civil Code 1910, § 3786 et seq.).

This new remedy is merely cumulative of common law, and it does not abolish the common law liability of the trustee personally either in tort or contract. Thus, if one wishes, a claimant may bring an action against the trustee individually. Oberdorfer v. Smith, 102 Ga. App. 336, 116 S.E.2d 308 (1960) (decided under former Code 1933, § 108-501).

Ordinarily, a charitable institution or corporation is not liable for the negligence of its officers and employees unless it fails to exercise ordinary care in their selection or fails to exercise such care in retaining them. A petition praying for general damages to be satisfied in part from charitable trust funds fails to state a cause of action when the petition fails to allege that the defendant was negligent in selecting or retaining employees. Burgess v. James, 73 Ga. App. 857, 38 S.E.2d 637 (1946) (decided under former Code 1933, § 108-501).

Pursuit of statutory remedy does not make equity case. — By parity of reasoning as regards those cases of statutory money rule against levying officers, which are not equity cases, and those of set off allowed by statute, the pursuit of the remedy allowed by statute does not make an "equity case" of which the Supreme Court has exclusive jurisdiction. Robinson v. Lindsey, 184 Ga. 684, 192 S.E. 910 (1937) (decided under former Code 1933, § 108-501).

Necessity of establishing facts. — Claim against trust estate for services or for articles or money furnished to trust estate may be enforced in either court of law or court of equity. But in order to subject a trust estate to an obligation, the specific facts which render the estate liable for the debt claimed must be alleged and established by evidence. Aiken v. White, 208 Ga. 572, 68 S.E.2d 149 (1951) (decided under former Code 1933, § 108-501).

Trustee is amenable to court of equity for faithful administration of trust. Hardware Mut. Cas. Co. v. Dooley, 193 Ga. 882, 20 S.E.2d 420 (1942) (decided under former Code 1933, § 108-501).

Jurisdiction generally. — All trusts are matters over which courts of equity may exercise jurisdiction in this state. O'Callaghan v. Bank of Eastman, 180 Ga. 812, 180 S.E. 847 (1935) (decided under former Code 1933, § 108-501).

To preserve a trust estate, to supervise the estate's management, to hold the trustee to the line of duty, for the purpose of preserving the trust's corpus for the benefit of the beneficiaries, is an elementary branch of equity jurisprudence. The judge of the superior court of each county has power, either in term or at chambers, to remove and appoint trustees. When a court of equity obtains jurisdiction for one purpose, it will proceed to give full relief to all parties with reference to the subject matter of the action where it has jurisdiction for that purpose. Fine v. Saul, 183 Ga. 309, 188 S.E. 439 (1936) (decided under former Code 1933, § 108-501).

If a will expressly creates a trust and imposes special fiduciary duties on the person named executor, not as executor but as a trustee, and the executor has expressly or impliedly assented to the gift and taken over the property as trustee, it is plain that the executor is not amenable to a proceeding in the court of ordinary (now probate court), brought by a legatee for an accounting and settlement with respect to the trust; but relief must be sought by equitable action in the superior court where the defendant resides. McDowell v. McDowell, 68 Ga. App. 363, 22 S.E.2d 851 (1942) (decided under former Code 1933, § 108-501).

Although a will does not in terms create a trust, yet the manifest purpose of the language and the exigencies of the case require that equity shall decree and en-

General Consideration (Cont'd)

force a trust, the trust will be raised by implication, and the rule is the same. McDowell v. McDowell, 68 Ga. App. 363, 22 S.E.2d 851 (1942) (decided under former Code 1933, § 108-501).

Courts of equity have jurisdiction to compel trustees to account for the trust funds in their hands, especially when the accounts are complicated. Keaton v. Greenwood, 8 Ga. 97 (1850) (decided under former law).

Probate court properly found that the court did not have jurisdiction to rule on a petition seeking an order from the court voiding a trust created by a guardian's brother for the benefit of a ward and seeking return of the assets in the trust to the ward as trusts of every kind were peculiarly subjects of equity jurisdiction. In re Longino, 281 Ga. App. 599, 636 S.E.2d 683 (2006), cert. denied, No. S07C0223, 2007 Ga. LEXIS 92 (Ga. 2007) (decided under former O.C.G.A. § 53-12-4).

If trustee omits to act when required by duty to do so, or is wanting in necessary care and diligence in the due execution of the trust which the trustee has undertaken, a court of equity will interpose. Jones v. Dougherty, 10 Ga. 273 (1851) (decided under former law); Fine v. Saul, 183 Ga. 309, 188 S.E. 439 (1936) (decided under former Code 1933, § 108-117).

If the trustee omits to act when required by duty to do so, or is wanting in necessary care and diligence in the due execution of the trust which the trustee has undertaken, a court of equity will interpose. The relief granted will always be molded and framed so as to render the trust effectual, and secure the best interests of all parties. A court of equity, having assumed jurisdiction over the trust for one purpose, will give effect to all the rights of the beneficiaries. Clark v. Clark, 167 Ga. 1, 144 S.E. 787 (1928) (decided under former Civil Code 1910, § 3779).

Interference with discretionary power. — In the case of trusts cognizable in a court of equity only, if the trustees have a discretionary power to be exercised according to their judgment a court of equity will not interfere to control the trustees acting bona fide in the exercise of their discretion. Semmes v. Mayor of Columbus, 19 Ga. 471 (1856) (decided under former law).

Equity has jurisdiction over charitable and religious trusts and uses it in a particular and special manner. Harris v. Pounds, 64 Ga. 121 (1879) (decided under former law).

Settlement of trust estate upon termination. — Court of equity has jurisdiction to settle a trust estate at the time provided for the termination of the trust. That a court of law may have concurrent jurisdiction will not oust that of a court of equity. Park v. Park, 65 Ga. 746 (1880) (decided under former law).

Executors are trustees and are amenable to a court of chancery (now court of equity) for the faithful discharge of their trust. Johns v. Johns, 23 Ga. 31 (1857) (decided under former law).

Article furnishes adequate remedy. — On the subject of trusts and the mode of enforcing relief against trust estates justly indebted to those having claims upon them, our law is plain and furnishes a simple and ample remedy. Moore, Jenkins & Co. v. Lampkin, 63 Ga. 748 (1879) (decided under former law).

If the plaintiffs seek to get a judgment against a trust estate for services rendered for such estate, plaintiffs must bring their action in accordance with the law; an ordinary judgment cannot be stretched to fit such circumstances. Blanford & Thornton v. McGehee, 67 Ga. 84 (1881) (decided under former law).

This entire statute simply means that any person having a valid claim against a trust estate may collect and enforce the payment of the claim without resorting to a court of equity, and the statute does not limit the liability of trust estates to the payment of such claims only as are indicated by the words "for services rendered to said estate, or for articles, or property, or money, furnished for the use of said estate." Miller v. Smythe, 92 Ga. 154, 18 S.E. 46 (1893) (decided under former law).

Depletion by subjection to liability for negligence of trustee. — Charitable trust funds may not be depleted by subjection to liability for negligence of

trustee. Burgess v. James, 73 Ga. App. 857, 38 S.E.2d 637 (1946) (decided under former Code 1933, § 1-8-501).

Enforcement of contractor's lien for improvements of trust estate is authorized. Williams v. Chatham Real Estate & Imp. Co., 13 Ga. App. 42, 78 S.E. 869 (1913) (decided under former law).

Sale of church edifice for pastor's salary. — Trust property of an unincorporated church in the hands of trustees can be subjected for a debt duly incurred to the pastor for salary and rent of parsonage, and, in the absence of other property, the church edifice and site in the hands of trustees can be subjected for such a debt. Kelsey v. Jackson, 123 Ga. 113, 50 S.E. 951 (1905) (decided under former law).

Foreclosure of mortgage on religious property. — When title to trust property is in trustees who appeared to represent an unincorporated religious institution and they executed a mortgage thereon, a proceeding to foreclose and subject the property to payment may be brought and the trustees are the only necessary parties. Langford v. Mount Zion Baptist Church, 22 Ga. App. 696, 97 S.E. 102 (1918) (decided under former Civil Code 1910, § 3786).

Trial court's discretion as to accountings. — Appellate court erred by reversing a trial court and ordering that the trustees provide the beneficiaries of a family trust the accounting sought because the appellate court failed to give any consideration to the trial court's discretion to require or excuse an accounting. Rollins v. Rollins, 294 Ga. 711, 755 S.E.2d 727 (2014).

Cited in Timmons v. Citizens Bank, 11 Ga. App. 69, 74 S.E. 798 (1912); Manget v. National City Bank, 168 Ga. 876, 149 S.E. 213 (1929); Sheldon & Co. v. Emory Univ., 52 Ga. App. 628, 184 S.E. 401 (1936); Farkas v. Stephens, 54 Ga. App. 706, 188 S.E. 919 (1936); Hardware Mut. Cas. Co. v. Dooley, 193 Ga. 882, 20 S.E.2d 420 (1942); McDowell v. McDowell, 194 Ga. 88, 20 S.E.2d 602 (1942); Smith v. Jarrett, 76 Ga. App. 525, 46 S.E.2d 626 (1948); Salter v. Salter, 209 Ga. 90, 70 S.E.2d 453 (1952); Rockefeller v. First Nat'l Bank, 154 F. Supp. 122 (S.D. Ga. 1957); Cohen v. Barris, 220 Ga. 131, 137 S.E.2d 469 (1964); McCann v. McCrain, 228 Ga. 814, 188 S.E.2d 484 (1972); Ray v. Beneventi, 220 Ga. 209, 190 S.E.2d 514 (1972); Tyler v. Borland, 157 Ga. App. 332, 277 S.E.2d 325 (1981); Citizens & S. Nat'l Bank v. Haskins, 254 Ga. 131, 327 S.E.2d 192 (1985); Davison v. Hines, 291 Ga. 434, 729 S.E.2d 330 (2012); Hasty v. Castleberry, 293 Ga. 727, 749 S.E.2d 676 (2013).

Statute of Limitations

Statute of limitations. — When a former petition was brought against a defendant as trustee of an alleged beneficiary and trustee, praying for a judgment against the defendant only in such representative capacity and against the described trust property, a petition brought within six months after a dismissal of the first, against the defendant only in its individual capacity, praying only for a general judgment against it, is not a renewal such as will toll the statute of limitations, since it involves a substantially different defendant and shows no exception to the general rule as to the requirement of identity of parties in order to suspend the statute of limitations. Sheldon & Co. v. Emory Univ., 184 Ga. 440, 191 S.E. 497 (1937) (decided under former law).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 267.

C.J.S. — 90 C.J.S., Trusts, § 203.

ALR. — Power of probate court to require attorney to return to estate or trust overpayment on account of fees or services, 70 A.L.R. 478.

Conflict of laws as to administration of testamentary trusts, and proper forum for judicial proceedings relating thereto, 115 A.L.R. 802.

Purchase by executor, administrator, or trustee of claims against estate or trust, 128 A.L.R. 917.

Doctrine of constructive trust or unjust enrichment as applicable between owner and one who fraudulently procures tax certificates, 175 A.L.R. 700.

Jurisdiction of suit involving trust as affected by location of res, residence of parties to trust, service, and appearance, 15 A.L.R.2d 610.

Power of court to extend term of trust, 46 A.L.R.2d 907.

Power of court to authorize modification of trust instrument because of changes in tax law, 57 A.L.R.3d 1044.

53-12-7. When trust and chapter conflict.

(a) The effect of the provisions of this chapter may be varied by the trust instrument except:

(1) As to any requirements relating to the creation and validity of express trusts as provided in Article 2 of this chapter;

(2) As to the effect of the rules relating to spendthrift trusts as provided in Article 5 of this chapter;

(3) As to the power of the beneficiaries to modify a trustee's compensation as provided in Code Section 53-12-210;

(4) As to the duty of a trustee to administer the trust and to exercise discretionary powers in good faith as provided in Code Sections 53-12-240 and 53-12-260;

(5) As to the effect of a provision relieving a trustee from liability as provided in Code Section 53-12-303;

(6) As to the periods of limitation on actions as provided in Code Sections 53-12-45 and 53-12-307; and

(7) As to the effect of the rules relating to trust directors as provided in Article 18 of this chapter.

(b) Nothing in a trust instrument shall prohibit or limit a court from taking any actions authorized by the provisions of this chapter.

History. — Code 1981, § 53-12-7, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 551, § 7/SB 134; Ga. L. 2020, p. 377, § 1-71/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (a), deleted "and" at the end of paragraph (a)(5), added "; and" at the end of paragraph (a)(6), and added paragraph (a)(7).

JUDICIAL DECISIONS

Trust instrument controlled. — In an appeal of an order granting a trustees' motion for summary judgment on a claim for breach of trust and breach of fiduciary duty, the court of appeals proceeded under the Revised Georgia Trust Code, O.C.G.A. § 53-12-1 et seq., as supplemented by the common law because even assuming that past distributions under the trust amounted to vested rights, the plaintiff could not show that the Revised Trust Code created any new trustees' obligations or impaired those rights in any relevant way; although the Revised Trust Code did not require a trustee to consider the resources of any beneficiary when determining whether to distribute trust property, O.C.G.A. § 53-12-245, the trust

instrument affirmatively directed the trustees to do so. McPherson v. McPherson, 307 Ga. App. 548, 705 S.E.2d 314 (2011).

Trustee's/executor's powers did not entitle trustee to ignore purpose of trust or commit waste. — Trial court erred in concluding that a widow's considerable powers of control over two testamentary trusts as trustee and executor entitled her to summary judgment on two of the children's/beneficiaries' claims against the trust created for the purpose of supporting them during their lifetimes; she was required to diligently and in good faith ascertain whether they required support, and her powers over the assets did not entitle her to commit waste. Peterson v. Peterson, 303 Ga. 211, 811 S.E.2d 309 (2018).

Jury question as to whether duty of good faith breached. — Jury question was presented as to whether two trustees of their children's trusts acted against the interests of the beneficiaries (their children) in bad faith by amending a partnership agreement to concentrate all voting power in themselves to the exclusion of the beneficiaries, who otherwise would have become partners when they turned 45. Likewise, the trustees as partners owed duties to the trusts as partners in the partnership. Rollins v. Rollins, 338 Ga. App. 308, 790 S.E.2d 157 (2016).

53-12-8. Notice to person permitted to bind another person; consent on behalf of another person; representation of others.

(a) Notice to a person who may represent and bind another person under this Code section shall have the same effect as if notice were given directly to such other person.

(b) The consent of a person who may represent and bind another person under this Code section shall be binding on the person represented unless the person represented objects to such representation before such consent would otherwise have become effective. Consent shall include, but shall not be limited to, an action related to the granting of powers to a trustee, modification or termination of a trust, a trustee's duty to report, entry into a binding nonjudicial settlement agreement, a trustee's compensation, the conversion of a trust to a unitrust, the appointment, resignation, or removal of a trustee, and other similar actions.

(c) Except as otherwise provided in Code Section 53-12-61, a person who under this Code section may represent a settlor who lacks capacity may receive notice and give a binding consent on such settlor's behalf.

(d) A settlor may not represent and bind a beneficiary under this Code section with respect to the termination or modification of a trust under Article 4 of this chapter.

(e) To the extent there is no conflict of interest between the holder of a power of appointment and the persons represented with respect to the particular question or dispute, such holder may represent and bind persons whose interests are as permissible appointees, as takers in default, or are otherwise subject to the power.

(f) To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

(1) A conservator may represent and bind the estate that the conservator controls;

(2) A guardian may represent and bind his or her ward if a conservator of such ward's estate has not been appointed;

(3) An agent having authority to act with respect to the particular question or dispute may represent and bind the principal;

(4) A trustee may represent and bind the beneficiaries of the trust;

(5) A trust director may represent and bind the beneficiaries of the trust on a question or dispute relating to the trust director's powers of direction;

(6) A person designated in the trust instrument to receive notice and provide consent on behalf of a beneficiary may represent and bind a beneficiary;

(7) A personal representative of a decedent's estate may represent and bind persons interested in such estate; and

(8) An ancestor may represent and bind an ancestor's minor or unborn descendant if a conservator or guardian for such descendant has not been appointed.

(g) Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to a particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented with respect to such particular question or dispute.

(h) A person who on the date of determination would be eligible to receive distributions of income or principal from the trust upon the termination of the interests of all persons then currently eligible to receive distributions of income or principal may represent and bind contingent successor beneficiaries with respect to matters in which there is no conflict of interest between the representative and the persons represented with respect to a particular question or dispute.

(i) A charitable entity may represent and bind another person and be represented by a person under this Code section in the same manner as an individual.

(j) The representative of a person represented under this Code section may represent and bind any other person who could be repre-

sented under this Code section by the person being represented by the representative if the person being represented were living and sui juris, but only to the extent there is no conflict of interest between the representative and such other person or among those being represented with respect to a particular question or dispute.

(k) Any person whose interests would be affected may request that the court determine whether an interest is represented under this Code section or whether the representation is adequate. If the court determines that an interest is not represented under this Code section, or that the otherwise available representation might be inadequate, the court may appoint a representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable. A representative may be appointed to represent several persons or interests. A representative may act on behalf of the individual represented with respect to any matter arising under this chapter, regardless of whether a judicial proceeding concerning the trust is pending. In making decisions, a representative may consider the general benefit accruing to the living members of the individual's family.

(l) The interests of unascertainable charitable beneficiaries of a trust that is not a charitable trust shall be represented as provided in Code Section 53-12-174 for the beneficiaries under a charitable trust.

History. — Code 1981, § 53-12-8, enacted by Ga. L. 2011, p. 551, § 8/SB 134; Ga. L. 2018, p. 262, § 4/HB 121; Ga. L. 2020, p. 377, § 1-72/HB 865.

The 2020 amendment, effective January 1, 2021, inserted "entry into a binding nonjudicial settlement agreement," in subsection (b); in subsection (f), inserted paragraphs (f)(5) and (f)(6), redesignated former paragraphs (f)(5) and (f)(6) as present paragraphs (f)(7) and (f)(8); in subsection (h), inserted "on the date of determination" and substituted "beneficiaries" for "remainder beneficiaries, including, but not limited to, charitable entities,"; added subsections (i) and (j); redesignated former subsection (i) as present subsection (k); and added subsection (l).

Law reviews. — For article on the 2018 amendment of this Code section, see 35 Ga. St. U. L. Rev. 219 (2018). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 70 Mercer L. Rev. 275 (2018).

53-12-9. Binding nonjudicial settlement agreement.

(a) Except as provided in subsection (b) of this Code section, the trustee, any trust director, and all other persons whose interests would be affected may enter into a binding nonjudicial settlement agreement with respect to any matter involving the trust.

(b) A nonjudicial settlement agreement:

(1) Shall be valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be

properly approved by the court under this Code section or other applicable law; and

(2) Shall not be valid with respect to any modification or termination of an irrevocable trust when the settlor's consent would be required in a proceeding to approve such modification or termination under subsection (b) of Code Section 53-12-61.

(c) The trustee, trust director, and any person whose interests would be affected by a nonjudicial settlement agreement may request that the court approve such agreement, determine whether the representation as provided in Code Section 53-12-8 was adequate, determine whether such agreement violates a material purpose of the trust, determine whether such agreement contains terms and conditions the court could have properly approved, or make any other similar determination.

(d) A nonjudicial settlement agreement entered into in accordance with this Code section shall be final and binding on all parties to such agreement, including individuals not sui juris, unborn beneficiaries, and persons unknown who are represented by a person who may represent and bind such parties under Code Section 53-12-8, as if ordered by a court with competent jurisdiction over the trust, the trust property, and the parties.

(e) Entering into or petitioning a court regarding a nonjudicial settlement agreement under this Code section shall not constitute a violation of a condition in terrorem under Code Section 53-12-22.

History. — Code 1981, § 53-12-9, enacted by Ga. L. 2018, p. 262, § 5/HB 121; Ga. L. 2020, p. 377, § 1-73/HB 865; Ga. L. 2020, p. 493, § 53/SB 429.

The 2020 amendments. — The first 2020 amendment, effective January 1, 2021, deleted former subsection (a), which read: "As used in this Code section, the term 'interested persons' means the trustee and all other persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court."; redesignated former subsections (b) through (e) as present subsections (a) through (d); in present subsection (a), substituted "subsection (b)" for "subsection (c)", substituted "trustee, any trust director, and all other persons whose interests would be affected" for "interested persons", and substituted "the trust" for "a trust" at the end; in present subsection (b), inserted "section" following "Code" in paragraph (b)(1) and, in paragraph (b)(2), substituted "an irrevocable trust" for "a noncharitable irrevocable trust" and substituted "a proceeding to approve such modification or termination under subsection (b) of Code Section 53-12-61" for "order to achieve a binding settlement, if such settlement were to be approved by a court"; in subsection (c), substituted "The trustee, trust director, and any person whose interests would be affected by" for "Any interested person may request the court approve", inserted "may request that the court approve such agreement", substituted "determine whether such agreement violates a material purpose of the trust," for "or", and added ", or make any other similar determination" at the end; in subsection (d), substituted "A nonjudicial settlement" for "An" at the beginning, substituted "all parties to such agreement, including individuals not sui juris, unborn beneficiaries, and persons unknown who are represented by a person who may represent and bind such parties under Code Section

53-12-8," for "the interested persons", and substituted "parties" for "interested persons"; and added subsection (e). The second 2020 amendment, effective July 29, 2020, part of an Act to revise, modernize, and correct the Code, substituted "this Code section" for "this Code" in paragraph (c)(1) (now (b)(1)).

Law reviews. — For article on the 2018 enactment of this Code section, see 35 Ga. St. U. L. Rev. 219 (2018). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 70 Mercer L. Rev. 275 (2018).

ARTICLE 2

CREATION AND VALIDITY OF EXPRESS TRUSTS

JUDICIAL DECISIONS

Analysis

General Consideration
Express Trusts
Implied Trusts
1. In General
2. Destruction Generally
3. Recovery of Property

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 3731 et seq., former Code 1933, § 108-101 et seq., and former O.C.G.A. § 53-12-22 are included in the annotations for this article.

Parol evidence. — In all cases when a trust is sought to be implied, a court may hear parol evidence of the nature of the transaction, or the circumstances, or conduct of the parties, either to imply or rebut a trust. Jansen v. Jansen, 180 Ga. 318, 178 S.E. 654 (1935) (decided under former Civil Code 1910, § 3739).

While an express trust must be created by writing and cannot be proved by parol, implied trusts may be established by parol evidence, although the effect of such evidence is to alter or vary a written instrument, and although the defendant sets up and insists upon the statute of frauds. Jansen v. Jansen, 180 Ga. 318, 178 S.E. 654 (1935) (decided under former Civil Code 1910, § 3739).

Principle in former Civil Code 1910, § 3258 (see O.C.G.A. § 44-14-32) that "a deed or bill of sale, absolute on its face, and accompanied by possession of the property, shall not be proved (at the instance of the parties) by parol to be a mortgage only, unless fraud in its procurement is the issue to be tried," is not applicable to an action seeking to set up an implied trust. Jansen v. Jansen, 180 Ga. 318, 178 S.E. 654 (1935) (decided under former Civil Code 1910, § 3739).

Promises made deceitfully for purpose of accomplishing fraudulent designs, whatever may be their terms, do not, unless reduced to writing, raise express trusts; but the law, acting upon them according to their nature, makes them a basis upon which to build up in favor of the defrauded party an implied trust. Jansen v. Jansen, 180 Ga. 318, 178 S.E. 654 (1935) (decided under former Civil Code 1910, § 3739).

Introduction of evidence generally. — Parties in an action to establish a trust are entitled to introduce, and the jury is entitled to consider, as tending to prove the intention of the parties, evidence relating to the nature and circumstances of the transactions and the conduct and declarations of the parties. Epps v. Wood, 243 Ga. 835, 257 S.E.2d 259 (1979) (decided under former Code 1933, § 108-101 et seq.).

Cited in Jenkins v. Lane, 154 Ga. 454, 115 S.E. 126 (1922); Bryant v. Green, 176

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Ga. 874, 169 S.E. 123 (1933); Ross v. Rambo, 195 Ga. 100, 23 S.E.2d 687 (1942); Bradley v. Thompson, 202 Ga. 785, 44 S.E.2d 898 (1947); Hodges v. Hodges, 213 Ga. 689, 100 S.E.2d 888 (1957); United States Epperson Underwriting Co. v. Jessup, 22 F.R.D. 336 (M.D. Ga. 1958); Lucas v. Bonner, 216 Ga. 334, 116 S.E.2d 548 (1960); Hodges v. Hodges, 221 Ga. 587, 146 S.E.2d 313 (1965); McCann v. McCrain, 228 Ga. 814, 188 S.E.2d 484 (1972); King v. Tyler, 148 Ga. App. 272, 250 S.E.2d 784 (1978); Conner v. Conner, 250 Ga. 27, 295 S.E.2d 739 (1982); Georgia Farm Bureau Mut. Ins. Co. v. Smith, 179 Ga. App. 399, 346 S.E.2d 848 (1986); Wasson v. Waid, 188 Ga. App. 177, 372 S.E.2d 508 (1988).

Express Trusts

Express trust may not be impressed by parol evidence upon a deed, as all express trusts must be created or declared in writing. Fowler v. Montgomery, 254 Ga. 118, 326 S.E.2d 765 (1985) (decided under former O.C.G.A. § 53-12-22).

Plaintiff cannot assert express trust and engraft deed by parol. — When father executed to plaintiff's sister a deed to land, absolute upon its face, with the agreement between all of them that the sister was to deed a specified portion of the land to plaintiff (her brother) whenever he or the father requested its execution, such an agreement, if properly executed in writing, would create an express trust; however, when the plaintiff tendered no written evidence but sought to establish the agreement by parol testimony, the court did not err in directing a verdict for the defendant, as plaintiff was attempting to assert an express trust and engraft it on a deed by parol, which cannot be done. Jones v. Jones, 196 Ga. 492, 26 S.E.2d 602 (1943) (decided under former Code 1933, § 108-104).

Impact of fraudulent undertakings or promises. — While fraudulent undertakings or promises, whatever their terms, do not unless reduced to writing raise express trusts, the law, acting upon them according to their nature, makes them a basis upon which to build up in favor of the defrauded party an implied or constructive trust. Pittman v. Pittman, 196 Ga. 397, 26 S.E.2d 764 (1943) (decided under former Code 1933, § 108-106).

Appointment of agent to purchase land for prisoner's family does not create express trust. Beasley v. Kendrick, 78 Ga. 121 (1886) (decided under former law).

An implied trust may rest upon express parol agreement, fraudulently made, by which a person acquires title to property of another; and in such case the express promise or agreement may be proved by parol to raise not an express but an implied trust. Pittman v. Pittman, 196 Ga. 397, 26 S.E.2d 764 (1943) (decided under former Code 1933, § 108-106).

Implied Trusts

1. In General

Implied trust sufficiently alleged. — When temporary administrator brought an equitable action alleging that the administrator's intestate had purchased certain real estate and had agreed to place title jointly in the defendant's name in order to secure a debt owed defendant, and that defendant was to reconvey title to deceased and had refused to reconvey the half interest held in the defendant's name, the temporary administrator has alleged an implied trust in favor of the estate of the intestate from the facts and circumstances. Royal v. Lane, 214 Ga. 375, 104 S.E.2d 901 (1958) (decided under former Code 1933, §§ 108-104 and 108-106).

Implied trusts are such as are inferred by law from the nature of the transaction or conduct of parties, and are either resulting or constructive. Hemphill v. Hemphill, 176 Ga. 585, 168 S.E. 878 (1933) (decided under former Code 1910, § 3732); Aetna Life Ins. Co. v. Weekes, 241 Ga. 169, 244 S.E.2d 46 (1978) (decided under former Code 1933, § 108-105).

Constructive trust found. — When a grantee holds property impressed with a constructive trust in favor of the grantor, and conveys such property to another who has notice and knowledge of the circumstances creating the constructive trust,

the latter takes the property subject to the equities of the original grantor and is a proper party in an action seeking to impress the property with a constructive trust. Hancock v. Hancock, 205 Ga. 684, 54 S.E.2d 385 (1949) (decided under former Code 1933, §§ 108-104 and 108-106).

When the contract of rescission was executed, the equity in the house and lot reverted to the vendor (in an exchange of property), and it became impressed with a trust, and the vendee held it for the benefit of the vendor as an implied trust. Eller v. McMillan, 174 Ga. 729, 163 S.E. 910 (1932) (decided under former Civil Code 1910, §§ 3732 and 3739).

Question of deed title in trust. — When deed was wholly without any good or valuable consideration, other than trust assumed by grantee (to sell the land and pay grantors their half interest in the proceeds), and the only title at all that grantee could have had was a title in trust, claim of grantors was not an attempt to engraft on an otherwise good and valid absolute deed an extraneous parol trust, but an effort either to void the deed or else to sustain the deed in the only way that it might possibly be given effect, if allowed to have any effect at all. Pittman v. Pittman, 196 Ga. 397, 26 S.E.2d 764 (1943) (decided under former Code 1933, § 108-106).

Obtaining property fraudulently. — Trust is implied when from any fraud one person obtains title to property which rightfully belongs to another. Jansen v. Jansen, 180 Ga. 318, 178 S.E. 654 (1935) (decided under former Civil Code 1910, §§ 3731 and 3739).

An implied trust arises wherever a person acquires the legal title to land or other property by means of an intentionally false and fraudulent verbal promise to hold the land for a certain specified purpose, and after having thus fraudulently obtained title, one retains, uses, and claims the property absolutely as one's own, so that the whole transaction by means of which the ownership is obtained is in fact a scheme of actual deceit. Jansen v. Jansen, 180 Ga. 318, 178 S.E. 654 (1935) (decided under former Civil Code 1910, §§ 3731 and 3739).

If by a false and fraudulent oral promise, which one intends at the time of making it afterwards to violate, the vendee of two contiguous parcels of land, which one has contracted for by separate and distinct contracts, induces the vendor to convey to one both parcels by one and the same absolute unconditional deed, one paying for one parcel but not for the other, equity by reason of one's fraud will fasten upon one a constructive trust on behalf of the vendor, as to the parcel not paid for, although the two parcels are not described in the deed as several tracts, but both together are treated as one tract. Jansen v. Jansen, 180 Ga. 318, 178 S.E. 654 (1935) (decided under former Civil Code 1910, §§ 3731 and 3739).

When a conveyance absolute in form is made to one person, but the circumstances show that the real intention of the parties was not to make an absolute conveyance but a conveyance with restrictions or reservations, when it is alleged and appears that there was fraud on the part of the grantee to induce the execution of the deed, a court of equity will set up an implied trust in the property, by construing the conveyance so as to do full justice to the parties as their interests may appear, and in such cases the courts have held that to allow an oral agreement to be set up which restricts the original instrument does not contravene the statute of frauds, since the jurisdiction of the court is predicated upon the fraud of the grantee; and the parol evidence rule does not exclude oral testimony which tends to establish the fraud and show the real intention of the parties. Jansen v. Jansen, 180 Ga. 318, 178 S.E. 654 (1935) (decided under former Civil Code 1910, §§ 3731 and 3739).

While it is the general rule that a parol trust cannot be grafted on an absolute deed, such instrument must be taken to mean a deed which is valid, not one without any good or valuable consideration, under which the grantee holds in fraud; under such circumstances, even though the language might otherwise be construed as setting up an express trust, it will nevertheless be taken as negativing any intent or purpose to pass title, and for such purpose it will be held to create a valid implied trust insofar as it imposes

Implied Trusts (Cont'd)
1. In General (Cont'd)

duties and obligations naturally arising from the nature of the transaction and the conduct of the parties. Pittman v. Pittman, 196 Ga. 397, 26 S.E.2d 764 (1943) (decided under former Code 1933, § 108-106).

Implied trust does not arise from agreement, but by implication of law from acts and conduct. Epps v. Epps, 209 Ga. 643, 75 S.E.2d 165 (1953) (decided under former Code 1933, § 108-106).

Parol evidence to raise implied trust. — While an express trust can only be shown by a writing, an implied trust may rest upon an express parol agreement, fraudulently made, by which a person acquires title to property of another; and in such case the express promise or agreement may be proved by parol to raise not an express but implied trust. Jenkins v. Lane, 154 Ga. 454, 115 S.E. 126 (1922) (decided under former Civil Code 1910, § 3731).

No implied trust created, — When property was purchased by plaintiffs, defendants, and their father, and conveyed to the mother upon understanding that upon her death it was to be equally divided between her heirs, no implied trust was created. King v. Tyler, 148 Ga. App. 272, 250 S.E.2d 784 (1978) (decided under former law).

Implied trust created. — When A. promises X. and X.'s relative to come by a hotel for her and accompany them to a public sale, but fails to come by, telling the relative A. will buy property for X., an implied trust is created when A. buys in the property. Rives v. Lawrence, 41 Ga. 283 (1870) (decided under former law).

When the children executed a deed to father to consummate sale which he failed to do, but claimed land as own, an implied trust was created and the deed will be reformed. Summerour v. Summerour, 148 Ga. 499, 97 S.E. 71 (1918) (decided under former Civil Code 1910, §§ 3732 and 3739).

When the purchase money for a tract of land was paid by one and the title thereto taken in the name of one's brother, an implied trust arises. Such a trust does not arise from an agreement but by implication of law from acts and conduct. Stevens v. Stevens, 204 Ga. 340, 49 S.E.2d 895 (1948) (decided under former Code 1933, § 108-106).

An implied trust results from the fact that one person's money has been invested in land, and the conveyance taken in the name of another. Bullard v. Bullard, 214 Ga. 122, 103 S.E.2d 570 (1958) (decided under former Code 1933, § 108-116).

General statement on implied trusts. — Trusts are implied whenever the legal title is in one person, but the beneficial interest, either from the payment of the purchase money or other circumstances, is either wholly or partially in another. Eller v. McMillan, 174 Ga. 729, 163 S.E. 910 (1932) (decided under former Civil Code 1910, §§ 3732 and 3739).

Required showing on implied trust creation. — In order to set up an implied resulting trust in favor of one paying the purchase money where the title is placed in another, it is indispensable that it be shown that the purchase price was paid by the beneficiary of the trust at or before the time the conveyance was made, or that it be shown, other than by a void parol agreement, that it was the intent and purpose of the parties at the time the conveyance was made that the one claiming the benefit of the trust should pay the purchase money in conformity with such original intent and purpose of the parties. Such intent may be established by proof of an initial payment by the one claiming the benefit of the trust, at or before the time the title is conveyed to another. Loggins v. Daves, 201 Ga. 628, 40 S.E.2d 520 (1946) (decided under former Code 1933, §§ 108-104, 108-105, and 108-106).

Implied trust is necessarily based upon implied contract, implied either in fact or in law. Jones v. Jones, 196 Ga. 492, 26 S.E.2d 602 (1943) (decided under former Code 1933, §§ 108-104 and 108-105); Beckwith v. Peterson, 227 Ga. 403, 181 S.E.2d 51 (1971) (decided under former Code 1933, §§ 108-104 and 108-105).

2. Destruction Generally

Implied trust not destroyed by express verbal agreement. — If from all

the facts and circumstances an implied trust is otherwise established, it is not destroyed by the express verbal agreement which may have constituted a part of the transaction. Pittman v. Pittman, 196 Ga. 397, 26 S.E.2d 764 (1943) (decided under former Code 1933, § 108-106).

Petition seeking to establish an implied trust will fail when all the allegations relied on are based solely upon an oral agreement setting up an invalid express trust. If, however, it is made to appear from all the alleged facts and circumstances surrounding a transaction that an implied trust was established, the mere fact that there may have been an abortive attempt to establish by parol an express trust does not operate to destroy the implied trust which the facts and circumstances otherwise establish. Johnson v. Upchurch, 200 Ga. 762, 38 S.E.2d 617 (1946) (decided under former Code 1933, §§ 108-104 and 108-105).

3. Recovery of Property

Recovery by owner of constructive trust. — When a constructive trust arises in favor of an owner, the owner may enforce such trust by following the property or its product in the hands of a third person who is not a bona fide purchaser, whether the product be land, chattels, choses in action, or money. Pittman v. Pittman, 196 Ga. 397, 26 S.E.2d 764 (1943) (decided under former Code 1933, § 108-106).

In an action to establish an implied resulting trust after the plaintiff made the first payment of the purchase price, the recovery by such plaintiff should be limited to the extent and in the proportion that plaintiff's money has actually gone to pay for property where the title is put in another. Loggins v. Daves, 201 Ga. 628, 40 S.E.2d 520 (1946) (decided under former Code 1933, §§ 108-104, 108-105, and 108-106).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, §§ 17, 128.

C.J.S. — 90 C.J.S., Trusts, § 9.

ALR. — Grantee's oral promise to grantor as giving rise to trust, 35 A.L.R. 280; 45 A.L.R. 851; 80 A.L.R. 195; 129 A.L.R. 689; 159 A.L.R. 997.

Attorney as trustee for purpose of running of statute of limitations against claim for money or property received or collected by him, 151 A.L.R. 1388.

Devise or legacy upon promise of devisee or legatee that another shall benefit as creating trust, 155 A.L.R. 106.

Rights of parties under oral agreement to buy or bid in land for another, 27 A.L.R.2d 1285.

Constructive trust with respect to partnership personal property assets knowingly received from individual partner for payment of his private debt, 45 A.L.R.2d 1211.

Creation of express trust in property to be acquired in future, 3 A.L.R.3d 1416.

53-12-20. Express trusts.

(a) Except as provided in subsection (d) of this Code section, an express trust shall be created or declared in writing and signed by the settlor or an agent for the settlor acting under a power of attorney containing express authorization.

(b) An express trust shall have, ascertainable with reasonable certainty:

(1) An intention by a settlor to create such trust;

(2) Trust property;

(3) Except for charitable trusts or a trust for care of an animal, a beneficiary who is reasonably ascertainable at the time of the

creation of such trust or reasonably ascertainable within the period of the rule against perpetuities;

(4) A trustee; and

(5) Trustee duties specified in writing or provided by law.

(c) The requirement that a trust have a reasonably ascertainable beneficiary shall be satisfied if under the trust instrument the trustee or some other person has the power to select the beneficiaries based on a standard or in the discretion of the trustee or other person.

(d) In the case of a trust created pursuant to 42 U.S.C. Section 1396p(d)(4)(B) by an agent acting for the settlor, the power of attorney need not contain an express authorization to create or declare a trust.

History. — Code 1981, § 53-12-20, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 551, § 9/SB 134.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1895, § 3153, former Civil Code 1910, § 3733, former Code 1933, §§ 108-104, 108-105, and 108-106, former Code Section 53-12-23, and former O.C.G.A. § 53-12-20 of the 1991 Trust Act are included in the annotations for this Code section.

Construction with provisions of 11 U.S.C. — When the debtor was granted bare legal title to a residential loan package for purposes of resale as a bailment under O.C.G.A. § 44-12-40, or alternatively as an express trust under former O.C.G.A. § 53-12-20 (see O.C.G.A. § 53-12-20), but had no equitable interest in the loan, the loan was not the property of the debtor's estate under 11 U.S.C. § 541(d), and the creditor's interest was not avoidable under 11 U.S.C. § 544(a)(1). HSBC Mortg. Servs. v. Pettigrew (In re Southstar Funding, LLC), No. 07-65842-PWB, 2008 Bankr. LEXIS 3883 (Bankr. N.D. Ga. Oct. 4, 2008) (Unpublished) (decided under former O.C.G.A. § 53-12-20).

Constructive trust may only be an implied trust because all express trusts must be in writing under Georgia law. Gooden v. Buffalo Sav. Bank, 21 Bankr. 456 (Bankr. N.D. Ga. 1982) (decided under former Code 1933, § 108-105).

Statute was taken from the statute of frauds. Smith v. Harvey-Given Co., 182 Ga. 410, 185 S.E. 793 (1936) (decided under former Code 1933, § 108-108).

There can be no express trust unless the trust is created in writing. Smith v. Peacock, 114 Ga. 691, 40 S.E. 757, 88 Am. St. R. 53 (1902) (decided under former Code 1895, § 3153); Macy v. Hays, 163 Ga. 478, 136 S.E. 517 (1927) (decided under former Civil Code 1910, § 3733).

Gift supported in trust must be in writing. — Gift cannot be supported on the theory of an express trust unless such trust be created or declared in writing. Jackson v. Gallagher, 128 Ga. 321, 57 S.E. 750 (1907) (decided under former Code 1895, § 3153).

Express trust must be in writing. — When the facts preclude an implied trust from being created, an express trust will also fail if not declared in writing. Walker v. Brown, 104 Ga. 357, 30 S.E. 867 (1898) (decided under former Code 1895, § 3153).

As no party contended that a writing established the interests of certain entities, there could be no express trust under Georgia law. Nor was there a constructive trust as no wrongdoing was alleged on the part of the debtor. High-Top Holdings, Inc.

v. RREF II BB Acquisitions, LLC (In re High-Top Holdings, Inc.), 564 B.R. 784 (Bankr. N.D. Ga. 2017).

Allegations in pleading. — While the trust must have been created or declared in writing, it was not necessary for the pleader to so allege in the petition. Brown v. Drake, 101 Ga. 130, 28 S.E. 606 (1897) (decided under former law); Walker v. Edmundson, 111 Ga. 454, 36 S.E. 800 (1900) (decided under former law); Taliaferro v. Smiley, 112 Ga. 62, 37 S.E. 106 (1900) (decided under former law); Eaton v. Barnes, 121 Ga. 548, 49 S.E. 593 (1904) (decided under former Code 1895, § 3153).

Oral express trusts prohibited. — As a decedent had successfully revoked a revocable living trust when the decedent notified the trustee in writing of a desire for revocation, the decedent's subsequent indication that reinstatement was no longer desired and that the trust could continue as it was had to be done in writing; further, although the trust had been governed by Illinois law, the decedent's oral statement to allow the trust to continue as it was had to be governed by Georgia law, where the decedent resided, and as Georgia law prohibited the creation of oral express trusts under former O.C.G.A. § 53-12-20(a), no such trust was created. Wachovia Bank, N.A. v. Moody Bible Inst. of Chi., Inc., 283 Ga. App. 488, 642 S.E.2d 118 (2007) (decided under former O.C.G.A. § 53-12-20).

Creation generally. — Testimony of an agent of the bank that at the direction of the depositor a written entry of deposit of the depositor was made on the records of the bank in the name of the depositor as trustee for the plaintiff, that a passbook evidencing such deposit was issued by the bank in favor of the depositor as trustee, and that the depositor signed an identification card as trustee was sufficient to meet the requirement that an express trust be in writing. Wilder v. Howard, 188 Ga. 426, 4 S.E.2d 199 (1939) (decided under former law).

While an express trust can only be shown by a writing, an implied trust may rest upon an express parol agreement, fraudulently made, by which a person acquires title to property of another; and in such case the express promise or agreement may be proved by parol to raise, not an express, but an implied trust. Pittman v. Pittman, 196 Ga. 397, 26 S.E.2d 764 (1943) (decided under former Code 1933, § 108-106).

While fraudulent undertakings or promises, whatever their terms, do not, unless reduced to writing, raise express trusts, yet the law, acting upon them according to their nature, makes them a basis upon which to build up in favor of the defrauded party an implied or constructive trust. Pittman v. Pittman, 196 Ga. 397, 26 S.E.2d 764 (1943) (decided under former Code 1933, § 108-106).

Court having properly charged that express trusts are those created and manifested by agreement of the parties, while implied trusts are such as are inferred by law from the nature of the transaction or the conduct of the parties, and thereafter charging that all express trusts shall be created or declared in writing, and there being no evidence whatever as to any trust having been created in writing, the charge of the court left for the consideration of the jury only the inquiry whether or not, as contended by the defendant, an implied trust was shown by the evidence, and was not reversible error. Bradley v. Thompson, 202 Ga. 785, 44 S.E.2d 898 (1947) (decided under former Code 1933, §§ 108-104, 108-105, and 108-106).

An order of a court directing plaintiff's mother to hold the funds received as judgment in trust until plaintiff's 18th birthday created an express trust. Hayes v. Clark, 242 Ga. App. 411, 530 S.E.2d 38 (2000) (decided under former O.C.G.A. § 53-12-20).

Trust is a valid express trust because the trust agreement provided for a beneficiary, who was also the settlor, named a trustee, imposed duties on the trustee, and both the settlor and the trustee executed the trust agreement. Metro Inv. Partners, Inc. v. Baker (In re Baker), No. 08-83693, 2009 Bankr. LEXIS 5738 (Bankr. N.D. Ga. Feb. 23, 2009).

An express trust cannot be made by parol agreement. Nor can an allegation of an express, oral trust be employed to defeat a resulting trust. Wells v. Wells, 216 Ga. 384, 116 S.E.2d 586 (1960) (de-

cided under former Code 1933, § 108-105).

With respect to a Chapter 11 bankruptcy in which the debtor, a business that served as an intermediary for clients desiring to effect exchanges of real property qualifying for tax-deferred treatment under 26 U.S.C. § 1031, held funds in bank accounts that resulted from certain real estate sales, two real estate exchange investors were not entitled to turnover of proceeds from sales of their real estate, as opposed to having their claims payable on the same basis as the other unpaid exchangers, because the written agreements between the investors and the debtor specifically and unequivocally defined the circumstances under which the debtor acquired cash proceeds and the use and disposition of them, but did not create an express trust under former O.C.G.A. § 53-12-20 (see O.C.G.A. § 53-12-20). The parol evidence rule, former O.C.G.A. § 24-6-1 (see O.C.G.A. § 24-3-1), prevented the investors from trying to establish a trust based on communications that occurred prior to the agreements, which contained merger clauses. McCamy v. Kerr (In re Real Estate Exch. Servs.), No. 08-85871-PWB, 2009 Bankr. LEXIS 3731 (Bankr. N.D. Ga. Oct. 9, 2009) (decided under former O.C.G.A. § 53-12-20).

An express trust cannot be created by parol and engrafted on an absolute deed. Jones v. Jones, 196 Ga. 492, 26 S.E.2d 602 (1943) (decided under former Code 1933, §§ 108-104 and 108-105); Pope v. Cole, 223 Ga. 448, 156 S.E.2d 36 (1967) (decided under former Code 1933, § 108-105); Dobbson v. Floyd County, 229 Ga. 598, 193 S.E.2d 611 (1972) (decided under former Code 1933, § 108-105).

When two persons buy land jointly and the deed is made to a third person in trust a reformation of the deed, conveying the land to third parties, is not authorized, because an express trust cannot be engrafted on a deed by parol. Wilder v. Wilder, 138 Ga. 573, 75 S.E. 654 (1912) (decided under former Code 1910, § 3733); DeLoach v. Jefferson, 142 Ga. 436, 83 S.E. 122 (1914) (decided under former Code 1933, § 108-105); Jenkins v. Georgia Inv. Co., 149 Ga. 475, 100 S.E. 635 (1919) (decided under former Code 1933, § 108-105).

While it is the general rule that a parol trust cannot be grafted on an absolute deed, such instrument must be taken to mean a deed which is valid, not one without any good or valuable consideration, under which the grantee holds in fraud; under such circumstances, even though the language might otherwise be construed as setting up an express trust, it will nevertheless be taken as negativing any intent or purpose to pass title, and for such purpose it will be held to create a valid implied trust, insofar as it imposes duties and obligations naturally arising from the nature of the transaction and the conduct of the parties. Pittman v. Pittman, 196 Ga. 397, 26 S.E.2d 764 (1943) (decided under former Code 1933, § 108-106).

A verdict and decree in the plaintiff's favor for a one-half undivided interest in the property, if based upon the express agreement as to the interest to be owned by each of the parties, and not upon the proportion of the purchase money paid, would manifestly impinge upon the rule that an express trust cannot be created by parol and accordingly, any recovery or decree in the plaintiff's favor must be in proportion to the amount of the purchase money paid by the plaintiff, and could not be based upon the express agreement. Hemphill v. Hemphill, 176 Ga. 585, 168 S.E. 878 (1933) (decided under former Civil Code 1910, § 3733).

When deed was wholly without any good or valuable consideration, other than trust assumed by grantee (to sell the land and pay grantors their half interest in the proceeds) and the only title at all that grantee could have had was a title in trust, claim of grantors was not an attempt to engraft on an otherwise good and valid absolute deed an extraneous parol trust, but an effort either to void the deed, or else to sustain it in the only way that it might possibly be given effect, if allowed to have any effect at all. Pittman v. Pittman, 196 Ga. 397, 26 S.E.2d 764 (1943) (decided under former Code 1933, § 108-106).

When the father executed to plaintiff's sister a deed to land, absolute upon the deed's face, with the agreement between all of them that the sister was to deed a

specified portion of the land to plaintiff (her brother) whenever he or the father requested its execution, such an agreement, if properly executed in writing, would create an express trust; however, when the plaintiff tendered no written evidence, but sought to establish the agreement by parol testimony, the court did not err in directing a verdict for the defendant, as plaintiff was attempting to assert an express trust and engraft it on a deed by parol, which cannot be done. Jones v. Jones, 196 Ga. 492, 26 S.E.2d 602 (1943) (decided under former Code 1933, §§ 108-104 and 108-105).

As all express trusts must be created or declared in writing, an express trust may not be impressed by parol evidence upon a deed. Fowler v. Montgomery, 254 Ga. 118, 326 S.E.2d 765 (1985) (decided under former O.C.G.A. § 53-12-20).

All express trusts must be in writing. — An attempt made to fasten upon the property an express trust upon a parol agreement, is forbidden, as all express trusts must be in writing, or else the express trusts are not enforceable as such. Mays v. Perry, 196 Ga. 729, 27 S.E.2d 698 (1943) (decided under former Code 1933, § 108-105).

When the parol agreement is a mere attempt to create an express trust, as such it is invalid as to any of the property because such a trust can be created only in writing. Caswell v. Caswell, 177 Ga. 153, 169 S.E. 748 (1933) (decided under former Civil Code 1910, § 3733).

When plaintiff purportedly conveyed a duplex to plaintiff's son by a duly recorded deed stating that the conveyance was for $10 and other valuable consideration, and plaintiff did not require any agreement in writing as to the true consideration for the deed, which was that the plaintiff was to have a right of possession of an apartment on the premises for the balance of plaintiff's life, this was an attempt to set up an express trust by parol, and plaintiff obtained no interest under this alleged agreement. Smith v. Lynch, 210 Ga. 338, 80 S.E.2d 175 (1954) (decided under former law).

Implied trust fails if based solely upon oral agreement. — Petition seeking to establish an implied trust will fail when all the allegations relied on are based solely upon an oral agreement setting up an invalid express trust. If, however, it is made to appear from all the alleged facts and circumstances surrounding a transaction that an implied trust was established, the mere fact that there may have been an abortive attempt to establish by parol an express trust, does not operate to destroy the implied trust which the facts and circumstances otherwise establish. Johnson v. Upchurch, 200 Ga. 762, 38 S.E.2d 617 (1946) (decided under former Code 1933, §§ 108-104 and 108-105).

When an express trust is not created by writing, the plaintiff must recover, if at all, upon an implied trust. Bryant v. Green, 176 Ga. 874, 169 S.E. 123 (1933) (decided under former Civil Code 1910, § 3733).

Introduction of evidence generally. — Parties in an action to establish a trust are entitled to introduce, and the jury is entitled to consider, as tending to prove the intention of the parties, evidence relating to the nature and circumstances of the transactions and the conduct and declarations of the parties. Epps v. Wood, 243 Ga. 835, 257 S.E.2d 259 (1979) (decided under former Code 1933, § 108-106).

Parol promise may be basis for implied trust. — Promises, whatever may be their terms, do not, unless reduced to writing, raise express trusts; but the law, acting upon them according to their nature, makes them a basis upon which to build up in favor of the defrauded party an implied or constructive trust. Brown v. Doane, 86 Ga. 32, 12 S.E. 179, 11 L.R.A. 381 (1890) (decided under former law); Taliaferro v. Smiley, 112 Ga. 62, 37 S.E. 106 (1900) (decided under former law).

Mortgagee's administration of an escrow account does not give rise to either a trust or an agency relationship. Telfair v. First Union Mortg. Corp., 216 F.3d 1333 (11th Cir. 2000), cert. denied, 531 U.S. 1073, 121 S. Ct. 765, 148 L. Ed. 2d 666 (2001) (decided under former O.C.G.A. § 53-12-20).

Charitable trust created. — Decedent's will unambiguously created a charitable trust rather than an outright devise subject to a condition subsequent as: (1)

the decedent plainly stated the decedent's express intent to devise the decedent's home to an organization that would maintain the property in perpetuity for conservation purposes; (2) the decedent also bequeathed gardening equipment to the same organization, clearly for the purpose of tending the land that the corporation had been given and was expected to hold as trustee; (3) the devise reflected all of the composite elements of an express trust; and (4) the failure of the will to use the terms "trust" and "trustee" did not alter the outcome. Chattowah Open Land Trust, Inc. v. Jones, 281 Ga. 97, 636 S.E.2d 523 (2006) (decided under former O.C.G.A. § 53-12-20).

No express trust created. — With respect to a Chapter 11 bankruptcy in which the debtor, a business that served as an intermediary for clients desiring to effect exchanges of real property qualifying for tax-deferred treatment under 26 U.S.C. § 1031, held funds in bank accounts that resulted from certain real estate sales, two real estate exchange investors were not entitled to turnover of proceeds from sales of their real estate, as opposed to having their claims payable on the same basis as the other unpaid exchangers, because the written agreements between the investors and the debtor specifically and unequivocally defined the circumstances under which the debtor acquired cash proceeds and the use and disposition of those proceeds, but did not create an express trust under former O.C.G.A. § 53-12-20 (see O.C.G.A. § 53-12-20). Nor could the investors establish a resulting trust under former O.C.G.A. § 53-12-91 (see O.C.G.A. § 53-12-130) or a constructive trust under former O.C.G.A. § 53-12-93 (see O.C.G.A. § 53-12-132). McCamy v. Kerr (In re Real Estate Exch. Servs.), No. 08-85871-PWB, 2009 Bankr. LEXIS 3731 (Bankr. N.D. Ga. Oct. 9, 2009) (decided under former O.C.G.A. § 53-12-20).

Because the deeds at issue did not convey property to trustees, nor to the regional body representing a national church or the national church, but simply to a local church, O.C.G.A. § 14-5-46 could not be applied without reference to other statutory and case law, particularly when the imposition of a trust was alleged in the absence of any reference in the deeds; the requirements of the Georgia Trust Act, O.C.G.A. § 53-12-20, were consistent with determining the intentions of the parties by applying neutral principles of law to all the relevant deeds, statutes, constitutions, and charters of the local and national churches. Timberridge Presbyterian Church, Inc. v. Presbytery of Greater Atlanta, Inc., 307 Ga. App. 191, 705 S.E.2d 262 (2010).

Cited in Arteaga v. Arteaga, 169 Ga. 595, 151 S.E. 5 (1929); Jones v. Robinson, 172 Ga. 746, 158 S.E. 752 (1931); Alston v. McGonigal, 179 Ga. 617, 176 S.E. 632 (1934); Evans v. Pennington, 180 Ga. 488, 179 S.E. 123 (1935); Turner v. Olympian Hills, Inc., 184 Ga. 340, 191 S.E. 106 (1937); Archer v. Kelley, 194 Ga. 117, 21 S.E.2d 51 (1942); Allen v. Allen, 196 Ga. 736, 27 S.E.2d 679 (1943); Pierce v. Harrison, 199 Ga. 197, 33 S.E.2d 680 (1945); Hawkins v. Commissioner, 152 F.2d 221 (5th Cir. 1945); Loggins v. Daves, 201 Ga. 628, 40 S.E.2d 520 (1946); Woo v. Markwalter, 210 Ga. 156, 78 S.E.2d 473 (1953); Westbrook v. Westbrook, 212 Ga. 472, 93 S.E.2d 683 (1956); Douglas v. Sumner, 213 Ga. 82, 97 S.E.2d 122 (1957); Belch v. Sprayberry, 97 Ga. App. 47, 101 S.E.2d 870 (1958); United States Epperson Underwriting Co. v. Jessup, 22 F.R.D. 336 (M.D. Ga. 1958); Southern Land, Timber & Pulp Corp. v. Eunice, 219 Ga. 338, 133 S.E.2d 345 (1963); Burns v. Winkler, 221 Ga. 285, 144 S.E.2d 337 (1965); Hodges v. Hodges, 221 Ga. 587, 146 S.E.2d 313 (1965); Beckwith v. Peterson, 227 Ga. 403, 181 S.E.2d 51 (1971); Taylor v. Aetna Life Ins. Co., 235 Ga. 630, 221 S.E.2d 45 (1975); Aetna Life Ins. Co. v. Weekes, 241 Ga. 169, 244 S.E.2d 46 (1978); King v. Tyler, 148 Ga. App. 272, 250 S.E.2d 784 (1978); Holzman v. National Bank, 149 Ga. App. 382, 254 S.E.2d 501 (1979); Conner v. Conner, 250 Ga. 27, 295 S.E.2d 739 (1982); Wasson v. Waid, 188 Ga. App. 177, 372 S.E.2d 508 (1988); Coleman v. Hainlen (In re Hainlen), 365 B.R. 288 (Bankr. S.D. Ga. 2007); Heiman v. Mayfield, 300 Ga. App. 879, 686 S.E.2d 284 (2009); Rector v. Bishop of the Episcopal Diocese of Ga., Inc., 290 Ga. 95, 718 S.E.2d 237 (2011); Presbytery of Greater

Atlanta, Inc. v. Timberridge Presbyterian Church, Inc., 290 Ga. 272, 719 S.E.2d 446 (2011).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 17.

C.J.S. — 90 C.J.S., Trusts, § 42.

ALR. — Construction and application of provision in trust instrument relating to amendment or modification, 128 A.L.R. 1173.

Attorney as trustee for purpose of running of statute of limitations against claim for money or property received or collected by him, 151 A.L.R. 1388.

53-12-21. Formal and precatory words.

(a) No formal words shall be necessary to create an express trust.

(b) Words otherwise precatory in nature will create a trust only if they are sufficiently imperative to show a settlor's intention to impose enforceable duties on a trustee and if all other elements of an express trust are present.

History. — Code 1981, § 53-12-21, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Law reviews. — For article, "The Rule Against Perpetuities as Applied to Georgia Wills and Trusts," see 16 Ga. L. Rev. 235 (1982).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, §§ 3148 and 3165, former Civil Code 1910, § 3783, former Code 1933, §§ 108-101 and 108-102, and former O.C.G.A. §§ 53-12-21 and 53-12-24 are included in the annotations for this Code section.

No formal words are necessary to create a trust. Peavy v. Dure, 131 Ga. 104, 62 S.E. 47 (1908) (decided under former Civil Code 1895, §§ 3148 and 3150); Collins v. Collins, 157 Ga. 85, 121 S.E. 218 (1923) (decided under former Civil Code 1910, § 3783).

When a person has used language from which it can be gathered that the person intended to create a trust, such intention is not negatived by the surrounding circumstances, the settlor has done such things as are necessary in equity to bind oneself not to recede from that intention, the trust property is of such a nature as to be legally capable of being settled, the object of the trust is lawful, and the settlor had complied with the provisions of law as to evidence, a good and valid declaration of trust has (prima facie) been made. No technical terms or expressions need be used. It is sufficient if the language used shows that the settlor intended to create a trust, and clearly points out the property, beneficiary, and disposition to be made of the property. McCreary v. Gewinner, 103 Ga. 528, 29 S.E. 960 (1898) (decided under former Civil Code 1895, § 3148).

The following words create a trust and make the daughters trustees for their children, if any: "My said effects thus going into the hands of my said daughters [that is, at the death of the life-tenant], not to be subject to the control of any husband, but the same to belong to my said daughters and other children." Sumpter v. Carter, 115 Ga. 893, 42 S.E. 324, 60 L.R.A. 274 (1902) (decided under former law).

An agreement to hold the proceeds of land for another, or an agreement, upon

consideration of the surrender of a title bond, to sell the land, and after deducting certain charges to deliver the residue of the proceeds over to a named person creates a valid express trust for such purpose. McCreary v. Gewinner, 103 Ga. 528, 29 S.E. 960 (1898) (decided under former Civil Code 1895, § 3148).

An undertaking on the part of a mortgagee, in consideration of the execution and delivery to the mortgagee by the mortgagor of a deed to the mortgaged property, to sell the property within a given time, and turn the proceeds, after making certain deductions, over to a named person, creates a valid express trust in favor of the latter. McCreary v. Gewinner, 103 Ga. 528, 29 S.E. 960 (1898) (decided under former Civil Code 1895, § 3148).

Deed which conveyed realty to guardian of minors created a trust estate in the property described. Wadley v. Oertel, 140 Ga. 326, 78 S.E. 912 (1913) (decided under former law); Trust Co. v. Wallace, 143 Ga. 214, 84 S.E. 538 (1915) (decided under former law); Humphrey v. Johnson, 143 Ga. 703, 85 S.E. 830 (1915) (decided under former law); Fleck v. Ellis, 144 Ga. 732, 87 S.E. 1055 (1916) (decided under former law).

When the intended husband contracts with L that his wife's property shall be free from all his marital rights, L was ipso facto made trustee of this settlement with the wife as the cestui que trust. Logan v. Goodall, 42 Ga. 95 (1871) (decided under former law).

When a father has property conveyed to himself to hold for his minor son and the father is not testamentary or statutory guardian, he is a trustee. McCrary v. Clements, 95 Ga. 778, 22 S.E. 675 (1895) (decided under former law).

Provisions in wills may be such that a trust is necessary in order to carry out and enforce them. In such a case an intention on the part of the testator to create the trust will generally be inferred and no formal words are necessary to create such an estate. Bell v. Watkins, 104 Ga. 345, 30 S.E. 756 (1898) (decided under former Civil Code 1895, § 3148).

Rule is applicable to express trusts. Hubbard v. Bibb Brokerage Co., 44 Ga. App. 1, 160 S.E. 639 (1931) (decided under former Civil Code 1910, § 3728).

Trust is an equitable obligation, either express or implied, resting upon a person by reason of a confidence reposed in the person, to apply or deal with property for the benefit of some other person, or for the benefit of that person and another or others, according to such confidence. Smith v. Francis, 221 Ga. 260, 144 S.E.2d 439 (1965) (decided under former Code 1933, §§ 108-101 and 108-102).

Majority rule appears to be that funds paid by a mortgagor to an escrow account to be used by the mortgagee to meet tax and insurance obligations upon the property as those obligations accrue do not constitute trust properties such as would render the mortgagee accountable to the mortgagor for any earnings or profits from the funds. Knight v. First Fed. Sav. & Loan Ass'n, 151 Ga. App. 447, 260 S.E.2d 511 (1979) (decided under former law).

Manifest intention necessary to create trust. — While educational purposes are proper matters of charity, and while no formal words are necessary to create a trust estate, there must be a manifest intention to do so. Moore v. Wells, 212 Ga. 446, 93 S.E.2d 731 (1956) (decided under former Code 1933, § 108-102).

Estates may be created not for the benefit of the grantee but for the use of some other person; they are termed trust estates; no formal words are necessary to create such an estate and whenever a manifest intention is exhibited that another person shall have the benefit of the property the grantee shall be declared a trustee. Finch v. Miller, 178 Ga. 37, 172 S.E. 25 (1933) (decided under former Civil Code 1910, § 3728).

When a person makes a deposit in a savings bank in the person's own name as trustee for another person, retains the bank book, gives notice to the beneficiary, makes withdrawals from the deposits in the account, and dies leaving the account unexplained, the beneficiary is entitled to the balance remaining at the death of the depositor, unless evidence is produced that overcomes the legal presumption in favor of the trust, by showing that the

depositor never intended to create a trust, or has revoked the trust. Wilder v. Howard, 188 Ga. 426, 4 S.E.2d 199 (1939) (decided under former law).

Parties in an action to establish a trust are entitled to introduce, and the jury is entitled to consider, as tending to prove the intention of the parties, evidence relating to the nature and circumstances of the transactions and the conduct and declarations of the parties. Epps v. Wood, 243 Ga. 835, 257 S.E.2d 259 (1979) (decided under former Code 1933, § 108-101 et seq.).

Duty to find and effectuate settlor's intention. — In construing trust instrument, it is duty of court to find intention of settlor and to effectuate that intention insofar as the language used and the rules of law will permit. Thomas v. Trust Co. Bank, 247 Ga. 693, 279 S.E.2d 440 (1981) (decided under former law).

Every kind of valuable property, both real and personal, that can be assigned at law may be subject matter of trust. Carmichael Tile Co. v. Yaarab Temple Bldg. Co., 182 Ga. 348, 185 S.E. 504 (1936) (decided under former Code 1933, §§ 108-101 and 108-102).

Trust fund may exist notwithstanding that beneficiaries may not be in existence at time of fund's creation or be specifically named. Carmichael Tile Co. v. Yaarab Temple Bldg. Co., 182 Ga. 348, 185 S.E. 504 (1936) (decided under former Code 1933, §§ 108-101 and 108-102).

It is essential to creation of express trust that object of bounty of grantor is defined by deed, and that the person or class of persons who shall be the beneficial owners of the property are marked out. Heyward v. Hatfield, 182 Ga. 373, 185 S.E. 519 (1936) (decided under former law).

Adoption laws determine class of beneficiaries of testamentary trust. — In order to effectuate the testator's intent, the adoption laws in effect at the date of the testator's death will determine the class of beneficiaries entitled to take under a testamentary trust in the absence of an express contrary intent; similarly, in order to determine the intention of a settlor as to who is to be included in a class of beneficiaries under an inter vivos trust, the law in effect at the time the trust was executed must be examined. Thomas v. Trust Co. Bank, 247 Ga. 693, 279 S.E.2d 440 (1981) (decided under former law).

Precatory words. — Words "I further will that my granddaughter to receive a support" are not precatory or recommendatory. Bell v. Watkins, 104 Ga. 345, 30 S.E. 756 (1898) (decided under former Code 1895, § 3148).

Testator devised his property as follows: I will to my wife, R, for her to give to our children as they arrive of age as she may be able, keeping a memorandum so as each child shall be equal. It was held, that "the words 'for her to give,'" etc., in the will, construed in connection with the rest of the item, are not such precatory or recommendatory words as will create a trust. It is left discretionary with her to give off to the children as she is able, and it is not declared what she shall give off, whether the entire share of each child or only a part. Had the intention been apparent that the wife should hold or use the property for the benefit of the children during minority, a trust would have been created, although the words were not mandatory in form. Glore v. Scroggins, 124 Ga. 922, 53 S.E. 690 (1906).

Words, "I give, to my beloved wife, my wagons, buggy, and also my household and kitchen furniture, all without limitation or reserve, for her to do as she thinks best for herself and all of my lawful heirs," are not sufficient precatory words to create a trust because the wife was first given without reserve or limitation. If the following words created such a trust, it could not be without limitation. Wood v. Owen, 133 Ga. 751, 66 S.E. 951 (1910) (decided under former Code 1895, § 3162).

Effect of precatory words generally. — General rule is that the courts will not by construction reduce an estate once devised absolutely in fee by limitations contained in subsequent parts of the will unless the intention to do so is unmistakably manifest. Russell v. Marshall, 221 Ga. 601, 146 S.E.2d 296 (1965) (decided under former Code 1933, § 108-103).

Provisions in the will requiring the testator's wife to make an inventory, to sell at public or private sale, make a final return and instructing the ordinary (now probate

judge) to discharge the executor do no more than protect creditors and follow the law applicable to executors, and in nowise diminish the fee simple estate therein devised. Russell v. Marshall, 221 Ga. 601, 146 S.E.2d 296 (1965) (decided under former Code 1933, § 108-103).

Testator's expressions of confidence in his wife and in her preserving the property and taking care of their children, neither expressly nor by implication limited or qualified her estate thus devised; therefore, the estate was in fee simple. Russell v. Marshall, 221 Ga. 601, 146 S.E.2d 296 (1965) (decided under former Code 1933, § 108-103).

Cited in Hibble v. Mutual Oil Co., 175 Ga. 381, 165 S.E. 219 (1932); Refinance Corp. v. Wilson, 183 Ga. 336, 188 S.E. 707 (1936); Harvey v. Greenfield, 186 Ga. 192, 197 S.E. 276 (1938); Wilson v. Fulton Nat'l Bank, 188 Ga. 691, 4 S.E.2d 660 (1939); Sanders v. First Nat'l Bank, 189 Ga. 450, 6 S.E.2d 294 (1939); Hall v. Hall, 203 Ga. 656, 47 S.E.2d 806 (1948); Budreau v. Mingledorff, 207 Ga. 538, 63 S.E.2d 326 (1951); Joseph v. Citizens & S. Nat'l Bank, 210 Ga. 111, 78 S.E.2d 193 (1953); United States Epperson Underwriting Co. v. Jessup, 22 F.R.D. 336 (M.D. Ga. 1958); Wright v. Piedmont Eng'r & Constr. Corp., 106 Ga. App. 401, 126 S.E.2d 865 (1962); Riser v. Trust Co., 231 Ga. 155, 200 S.E.2d 756 (1973); Epps v. Wood, 243 Ga. 835, 257 S.E.2d 259 (1979); Raines v. Duskin, 247 Ga. 512, 277 S.E.2d 26 (1981); Odum v. Henry, 254 Ga. 739, 334 S.E.2d 304 (1985); Wasson v. Waid, 188 Ga. App. 177, 372 S.E.2d 508 (1988).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, §§ 66, 135.

C.J.S. — 90 C.J.S., Trusts, § 25.

ALR. — Grantee's oral promise to grantor as giving rise to trust, 35 A.L.R. 280; 45 A.L.R. 851; 80 A.L.R. 195; 129 A.L.R. 689; 159 A.L.R. 997.

May unconsummated intention to make a gift of personal property be made effective as a voluntary trust, 96 A.L.R. 383; 123 A.L.R. 1335.

Precatory trusts, 107 A.L.R. 896.

Effect of deed in which the word "trustee" follows the name of grantee, but does not set out terms of trust or name the beneficiary, 137 A.L.R. 460.

Devise or legacy upon promise of devisee or legatee that another shall benefit as creating trust, 155 A.L.R. 106.

Gift or trust by deposit in bank in another's name or in depositor's own name in trust for another, as affected by lack of knowledge on part of such other person, 157 A.L.R. 925; 168 A.L.R. 1324.

Creation of voluntary trust in bank deposit maintained in ordinary individual form, 168 A.L.R. 1273.

Term "proceeds" in will or other trust instrument as indicating intention as to whether assets are to constitute principal or income, 1 A.L.R.2d 194.

Wills: effect of gift to be disposed of "as already agreed" upon or the like, 85 A.L.R.3d 1181.

Unemployment compensation: trucker as employee or independent contractor, 2 A.L.R.4th 1219.

Trusts: merger of legal and equitable estates where sole trustees are sole beneficiaries, 7 A.L.R.4th 621.

Adopted child as within class named in deed or inter vivos trust instrument, 37 A.L.R.5th 237.

Determination of employer-employee relationship for social security contribution and unemployment tax purposes under sec. 3121(d)(2) of Federal Insurance Contributions Act (26 USCS sec. 3121(d)(2)), sec. 3306(i) of Federal Unemployment Tax Act (26 USCS sec. 3306(i)), and implementing regulations, 37 A.L.R. Fed 95.

53-12-22. Trust purposes and conditions in terrorem.

(a) A trust may be created for any lawful purpose.

(b) A condition in terrorem shall be void unless there is a direction in the trust instrument as to the disposition of the property if the condition in terrorem is violated, in which event the direction in the trust instrument shall be carried out, except as otherwise provided in subsection (c) of this Code section.

(c) A condition in terrorem shall not be enforceable against an individual for:

(1) Bringing an action for interpretation or enforcement of a trust instrument;

(2) Bringing an action for an accounting, for removal, or for other relief against a trustee; or

(3) Entering into a settlement agreement.

History. — Code 1981, § 53-12-22, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2020, p. 377, § 1-74/HB 865.

The 2020 amendment, effective January 1, 2021, inserted ", except as otherwise provided in subsection (c) of this Code section" in subsection (b); and added subsection (c).

JUDICIAL DECISIONS

Clause valid. — In terrorem clause in the subject trust contained an alternative disposition in the event the clause was triggered and, thus, it passed the test in O.C.G.A. § 53-12-22(b). Duncan v. Rawls, 345 Ga. App. 345, 812 S.E.2d 647 (2018), cert. denied, No. S18C1055, 2018 Ga. LEXIS 713 (Ga. 2018).

No good faith/probable cause exception. — Trial court correctly concluded that no good faith/probable cause exception existed in O.C.G.A. § 53-12-22. Duncan v. Rawls, 345 Ga. App. 345, 812 S.E.2d 647 (2018), cert. denied, No. S18C1055, 2018 Ga. LEXIS 713 (Ga. 2018).

Challenges to will and trust barred beneficiary's recovery of trust distribution. — Decedent's niece could not recover the $25,000 provided for the niece in a decedent's revocable trust because the niece had violated the trust's in terrorem clause by filing legal challenges to the validity of the decedent's will and obtaining a temporary restraining order against the trustee, preventing the trustee from distributing trust assets. Howell v. Bates, 350 Ga. App. 708, 830 S.E.2d 250 (2019).

Benefits forfeited. — Sibling forfeited any benefits under a parent's trust by violating the trust's in terrorem clause, and the superior court erred in not only awarding a constructive trust based on any benefits the brother would have received under the trust, but also in permitting the claim of undue influence to proceed to the jury. Giller v. Slosberg, No. A21A0001, 2021 Ga. App. LEXIS 204 (Apr. 27, 2021).

53-12-23. Capacity of settlor.

A person has capacity to create an inter vivos trust to the extent that such person has legal capacity to transfer title to property inter vivos. A person has capacity to create a testamentary trust to the extent that such person has legal capacity to devise or bequeath property by will.

History. — Code 1981, § 53-12-23, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-12-22 of the 1991 Trust Act are included in the annotations for this Code section.

Cited in Hayes v. Clark, 242 Ga. App. 411, 530 S.E.2d 38 (2000).

53-12-24. Non-merger.

No trust shall be invalid or terminated and no merger of title to trust property shall occur merely because the trustee or trustees are the same person or persons as the beneficiary or beneficiaries of the trust.

History. — Code 1981, § 53-12-24, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-25. Transfer of property in trust.

(a) Transfer of property in trust shall require a transfer of legal title to the trustee. In any transfer of property or any interest in property, if a trust is named as a grantee, whether such trust is held under the laws of this state or of any other jurisdiction, then such transfer is deemed to have been made to the trustee of such trust as though the trustee of such trust had been named as grantee instead of the trust.

(b) For any interest in real property to become trust property in a trust of which any transferor is a trustee, the instrument of conveyance shall additionally be recorded in the appropriate real property records.

History. — Code 1981, § 53-12-25, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2018, p. 262, § 6/HB 121.

Law reviews. — For annual survey on wills, trusts, guardianships, and fiduciary administration, see 65 Mercer L. Rev. 295 (2013). For article on the 2018 amendment of this Code section, see 35 Ga. St. U. L. Rev. 219 (2018).

JUDICIAL DECISIONS

Wrongful death claim did not comprise the res of a technical trust. — Creditors' 11 U.S.C. § 523(a)(4) claim against a Chapter 13 debtor, their attorney, was dismissed because although the attorney failed to file a wrongful death complaint on the creditors' behalf and represented to the creditors that the attorney had, the creditors failed to allege a contract or other agreement establishing a technical trust. The creditors' wrongful death cause of action did not comprise the res of a technical trust because under O.C.G.A. § 53-12-25 only property subject to transfer by the settler could become the subject matter of a trust, and under O.C.G.A. § 44-12-24 the creditors' wrongful death action was non-transferable. Crisler v. Farr (In re Farr), No. 11-1009, 2011 Bankr. LEXIS 1875 (Bankr. M.D. Ga. May 18, 2011).

Retroactive application of statute

prohibited. — Rights of the decedent's surviving spouse were already vested when the Revised Georgia Trust Code of 2010 (Revised Code), O.C.G.A. § 53-12-1 et seq., was enacted because under the terms of the amended trust agreement, the surviving spouse's rights to the trust assets took effect upon the decedent's death before the Revised Code took effect. Accordingly, any new obligation imposed by the Revised Code that would have impaired the surviving spouse's right to possession could not be applied retroactively, and O.C.G.A. § 53-12-25 would have had no application to the trust if it, in fact, created such a new obligation. Rose v. Waldrip, 316 Ga. App. 812, 730 S.E.2d 529 (2012), cert. denied, No. S12C1888, 2012 Ga. LEXIS 981 (Ga. 2012).

Trial court improperly found that O.C.G.A. § 53-12-25(a) applied retroactively to the conveyance of a parcel of property because retroactive application of the statute could have impermissibly affected the beneficiary's vested rights. Callaway v. Willard, 351 Ga. App. 1, 830 S.E.2d 464 (2019), cert. denied, No. S19C1589, 2020 Ga. LEXIS 165 (Ga. 2020).

53-12-26. Additions to trust property.

Property may be added to an existing trust from any source in any manner if the addition is not prohibited by the trust instrument and the property is acceptable to the trustee.

History. — Code 1981, § 53-12-26, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former O.C.G.A. § 53-12-25 of the 1991 Trust Act are included in the annotations for this Code section.

Cited in Telfair v. First Union Mortg. Corp., 216 F.3d 1333 (11th Cir. 2000); Forsyth County v. White, 272 Ga. 619, 532 S.E.2d 392 (2000).

53-12-27. Construction; parol evidence.

When the construction of an express trust is at issue, the court may hear parol evidence of the circumstances surrounding the settlor at the time of the execution of the trust and parol evidence to explain all ambiguities, both latent and patent.

History. — Code 1981, § 53-12-27, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-12-27 of the 1991 Trust Act are included in the annotations for this Code section.

Meaning of "foundation." — Word "foundation" as used in a trust was ambiguous as the settlor did not establish a foundation at the time of the settlor's death and it could not be determined whether the settlor had a charitable intent; thus, the trial court should have considered parol evidence under former O.C.G.A. § 53-12-27 (see O.C.G.A.

§ 53-12-27) to explain the ambiguity and to determine the settlor's intent. Baker v. Merrill Lynch Trust Co., 286 Ga. App. 767, 650 S.E.2d 296 (2007), cert. denied, No. S07C1772, 2007 Ga. LEXIS 810 (Ga. 2007) (decided under former O.C.G.A. § 53-12-27).

53-12-28. Trusts for animals.

(a) A trust may be created to provide for the care of an animal that is alive during the settlor's lifetime. The trust shall terminate upon the death of such animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.

(b) A trust authorized by this Code section may be enforced by a person appointed in the trust instrument or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

(c) Upon termination of a trust authorized by this Code section, the trustee shall transfer any unexpended trust property in the following order:

(1) As directed in the trust instrument;

(2) If the trust was created in a nonresiduary clause in the settlor's will or in a codicil to the settlor's will, under the residuary clause in the settlor's will; and

(3) If no taker is produced by the application of paragraph (1) or (2) of this subsection, to the settlor, if living, and if not, to the settlor's heirs, as determined under Code Section 53-2-1.

History. — Code 1981, § 53-12-28, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

ARTICLE 3

REVOCABLE TRUSTS

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 25.

Am. Jur. Pleading and Practice Forms. — Am. Jur. Pleading and Practice Forms, Trusts, §§ 11, 29, 31, 33, 34.

53-12-40. Revocation and modification generally.

(a) A settlor shall have no power to modify or revoke a trust in the absence of an express reservation of such power.

(b) A power to revoke shall be deemed to include a power to modify, and an unrestricted power to modify shall be deemed to include a power to revoke.

(c) Any revocation or modification of an express trust shall be in writing and signed by the settlor.

History. — Code 1981, § 53-12-40, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Law reviews. — For annual survey on wills, trusts, guardianships, and fiduciary administration, see 67 Mercer L. Rev. 273 (2015).

JUDICIAL DECISIONS

Settlor reserved right to amend trust. — Because a trust provided that the settlor "may at any time by duly executed written instrument alter or amend" the trust, the settlor had reserved the right to alter or amend the trust, O.C.G.A. § 53-12-40(a), and the settlor's execution of a power of attorney clearly expressed the settlor's intent to name the settlor's son as the executor of the settlor's estate and the trust and was properly notarized under O.C.G.A. § 45-17-6(a)(1). Strange v. Towns, 330 Ga. App. 876, 769 S.E.2d 604 (2015).

53-12-41. Trustee's consent necessary to enlarge duties.

In exercising a power to modify the trust instrument, the settlor shall not enlarge the duties or liabilities of the trustee without the trustee's express consent.

History. — Code 1981, § 53-12-41, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-42. Notice to trustee.

A trustee shall not be liable for failing to act in accordance with the terms and conditions of an amendment or revocation of a trust of which the trustee had no notice.

History. — Code 1981, § 53-12-42, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-43. Power of agent or conservator to revoke trust.

(a) A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the trust instrument and the power.

(b) A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by the settlor's conservator only as provided in Code Section 29-5-23.

History. — Code 1981, § 53-12-43, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-44. Trust not revocable because life estate holder has reversion.

No trust shall be considered to be revocable merely because the life beneficiary has a reversion in or a power of appointment over assets of the trust or because the life beneficiary's heirs or estate have a remainder interest therein.

History. — Code 1981, § 53-12-44, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-45. Limitation on action contesting validity of revocable trust.

(a) Any judicial proceeding to contest the validity of a trust that was revocable immediately before the settlor's death shall be commenced within two years of the settlor's death.

(b) Upon the death of the settlor of a trust that was revocable immediately before the settlor's death, the trustee may proceed to distribute the trust property in accordance with the trust provisions. The trustee shall not be subject to liability for doing so unless:

(1) The trustee knows of a pending judicial proceeding contesting the validity of the trust; or

(2) A potential contestant has notified the trustee in writing of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within 60 days after the contestant sent such notification.

(c) A beneficiary of a trust that is determined to have been invalid shall be liable to return any distribution received.

History. — Code 1981, § 53-12-45, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 752, § 53/HB 142.

Law reviews. — For annual survey of law on wills, trusts, guardianships, and fiduciary administration, see 62 Mercer L. Rev. 365 (2010).

JUDICIAL DECISIONS

Action time barred. — Because a decedent died in May 2013, the two-year period in O.C.G.A. § 53-12-45(a) barred the niece's challenge to the decedent's revocable trust's validity asserted in January 2017; it was immaterial whether § 53-12-45(a) was a statute of limitation or repose because the niece had actual notice of the trust two months after the decedent died. Howell v. Bates, 350 Ga. App. 708, 830 S.E.2d 250 (2019).

ARTICLE 4

REFORMATION, MODIFICATION, DIVISION, CONSOLIDATION, AND TERMINATION OF TRUSTS

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 67 et seq.

Am. Jur. Pleading and Practice Forms. — Am. Jur. Pleading and Practice Forms, Trusts, §§ 8, 9, 13, 14, 35 to 37.

53-12-60. Reformation to correct mistakes.

(a) If it is proved by clear and convincing evidence that the trust provisions were affected by a mistake of fact or law, whether in expression or inducement, the court may reform the trust provisions, even if unambiguous, to conform the provisions to the settlor's intention.

(b) A petition for reformation may be filed by the trustee, any trust director, or any beneficiary or, in the case of an unfunded testamentary trust, the personal representative of the settlor's estate.

(c) Notice of a petition for reformation of the trust shall be given to the trustee, any trust director, and all qualified beneficiaries.

History. — Code 1981, § 53-12-60, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2020, p. 377, § 1-75/HB 865.

The 2020 amendment, effective January 1, 2021, inserted ", any trust director," in subsection (b); and substituted ", any trust director, and all qualified beneficiaries" for "and all beneficiaries" in subsection (c).

53-12-61. Power to direct modification or termination; petition to modify or terminate irrevocable trust; proceeding to approve proposed modification or termination; distribution of trust property under order for termination; waiver of notice.

(a) The trust instrument may confer upon a trustee or other person a power to modify or terminate the trust without court approval.

(b) During the settlor's lifetime, the court shall approve a petition to modify or terminate an irrevocable trust, even if the modification or termination is inconsistent with a material purpose of the trust, if the settlor and all qualified beneficiaries consent to such modification or termination and the trustee has received notice of the proposed modification or termination. A settlor's power to consent to such trust's modification or termination may be exercised by:

(1) An agent under a power of attorney only to the extent expressly authorized by the power of attorney and the provisions of the trust;

(2) The settlor's conservator with the approval of the court supervising the conservatorship if an agent is not so authorized; or

(3) The settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed.

(c) Following the settlor's death the court shall approve a petition to:

(1) Modify an irrevocable trust if all qualified beneficiaries consent, the trustee has received notice of the proposed modification, and the court concludes that modification is not inconsistent with any material purpose of such trust; and

(2) Terminate an irrevocable trust if all qualified beneficiaries consent, the trustee has received notice of the proposed termination, and the court concludes that continuance of such trust is not necessary to achieve any material purpose of such trust.

(d) The court may, upon petition:

(1) Modify the trust if, owing to circumstances not anticipated by the settlor, modification would further the purposes of such trust;

(2) Modify the administrative provisions of a trust if continuation of such trust under its existing provisions would impair such trust's administration;

(3) Modify the trust by the appointment of an additional trustee or special fiduciary if such appointment is necessary or helpful to the administration of such trust;

(4) Modify the trust to achieve the settlor's tax objectives, with such modification to have either prospective or retroactive effect;

(5) Order the division of a single trust into two or more trusts or the consolidation of two or more trusts, whether created by the same or different trust instruments or by the same or different persons, into a single trust if the division or consolidation would be helpful to the administration of such trust or trusts; or

(6) Terminate a trust and order distribution of the trust property if the:

(A) Costs of administration are such that the continuance of such trust, the establishment of such trust if it is to be established, or the distribution from a probate estate would defeat or substantially impair the purposes of such trust;

(B) Purpose of such trust has been fulfilled or become illegal or impossible to fulfill; or

(C) Continuance of such trust would impair the accomplishment of the purposes of such trust.

(e) A proceeding to approve a proposed modification or termination under this Code section may be commenced by a trustee, trust director, or beneficiary. A proceeding to approve a proposed modification or termination under subsection (b) of this Code section may be commenced by a trustee, trust director, beneficiary, or settlor. In the case of an unfunded testamentary trust, a petition for modification or termination under this Code section may be filed by the personal representative of the settlor's estate.

(f) Notice of a petition to modify or terminate a trust under subsection (d) of this Code section shall be given to the settlor, if living, the trustee, any trust director, all qualified beneficiaries, any holder of a power of appointment over the trust property, and such other persons as the court may direct.

(g) The court may modify or terminate a trust as provided in this Code section regardless of whether it contains spendthrift provisions or other similar protective provisions.

(h) An order under subsection (d) of this Code section shall conform as nearly as practicable to the intention of the settlor.

(i) Distribution of the trust property under an order for termination shall be made to or among the current beneficiaries and the vested remainder beneficiaries, or, if there are no vested remainder beneficiaries, among the current beneficiaries and the contingent remainder beneficiaries. The order shall specify the appropriate share, if any, of each current and remainder beneficiary who is to share in the proceeds of the trust so as to conform as nearly as practicable to the intention of the settlor. The order may direct that the interest of a minor beneficiary, or any portion thereof, be converted into qualifying property and distributed to a custodian pursuant to Article 5 of Chapter 5 of Title 44, "The Georgia Transfers to Minors Act."

(j) For purposes of this chapter, modification of a trust includes the consolidation or division of a trust.

(k) Subsections (b) and (c) of this Code section shall not apply to charitable trusts.

(l) Petitioning for or consenting to a modification or termination under this Code section shall not constitute a violation of a condition in terrorem under Code Section 53-12-22.

(m)(1)(A) Unless the trustee:

> (i) Expressly waives notice in a writing signed by the trustee, notice to the trustee under subsection (b) or (c) of this Code section shall be given by delivery of a copy of the petition by certified or registered mail or statutory overnight delivery with

return receipt requested and with delivery restricted to addressee only at least 31 days before the entry of an order granting the petition; and

(ii) Expressly waives notice and assents to the petition in a writing signed by the trustee, the trustee shall have standing to intervene as a matter of right pursuant to paragraph (1) of subsection (a) and subsection (c) of Code Section 9-11-24 and to file a caveat or objection to the petition showing that one or more of the applicable requirements of subsection (b) or (c) of this Code section has or have not been satisfied, provided that the trustee must file any such pleadings provided by this division not more than 30 days following the express written waiver of notice by the trustee or delivery of notice to the trustee as provided in division (i) of this subparagraph or by such later date as the court may direct pursuant to subparagraph (B) of paragraph (2) of this subsection.

(B) Unless a person to be given notice under subsection (f) of this Code section:

(i) Expressly waives notice in a writing signed by such person, such notice shall be given by delivery of a copy of the petition by certified or registered mail or statutory overnight delivery with return receipt requested at least 31 days before the entry of an order granting the petition;

(ii) Expressly waives notice and assents to the petition in a writing signed by such person, such person shall have standing to intervene as a matter of right pursuant to paragraph (1) of subsection (a) and subsection (c) of Code Section 9-11-24 and to file a caveat or objection to the petition showing that one or more of the applicable requirements of subsection (d) of this Code section has or have not been satisfied, provided that such person must file any such pleadings provided by this division not more than 30 days following the express written waiver of notice by such person or delivery of notice to such person as provided in division (i) of this subparagraph or by such later date as the court may direct pursuant to subparagraph (B) of paragraph (2) of this subsection, and further provided that such person is the settlor, the trustee, a trust director, a qualified beneficiary, or the holder of a power of appointment over the trust property; and

(iii) Expressly waives notice and assents to the petition in a writing signed by such person, such person may file a motion for permissive intervention pursuant to paragraph (1) of subsection (b) and subsection (c) of Code Section 9-11-24 and a caveat or objection to the petition showing that one or more of the

applicable requirements of subsection (d) of this Code section has or have not been satisfied, provided that such person must file any such pleadings provided by this division not more than 30 days following the express written waiver of notice by such person or delivery of notice to such person as provided in division (i) of this subparagraph or by such later date as the court may direct pursuant to subparagraph (B) of paragraph (2) of this subsection, and further provided that the court shall deny such motion for permissive intervention and dismiss such caveat or objection unless such person satisfactorily demonstrates to the court that he or she is a person whose interests would be affected directly and adversely by the grant of the petition.

(2)(A) The petitioner shall certify to the court that notice has been waived or given in compliance with paragraph (1) of this subsection in a writing signed by the petitioner or by counsel for the petitioner and filed with the clerk to which all applicable executed waivers and return receipts are attached as exhibits.

(B) The court may direct any additional notice or extend the time to respond to a petition under this Code section as the judge may determine to be proper in the interests of due process and reasonable opportunity for any affected person or interest to be heard.

(n) The court may, in its sound discretion, conduct a hearing on a petition under this Code section, but such hearing shall not be required if no caveat or objection is timely filed by a person having standing under division (m)(1)(A)(ii) or (m)(1)(B)(ii) of this Code section or by a person granted permission to intervene by the court pursuant to division (m)(1)(B)(iii) of this Code section.

History. — Code 1981, § 53-12-61, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2018, p. 262, § 7/HB 121; Ga. L. 2020, p. 377, § 1-76/HB 865.

The 2020 amendment, effective January 1, 2021, deleted ", consolidate, divide," following "power to modify" in subsection (a); in subsection (b), in the first sentence in the introductory language, substituted "an irrevocable trust" for "a noncharitable irrevocable trust" and substituted "qualified beneficiaries" for "the beneficiaries"; substituted "provisions" for "terms" in paragraph (b)(1); substituted "an irrevocable trust if all qualified beneficiaries" for "a noncharitable irrevocable trust if all the beneficiaries" in paragraph (c)(1) and in paragraph (c)(2); inserted "trust director," in the first and second sentences in subsection (e); in subsection (f), substituted "No later than 30 days after filing the petition for modification or termination, notice" for "Notice" at the beginning and substituted "if living, the trustee, any trust director, all qualified beneficiaries" for "the trustee, all the beneficiaries"; and added subsections (j) through (n).

Law reviews. — For annual survey on wills, trusts, guardianships, and fiduciary administration, see 70 Mercer L. Rev. 275 (2018). For article on the 2018 amendment of this Code section, see 35 Ga. St. U. L. Rev. 219 (2018). For article, "To Tax or Not to Tax: State Income Tax on Trusts After North Carolina Department of Revenue v. The Kimberly Rice Kaestner 1992 Family Trust," see 25 Ga. St. B.J 26 (Feb. 2020).

JUDICIAL DECISIONS

Trust properly modified to remove trustees with consent of beneficiaries. — Trial court did not err in modifying the trust to remove the trustees under O.C.G.A. § 53-12-61(c)(1), which provided that a petition to modify "shall" be granted if certain conditions were met; allowing the beneficiaries to change the trustees by modifying the trust did not conflict with O.C.G.A. § 53-12-221(a), the trustee removal statute. Glass v. Faircloth, 354 Ga. App. 326, 840 S.E.2d 724 (2020), cert. denied, 2020 Ga. LEXIS 972 (Ga. 2020).

53-12-62. Power of trustee to invade principal of original trust.

(a) As used in this Code section, the term:

(1) "Original trust" refers to the trust from which principal is being distributed.

(2) "Second trust" refers to the trust to which assets are being distributed from the original trust, whether a separate trust or an amended version of the original trust.

(b)(1) As used in this subsection, the term "current beneficiary" means a person who, on the date of distribution to the second trust, is a distributee or permissible distributee of trust income or principal.

(2) Unless the original trust instrument expressly provides otherwise, a trustee, other than a person who contributed property to the trust, with authority to invade the principal of the original trust to make distributions to or for the benefit of one or more of the beneficiaries may also, independently or with court approval, exercise such authority by distributing all or part of the principal of the original trust to a trustee of a second trust; provided, however, that the second trust shall not include as a:

(A) Current beneficiary any person that is not a current beneficiary of income or principal of the original trust; or

(B) Beneficiary any person that is not a beneficiary of the original trust.

(c) Except as provided in this Code section, a trustee may exercise the power to invade the principal of the original trust under subsection (b) of this Code section without the consent of the settlor or the beneficiaries of the original trust if such trustee provides written notice of such trustee's decision to exercise the power to such settlor, if living, any trust director, and those persons then entitled to annual reports from the trustee of the original trust under subsection (b) of Code Section 53-12-243, taking into account the provisions of the original trust and subsections (c) and (d) of Code Section 53-12-243. Such notice shall:

(1) Describe the manner in which such trustee intends to exercise such power;

(2) Specify the date such trustee proposes to distribute to the second trust; and

(3) Be delivered at least 30 days before the proposed distribution to the second trust.

(d) The exercise of the power to invade the principal of the original trust under subsection (b) of this Code section shall be by an instrument in writing, signed and acknowledged by the trustee, and filed with the records of the original trust.

(e) The exercise of the power to invade the principal of the original trust under subsection (b) of this Code section shall not extend the permissible period of the rule against perpetuities that applies to such original trust.

(f) The exercise of the power to invade the principal of the original trust under subsection (b) of this Code section by a trustee who is also a beneficiary shall be subject to the limitations of Code Section 53-12-270.

(g) This Code section shall not be construed to abridge the right of any trustee who has a power of invasion to distribute property in further trust that arises under any other law or under common law, and nothing in this Code section shall be construed to imply that the common law does not permit the exercise of a power to invade the principal of a trust in the manner authorized under subsection (b) of this Code section.

(h) A second trust may confer a power of appointment upon a beneficiary of the original trust to whom or for the benefit of whom the trustee has the power to distribute the principal of such original trust. For purposes of this subsection, the permissible appointees of the power of appointment conferred upon a beneficiary may include persons who are not beneficiaries of such original trust or second trust.

(i) If any contribution to the original trust qualified for the annual exclusion under Section 2503(b) of the federal Internal Revenue Code, as it existed on February 1, 2018, the marital deduction under Section 2056(a) or 2523(a) of the federal Internal Revenue Code, as it existed on February 1, 2018, or the charitable deduction under Section 170(a), 642(c), 2055(a), or 2522(a) of the federal Internal Revenue Code, as it existed on February 1, 2018, is a direct skip qualifying for treatment under Section 2642(c) of the federal Internal Revenue Code, as it existed on February 1, 2018, or qualified for any other specific tax benefit that would be lost by the existence of the authorized trustee's authority under subsection (b) of this Code section for income, gift,

estate, or generation-skipping transfer tax purposes under the federal Internal Revenue Code, then the authorized trustee shall not have the power to distribute the principal of a trust pursuant to subsection (b) of this Code section in a manner that would prevent the contribution to the original trust from qualifying for such exclusion, deduction, or other tax benefit or would reduce such exclusion, deduction, or other tax benefit that was originally claimed with respect to such contribution.

(j) The exercise of the power to invade the principal of the original trust under subsection (b) of this Code section shall be subject to the following limitations:

(1) The second trust need not qualify as a grantor trust for federal income tax purposes, even if the original trust does qualify as a grantor trust, except that if such original trust qualifies as a grantor trust because of the application of Section 672(f)(2)(A) of the federal Internal Revenue Code, as it existed on February 1, 2018, such second trust may not include or omit a term that, if included in or omitted from the original trust instrument, would have prevented such original trust from qualifying under such section;

(2) Unless the settlor objects in a writing delivered to the trustee before the date the trustee proposes to distribute from the original trust to the second trust, such second trust may qualify as a grantor trust for federal income tax purposes, even if such original trust does not so qualify, except that if such original trust does not so qualify and such second trust will so qualify, in whole or in part, with respect to the settlor, such second trust shall grant such settlor or another person a power that would cause such second trust to cease to be a grantor trust for federal income tax purposes; and

(3) When both the original trust and the second trust qualify as grantor trusts for federal income tax purposes and such original trust grants the settlor or another person the power to cause such original trust to cease to be a grantor trust, such second trust shall grant an equivalent power to the settlor or another person unless such settlor objects in a writing delivered to the trustee before the date the trustee proposes to distribute from such original trust to such second trust.

(k) During any period when the original trust owns stock in a Subchapter "S" corporation as defined in Section 1361(a)(1) of the federal Internal Revenue Code, as it existed on February 1, 2018, an authorized trustee shall not exercise a power authorized by subsection (b) of this Code section to distribute part or all of the stock of the Subchapter "S" corporation to a second trust that is not a permitted shareholder under Section 1361(c)(2) of the federal Internal Revenue Code, as it existed on February 1, 2018.

(l) A trustee or other person that reasonably relies on the validity of a distribution of property of the original trust to the second trust under subsection (b) of this Code section or any other law or common law shall not be liable for any action or failure to act as a result of such reliance.

(m) This Code section shall not create or imply a duty for a trustee or trust director to exercise a power conferred by this Code section.

(n) If exercise of the power to invade the principal of the original trust would be effective under subsection (b) of this Code section except that the second trust in part does not comply with this Code section, such exercise of the power shall be effective, a provision in such second trust that is not permitted under this Code section shall be void to the extent necessary to comply with this Code section, and a provision required by this Code section to be in such second trust that is not contained in such second trust shall be deemed to be included in such second trust to the extent necessary to comply with this Code section.

(o) The settlor of the original trust shall be deemed to be the settlor of the second trust with respect to the portion of the principal of the original trust subject to the exercise of the power to invade the principal of such original trust under subsection (b) of this Code section.

(p) A debt, liability, or other obligation enforceable against property of the original trust shall be enforceable to the same extent against the property when held by the second trust after exercise of the power to invade the principal of such original trust under subsection (b) of this Code section.

(q) This Code section shall apply to any trust the meaning and effect of whose trust provisions are determined by the law of this state.

(r) This Code section shall not apply to charitable trusts.

History. — Code 1981, § 53-12-62, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2018, p. 262, § 8/HB 121; Ga. L. 2020, p. 377, § 1-77/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (c), in the introductory language, inserted "any trust director," and inserted "under subsection (b) of Code Section 53-12-243, taking into account the provisions of the original trust and subsections (c) and (d) of Code Section 53-12-243" and substituted "30 days" for "60 days" in paragraph (c)(3); added subsection (f) and redesignated former subsections (f) through (o) as present subsections (g) through (p); in paragraph (j)(2), substituted "Unless the settlor objects in a writing delivered to the trustee before the date the trustee proposes to distribute from the original trust to the second trust, such" for "The" at the beginning, substituted "such" for "the" following "even if", and deleted "unless such settlor objects in a writing delivered to the trustee before the date the trustee proposes to distribute from such original trust to such second trust" following "tax purposes" near the end; inserted "or trust director" in subsection (m); added subsection (q) and redesignated former subsection (p) as present subsection (r); and substituted "charitable trusts" for "a trust held solely for charitable purposes" at the end of subsection (r).

Law reviews. — For article on the 2018 amendment of this Code section, see 35 Ga. St. U. L. Rev. 219 (2018). For

annual survey on wills, trusts, guardianships, and fiduciary administration, see 70 Mercer L. Rev. 275 (2018).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-12-153 of the 1991 Trust Act are included in the annotations for this Code section.

Evidence insufficient to support modification. — Trial court did not abuse the court's discretion in finding that the evidence of tax consequences was insufficient to support modification of a trust. Friedman v. Teplis, 268 Ga. 721, 492 S.E.2d 885 (1997) (decided under former O.C.G.A. § 53-12-153).

Trust was improperly modified to forego any distributions to a beneficiary, who had been charged with aggravated assault and battery of the settlor's spouse, because the record did not establish that the assault was motivated by the beneficiary's greed for the trust receipts, rather than by the beneficiary's mental condition, which had required appointment of a guardian ad litem. Smith v. Hallum, 286 Ga. 834, 691 S.E.2d 848 (2010) (decided under former O.C.G.A. § 53-12-153).

Cited in Martin v. Martin, 286 Ga. 69, 685 S.E.2d 288 (2009).

53-12-63. Division and consolidation of trusts.

Reserved. Repealed by Ga. L. 2018, p. 262, § 9/HB 121, effective July 1, 2018.

Editor's notes. — This Code section was based on Ga. L. 2010, p. 579, § 1/SB 131.

Law reviews. — For article on the 2018 repeal of this Code section, see 35 Ga. St. U. L. Rev. 219 (2018).

53-12-64. Termination of trusts.

Reserved. Repealed by Ga. L. 2018, p. 262, § 10/HB 121, effective July 1, 2018.

Editor's notes. — This Code section was based on Ga. L. 2010, p. 579, § 1/SB 131.

Law reviews. — For article on the 2018 repeal of this Code section, see 35 Ga. St. U. L. Rev. 219 (2018).

53-12-65. Modification or termination of uneconomic trust.

(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property either having a total value less than $100,000.00 or for which the trustee's annual fee for administering the trust is 5 percent or more of the market value of the principal assets of the trust as of the last day of the preceding trust accounting year may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration, provided that in the case of a cemetery trust, notice shall be given to the Attorney General. For purposes of this subsection, the term "cemetery trust" means a trust the sole purpose of which is to hold and invest property to be used for the maintenance and care of cemetery plots.

(b) The court may modify or terminate a trust or remove a trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.

(c) Upon termination of a trust under this Code section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

(d) This Code section shall not apply to an easement for conservation.

(e) This Code section shall not apply to trusts governed by Chapter 14 of Title 10.

History. — Code 1981, § 53-12-65, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2018, p. 262, § 11/HB 121.

Law reviews. — For article on the 2018 amendment of this Code section, see 35 Ga. St. U. L. Rev. 219 (2018).

ARTICLE 5

SPENDTHRIFT PROVISIONS AND CREDITORS' RIGHTS AND CLAIMS

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 94 et seq.

ALR. — Invalidity of spendthrift provisions as affecting other provisions of trust, 9 A.L.R.2d 1361.

Validity of spendthrift trusts, 34 A.L.R.2d 1335.

Beneficiary's right to disclaim or renounce spendthrift trust prior to acceptance, 14 A.L.R.3d 1437.

53-12-80. Spendthrift provisions.

(a) A spendthrift provision shall only be valid if it prohibits both voluntary and involuntary transfers.

(b) A term of a trust providing that the interest of a beneficiary is held subject to a spendthrift trust, or words of similar import, shall be sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest in the manner set forth in this article.

(c) A beneficiary shall not transfer an interest in a trust in violation of a valid spendthrift provision, and, except as otherwise provided in this Code section, a creditor or assignee of the beneficiary shall not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

(d) A spendthrift provision shall not be valid as to the following claims against a beneficiary's right to a current distribution to the extent the distribution would be subject to garnishment under Article 1 of Chapter 4 of Title 18 if the distribution were disposable earnings:

(1) Alimony or child support;

(2) Taxes or other governmental claims;

(3) Tort judgments;

(4) Judgments or orders for restitution as a result of a criminal conviction of the beneficiary; or

(5) Judgments for necessaries.

The ability of a creditor or assignee to reach a beneficiary's interest under this subsection shall not apply to the extent that it would disqualify the trust as a special needs trust established pursuant to 42 U.S.C. Sections 1396p(d)(4)(A) or 1396p(d)(4)(C).

(e) A provision in a trust instrument that a beneficiary's interest shall terminate or become discretionary upon an attempt by the beneficiary to transfer it, an attempt by the beneficiary's creditors to reach it, or upon the bankruptcy or receivership of the beneficiary shall be valid except to the extent of the proportion of trust property attributable to such beneficiary's contribution.

(f) If a beneficiary is also a contributor to the trust, a spendthrift provision shall not be valid as to such beneficiary to the extent of the proportion of trust property attributable to such beneficiary's contribution. This subsection shall not apply to a special needs trust established pursuant to 42 U.S.C. Sections 1396p(d)(4)(A) or 1396p(d)(4)(C).

(g) Notwithstanding any other provision in this Code section, a spendthrift provision in a pension or retirement arrangement described in sections 401, 403, 404, 408, 408A, 409, 414, or 457 of the federal Internal Revenue Code of 1986 shall be valid with reference to the entire interest of the beneficiary in the income, principal, or both, even if the beneficiary is also a contributor of trust property, except where a claim is made pursuant to a qualified domestic relations order as defined in 26 U.S.C. Section 414(p).

History. — Code 1981, § 53-12-80, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 752, § 53/HB 142; Ga. L. 2016, p. 8, § 4/SB 255.

Law reviews. — For article, "Self-Settled Asset Protection Trusts in Georgia," see 23 Ga. St. B. J. 17 (Feb. 2018).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1895, § 3149, former Civil Code 1910, § 3729, former O.C.G.A. § 53-12-25, and former O.C.G.A. § 52-12-28 of the 1991 Trust Act are included in the annotations for this Code section.

Spendthrift trusts. — See Gray v. Obear, 54 Ga. 231 (1875) (decided under former law); Sinnott v. Moore, 113 Ga. 908, 39 S.E. 415 (1901) (decided under

former Code 1895, § 3149); DeVaughn v. Hays, 140 Ga. 208, 78 S.E. 844 (1913) (decided under former Civil Code 1910, § 3729); Wright v. Hill, 140 Ga. 554, 79 S.E. 546 (1913) (decided under former Civil Code 1910, §§ 3736 and 3737).

Trustee may be named by will. Gilmore v. Gilmore, 208 Ga. 245, 65 S.E.2d 813 (1951) (decided under former Code 1933, § 108-114).

Sole beneficiary as settlor. — Because a husband was both the settlor and the sole beneficiary of a trust and to have allowed him to shield his assets with a spendthrift clause would have been contrary to both express law and policy, the spendthrift clause was invalid and unenforceable, and did not protect the trust property from claims for alimony or property division. Speed v. Speed, 263 Ga. 166, 430 S.E.2d 348 (1993) (decided under former O.C.G.A. § 53-12-28).

Spendthrift provision of a trust prohibiting the involuntary transfers of trust property in bankruptcy was not enforceable under former O.C.G.A. § 53-12-28 (see O.C.G.A. § 53-12-80) because the Chapter 7 debtor was both the settlor and the sole beneficiary due to the debtor's general power of appointment. As a result, the corpus of the trust was the property of the debtor's Chapter 7 estate under 11 U.S.C. § 541(a)(1). Moore v. Phillips (In re Phillips), 411 B.R. 467 (Bankr. S.D. Ga. 2008), aff'd, No. 608CV102, 2010 U.S. Dist. LEXIS 28710 (S.D. Ga. 2010) (decided under former O.C.G.A. § 53-12-28).

Distribution subject to tort judgment. — Judgment creditor did not have an equitable right to have a testamentary trust declared null and void after the creditor had failed to make a claim against the trust during the time between the trust's establishment and the enactment of the Georgia Trust Act; the act applied to the trust and, since it gives a creditor having a tort judgment a statutory right to proceed against distributions from the trust, the creditor was not entitled to equitable relief. Jordan v. Caswell, 264 Ga. 638, 450 S.E.2d 818 (1994) (decided under former O.C.G.A. § 53-12-28).

Anti-alienation provision incorporated into teachers retirement annuity is enforceable. — Chapter 7 debtor's interest in a Teachers Retirement System of Georgia annuity that the teacher received as a beneficiary was excluded from the bankruptcy estate under 11 U.S.C. § 541(c)(2); the interest was in a trust because the annuity funds were still under the administration of the state pursuant to O.C.G.A. § 47-3-20 et seq., and the trust incorporated a statutory anti-alienation provision under former O.C.G.A. § 47-3-28 (see O.C.G.A. § 53-12-80) enforceable under former O.C.G.A. § 53-12-28 (see O.C.G.A. § 53-12-80). Coleman v. Hainlen (In re Hainlen), 365 B.R. 288 (Bankr. S.D. Ga. 2007) (decided under former O.C.G.A. § 53-12-28).

Spendthrift provision properly prevented voluntary transfer by a debtor beneficiary to a creditor. — Spendthrift provision of an irrevocable trust in a land investment was enforceable under former O.C.G.A. § 53-12-28 to prohibit voluntary transfers by a debtor to a creditor since the debtor and the debtor's children were beneficiaries of the trust as the intention of the settlor to provide a vehicle for repaying the creditor was only effective as the trust and rules of law permitted. McSweeney v. Kahn, No. 08-16196; No. 08-16515, 2009 U.S. App. LEXIS 20195 (11th Cir. Sept. 10, 2009) (decided under former O.C.G.A. § 53-12-28).

Relationship to bankruptcy. — In a case in which the issue was whether the campaign funds of the debtor, a candidate for public office who filed for Chapter 13 bankruptcy without incorporating the campaign, were the property of the bankruptcy estate, the spendthrift trust exception to the anti-alienation provision in 11 U.S.C. § 541(c)(1)(A) did not apply because the campaign funds were not held in a spendthrift trust under Georgia law. There was no evidence of a writing creating an express trust, let alone an express trust containing a valid spendthrift provision as required under O.C.G.A. § 53-12-80. In re Chambers, 451 B.R. 621 (Bankr. N.D. Ga. 2011).

RESEARCH REFERENCES

ALR. — Validity of bequest or trust for care of specified animal, 31 A.L.R. 430.

Validity of provisions of instrument creating legal estate attempting to exempt it from claims of creditors, 80 A.L.R. 1007.

Validity of spendthrift trust for life or shorter period for benefit of one to whom fee simple or absolute estate is given, 91 A.L.R. 1084.

Validity of spendthrift trusts, 119 A.L.R. 19; 34 A.L.R.2d 1335.

Liability of trustee of spendthrift trust, or trust for support, for making payments of income to assignee of beneficiary or person whom beneficiary has named to receive them, 121 A.L.R. 1307.

Revocation of a tentative or revocable trust created by one who has since become incompetent, 138 A.L.R. 1383.

Spendthrift trust provision as applicable to indebtedness of beneficiary to trustor, estate of testator, or trust itself, 145 A.L.R. 1318.

Termination of trust by consent of beneficiaries, 163 A.L.R. 852.

Trust for payment of income to beneficiary or beneficiaries until attaining a specified age or for a specified period, when property is to be turned over to him or them, as a dry or as an active trust, 165 A.L.R. 550.

Invalidity of spendthrift provisions as affecting other provisions of trust, 9 A.L.R.2d 1361.

Construction and effect of instrument authorizing or directing trustee or executor to retain investments received under such instrument, 47 A.L.R.2d 187.

Power of guardian representing unborn future interest holders to consent to invasion of trust corpus, 49 A.L.R.2d 1095.

Person entitled to inter vivos grant of gift to "husband," "wife," or "widow," 71 A.L.R.2d 1273.

Validity and construction of beneficiary's arrangement for payment to another, as they become due, of sums due under spendthrift trust, 83 A.L.R.3d 1142.

Eligibility for welfare benefits as affected by claimant's status as trust beneficiary, 21 A.L.R.4th 729.

53-12-81. Limitations on creditors' rights to discretionary distributions.

A transferee or creditor of a beneficiary shall not compel the trustee or a trust director to pay any amount that is payable only in the discretion of the trustee or trust director regardless of whether the discretion is expressed in the form of a standard of distribution, including, but not limited to, health, education, maintenance, and support, and whether such trustee or trust director is also a beneficiary. This Code section shall not apply to the extent of the proportion of trust property attributable to the beneficiary's contribution.

History. — Code 1981, § 53-12-81, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2018, p. 262, § 12/HB 121; Ga. L. 2020, p. 377, § 1-78/HB 865.

The 2020 amendment, effective January 1, 2021, in the first sentence of this Code section, inserted "or a trust director" following "compel the trustee", substituted "discretion of the trustee or trust director" for "trustee's discretion", and inserted "or trust director" following "such trustee".

Law reviews. — For article on the 2018 amendment of this Code section, see 35 Ga. St. U. L. Rev. 219 (2018).

53-12-82. Rules for trusts; consideration of assets of an inter vivos marital trust following death.

(a)(1) As used in this subsection, the term "creditor" means:

(A) With respect to subparagraphs (A) and (B) of paragraph (2) of this subsection, those creditors of a settlor whose claims against the property of the trust are governed by this article, including those creditors identified in subsection (d) of Code Section 53-12-80; and

(B) With respect to subparagraph (C) of paragraph (2) of this subsection, those claimants whose claims against the property of the settlor's estate are governed by Article 4 of Chapter 7 of this title, including those claimants identified in Code Section 53-7-40.

(2) Regardless of whether the trust instrument contains a spendthrift provision, the following rules shall apply:

(A) During the lifetime of the settlor, the property of a revocable trust shall be subject to claims of the settlor's creditors;

(B) With respect to an irrevocable trust:

(i) Creditors or assignees of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit during the settlor's life or that could have been distributed to or for the settlor's benefit immediately prior to the settlor's death, provided that, if a trust has more than one settlor, the amount the creditors or assignees of a particular settlor may reach shall not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution; and

(ii) The portion of a trust that can be distributed to or for the settlor's benefit pursuant to the power of a trustee, whether arising under the trust instrument or any other law, to make a distribution to or for the benefit of a settlor for the purpose of reimbursing the settlor in an amount equal to any income taxes payable on any portion of the trust principal and income that is treated as the settlor's individual income under applicable law shall not be considered an amount that can be distributed to or for the settlor's benefit during the settlor's life or that could have been distributed to or for the settlor's benefit immediately prior to the settlor's death; and

(C) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities shall be paid:

(i) The property of a trust that was revocable at the settlor's death or had become irrevocable as a result of the settlor's

incapacity shall be subject to claims of the creditors of the settlor's estate to the extent the settlor's probate estate is inadequate; and

(ii) Payments that would not be subject to the claims of the creditors of the settlor's estate if made by way of beneficiary designation to persons other than the settlor's estate shall not be made subject to such claims by virtue of this Code section unless otherwise provided in the trust instrument.

(b)(1) As used in this subsection, the term:

(A) "Inter vivos marital trust" means:

(i) A trust described in Section 2523(e) of the Internal Revenue Code of 1986, as it existed on February 1, 2018;

(ii) A trust for which the election described in Section 2523(f) of the Internal Revenue Code of 1986, as it existed on February 1, 2018, has been made; or

(iii) Another trust to the extent such trust's assets are attributable to a trust described in division (i) or (ii) of this subparagraph.

(B) "Settlor's spouse" means the spouse of the settlor at the time of the creation of an inter vivos marital trust, regardless of whether such spouse is married to the settlor at the time of such spouse's death.

(2) Subject to Article 4 of Chapter 2 of Title 18, after the death of the settlor's spouse, the assets of an inter vivos marital trust shall be deemed to have been contributed by the settlor's spouse and not by the settlor.

History. — Code 1981, § 53-12-82, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2018, p. 262, § 13/HB 121; Ga. L. 2019, p. 1056, § 53/SB 52; Ga. L. 2020, p. 377, § 1-79/HB 865.

The 2019 amendment, effective May 12, 2019, part of an Act to revise, modernize, and correct the Code, revised punctuation in subparagraph (a)(2)(A).

The 2020 amendment, effective January 1, 2021, inserted paragraph (a)(1) and designated the former existing provisions of subsection (a) as current paragraph (a)(2); in paragraph (a)(2), substituted ""Regardless of whether" for "Whether or not" in the introductory language, redesignated former paragraphs (a)(1), (a)(2) and (a)(3) as subparagraphs (a)(2)(A), (a)(2)(B) and (a)(2)(C), redesignated former subparagraphs (a)(1)(A) and (a)(1)(B) as divisions (a)(2)(A)(i) and (a)(2)(A)(ii); substituted "instrument" for ""agreement" in division (a)(2)(A)(ii); in subparagraph (a)(2)(C), substituted ": (i) The" for ", the", substituted "creditors of the settlor's estate to the extent the settlor's" for "settlor's creditors to the extent the", substituted "; and (ii)" for a period, and substituted "creditors of the settlor's estate" for "settlor's creditors".

Law reviews. — For annual survey of law on wills, trusts, guardianships, and fiduciary administration, see 62 Mercer L. Rev. 365 (2010). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 66 Mercer L. Rev. 231

(2014). For article on the 2018 amendment of this Code section, see 35 Ga. St. U. L. Rev. 219 (2018).

53-12-83. Creditors' claims against property that is subject to withdrawal right.

The holder of a power of withdrawal, during the period that the power may be exercised, shall be treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power. The lapse, release, or waiver of a power of withdrawal shall not cause the holder to be treated as a settlor of the trust.

History. — Code 1981, § 53-12-83, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

ARTICLE 6

TESTAMENTARY ADDITIONS TO TRUSTS

PART 1

TESTAMENTARY ADDITIONS TO TRUSTS

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — Am. Jur. Pleading and Practice Forms, Trusts, § 17.

U.L.A. — Uniform Testamentary Additions to Trusts Act (U.L.A.) § 1 et seq.

53-12-100. Short title.

This part shall be known and may be cited as the "Georgia Testamentary Additions to Trusts Act."

History. — Code 1981, § 53-12-100, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

RESEARCH REFERENCES

U.L.A. — Uniform Testamentary Additions to Trusts Act (U.L.A.) § 4.

53-12-101. Making of testamentary additions to trusts.

(a) A devise or bequest, the validity of which is determinable by the law of this state, may be made by a will to the trustee of a trust established or to be established by the testator or by the testator and some other person or by some other person, including a funded or

unfunded life insurance trust, even if the settlor has reserved any or all rights of ownership of the insurance contracts, if the trust is identified in the testator's will and its provisions are set forth in a written trust instrument, other than a will, executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator, regardless of the existence, size, or character of the corpus of the trust and notwithstanding the requirements of paragraph (2) of subsection (b) of Code Section 53-12-20. The devise or bequest shall not be invalid because the trust is amendable or revocable or both or because the trust was amended after the execution of the will or after the death of the testator.

(b) Unless the testator's will provides otherwise, the property so devised or bequeathed:

(1) Shall not be deemed to be held under a testamentary trust of the testator but shall become a part of the trust to which it is devised or bequeathed; and

(2) Shall be administered and disposed of in accordance with the provisions of the trust instrument or will setting forth the terms of the trust, including any amendments thereto made before or after the testator's death.

(c) Unless the testator's will provides otherwise, a revocation or termination of the trust before the death of the testator shall cause the devise or bequest to lapse.

History. — Code 1981, § 53-12-101, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-14-2 and former O.C.G.A. § 53-12-71 of the 1991 Trust Act are included in the annotations for this Code section.

Cited in Public Interest Bounty Hunters v. Board of Governors, 548 F. Supp. 157 (N.D. Ga. 1982); Cames v. Joiner (In re Joiner), 319 B.R. 903 (Bankr. M.D. Ga. 2004).

RESEARCH REFERENCES

U.L.A. — Uniform Testamentary Additions to Trusts Act (U.L.A.) § 1.

ALR. — Reference in will to extrinsic trust instrument for terms of trust created or enlarged by will, 80 A.L.R. 103.

53-12-102. Limitations of duties and responsibilities of trustee.

The trustee of a trust established by the testator or others as provided in Code Section 53-12-101 shall not be required to inquire into

or audit the actions of the executor of the testator's estate or to make any claim against the executor unless specifically directed to do so by the settlor in the trust instrument. In the event that the trustee is authorized or directed by the settlor in the trust instrument to pay or advance any part or all of the trust property to the executor of the testator's estate for the payment of debts, taxes, and expenses of administration of the testator's estate, the trustee shall not be liable for the application of the trust property so paid or advanced and shall not be liable for any act done or omitted to be done by the executor with regard to the trust property.

History. — Code 1981, § 53-12-102, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

RESEARCH REFERENCES

ALR. — Duty of testamentary trustee to secure possession of property, 32 A.L.R. 931.

53-12-103. Effect on prior and subsequent wills.

This part shall apply to all devises or bequests made in the will of a testator dying on or after May 31, 1968, whether the will is executed before or after such date. This part shall not invalidate a devise or bequest to a trustee made by a will executed prior to May 31, 1968, by a testator dying prior to such date.

History. — Code 1981, § 53-12-103, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Wills, § 196.

C.J.S. — 95 C.J.S., Wills, § 217 et seq.

U.L.A. — Uniform Testamentary Additions to Trusts Act (U.L.A.) § 2.

Part 2

Trusts as Beneficiaries

53-12-120. Trusts as beneficiaries.

A trust under a testator's will may be designated as the beneficiary of the testator's qualified retirement plan, individual retirement account, other retirement plan, or life insurance policies on the life of the testator so long as the testator's will is admitted to probate in solemn form, whether the designation occurs before or after the execution of the

will. Unless the beneficiary designation provides otherwise, the designation of a trust under a will as beneficiary shall not be treated as the designation of the testator's estate as beneficiary nor shall such property, once delivered to the trustee under the testator's will, be deemed to be part of the testator's estate.

History. — Code 1981, § 53-12-120, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Law reviews. — For article, "The Georgia Trust Act," see 28 Ga. St. B.J. 95 (1991).

ARTICLE 7

IMPLIED TRUSTS

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 128 et seq.

53-12-130. Resulting trusts.

A resulting trust is a trust implied for the benefit of the settlor or the settlor's successors in interest when it is determined that the settlor did not intend that the holder of the legal title to the trust property also should have the beneficial interest in the property under any of the following circumstances:

(1) A trust is created but fails, in whole or in part, for any reason;

(2) A trust is fully performed without exhausting all the trust property; or

(3) A purchase money resulting trust as defined in subsection (a) of Code Section 53-12-131 is established.

History. — Code 1981, § 53-12-130, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, §§ 3740 and 3741, and former O.C.G.A. §§ 53-12-27 and 53-12-91 of the 1991 Trust Act are included in the annotations for this Code section.

Resulting trust is an implied-in-fact or inferred trust. It is not based upon fraud or misrepresentation. On the contrary, the basis of the true constructive trust is fraud, actual or "constructive." Jackson v. Jackson, 150 Ga. 544, 104 S.E. 236 (1920) (decided under former Civil Code 1910, §§ 3740 and 3741).

When A pays the purchase money and causes the deed to be made to A's spouse, and an oral agreement to hold in trust for A is shown to rebut the presumption of gift, the majority view is that the trust is nevertheless resulting if the oral agreement is not different from the agreement

which would be implied if the grantee were legally a stranger to A. Jackson v. Jackson, 150 Ga. 544, 104 S.E. 236 (1920) (decided under former Civil Code 1910, §§ 3740 and 3741).

In a divorce, a husband did not show that the transfer of the marital home to the wife for "love and affection" to protect the home from possible future creditors created an implied resulting trust under which the wife held the home for the husband because the husband did not show an express trust had been created or fully performed without exhausting trust property. Brock v. Brock, 279 Ga. 119, 610 S.E.2d 29 (2005) (decided under former O.C.G.A. § 53-12-91).

Loan funds deposited for the purpose of paying a specific creditor. — Repayment of the loan was not a transfer of an interest of the debtor's property and, therefore, not voidable as a preferential treatment since the funds were loaned to be applied to pay a specific creditor, debtor deposited the funds into a checking account the sole purpose of which was to satisfy that obligation, the debtor understood that the funds could not be used for any other purpose, and the balance in the account always exceeded the amount of the loan before the debtor repaid defendant. Tidwell v. Hendricks (In re McDowell), 258 B.R. 296 (Bankr. M.D. Ga. 2001) (decided under former O.C.G.A. § 53-12-91).

Rebuttal of resulting trust. — Resulting trust may be rebutted even by parol declarations of the person in whose favor the trust would otherwise be raised; and it is effectually rebutted by a subsequent deed taken by the same parties proffering to follow the very same trusts. Adams v. Guerard, 29 Ga. 651, 76 Am. Dec. 624 (1859) (decided under former law).

An express oral agreement of the wife to hold in trust for the husband will not operate to defeat the so-called resulting trust. Jackson v. Jackson, 150 Ga. 544, 104 S.E. 236 (1920) (decided under former Civil Code 1910, §§ 3740 and 3741).

Inadequate allegation of resulting trust. — In an action in which the patients alleged that the hospital was a not-for-profit corporation that charged inflated rates to uninsured patients and used excessively aggressive tactics to collect on unpaid bills, the tax exemption granted under I.R.C. § 501(c)(3) did not create a trust, express or implied, resulting or constructive; furthermore, the patients did not adequately allege a resulting or constructive trust pursuant to former O.C.G.A. §§ 53-12-91 and 53-12-93 (see O.C.G.A. § 53-12-130 and 53-12-132), respectively. Hogland v. Athens Reg'l Health Servs., No. 3:04-cv-50 (CAR), 2005 U.S. Dist. LEXIS 7763 (M.D. Ga. Jan. 21, 2005) (decided under former O.C.G.A. § 53-12-91).

Genuine issue of material fact as to whether a constructive trust should be implied. — Trial court erred in granting summary judgment to a record title holder in a quiet title action because a disputed question of material fact existed whether the holder had agreed to deed back the properties at issue to the claimant after financing fell through; thus, a dispute existed as to whether a constructive trust should be implied under the circumstances. Ansley v. Raczka-Long, 293 Ga. 138, 744 S.E.2d 55 (2013).

Trial court erred in granting an ex-husband summary judgment as to the ex-wife's and mother's implied trust claim because there was a genuine issue of material fact regarding whether an implied constructive trust arose at the time of the 2008 conveyance. Robertson v. Robertson, 333 Ga. App. 864, 778 S.E.2d 6 (2015).

Assuming that a widow's counterclaim against her late husband's two siblings for failure to continue mortgage payments on a home that the husband had bought for another sibling was for a constructive trust on the property, the widow was not entitled to summary judgment because the familial gift presumption applicable to purchase money resulting trusts could apply, or the husband's contributions toward the home could be considered gifts or voluntary payments. Roberts v. Smith, 341 Ga. App. 823, 801 S.E.2d 915 (2017).

Insufficient evidence of a resulting trust. — Trial court properly granted summary judgment to a parent and trustee of the parent's trust in a suit brought by a child to obtain a half interest in certain real property by the imposition

of a resulting trust as there was no dispute that no consideration was paid by the child for the property when the property was acquired. Rosado v. Rosado, 291 Ga. App. 670, 662 S.E.2d 761 (2008) (decided under former O.C.G.A. § 53-12-91).

Although there was no purchase money resulting trust created under former O.C.G.A. §§ 53-12-90 and 53-12-91 (see O.C.G.A. §§ 53-12-2 and 53-12-130), a decedent's mother was entitled to an equity interest in property of the deceased daughter because a constructive trust was established under O.C.G.A. § 53-12-93(a) and there was evidence of a gift of land under O.C.G.A. § 23-2-132, as an exception to the statute of frauds, in that the mother lived on the property, made valuable improvements, and paid meritorious consideration. Oliver v. 4708 Old Highgate Entry, No. 1:07-cv-2117-ODE, 2009 U.S. Dist. LEXIS 73002 (N.D. Ga. Apr. 21, 2009) (decided under former O.C.G.A. § 53-12-91).

With respect to a Chapter 11 bankruptcy in which the debtor, a business that served as an intermediary for clients desiring to effect exchanges of real property qualifying for tax-deferred treatment under 26 U.S.C. § 1031, held funds in bank accounts that resulted from certain real estate sales, two real estate exchange investors were not entitled to a turnover of proceeds from sales of their real estate, as opposed to having their claims payable on the same basis as the other unpaid exchangers, because the written agreements between the investors and the debtor specifically and unequivocally defined the circumstances under which the debtor acquired cash proceeds and the use and disposition of those proceeds, but did not create an express trust under former O.C.G.A. § 53-12-20 (see O.C.G.A. § 53-12-20). Nor could the investors establish a resulting trust under former O.C.G.A. § 53-12-91 (see O.C.G.A. § 53-12-130) or a constructive trust under former O.C.G.A. § 53-12-93 (see O.C.G.A. § 53-12-2132). McCamy v. Kerr (In re Real Estate Exch. Servs.), No. 08-85871-PWB, 2009 Bankr. LEXIS 3731 (Bankr. N.D. Ga. Oct. 9, 2009) (decided under former O.C.G.A. § 53-12-91).

Best interest of creditors' test under 11 U.S.C. § 1325(a)(4) was not met by the proposed plan of Chapter 13 debtors because the plan did not account for the recoverable value of the debtor's transfer of the debtor's interest in property given to the debtor by the debtor's mother. A resulting trust under O.C.G.A. § 53-12-130(1) in favor of the mother was not created based on the nature of her transaction and the conduct of the parties, and a purchase money resulting trust under § 53-12-130(3) did not arise because the transfer from the mother to the brothers was made without consideration. Meredith v. Weigl (In re Weigl), No. 10-60341, 2011 Bankr. LEXIS 2246 (Bankr. S.D. Ga. Jan. 18, 2011).

Tax exempt status did not create resulting trust. — Uninsured patients could not challenge hospital's tax exempt status under 26 U.S.C. § 501(c)(3) by alleging that the hospital breached an implied charitable trust in the hospital's billing and collection policies for uninsured and indigent patients because the tax exempt status did not meet the definition of a resulting trust in former O.C.G.A. § 53-12-91 (see O.C.G.A. § 53-12-130), because there was no allegation of any frustrated intent to form a trust on the part of a settlor. Washington v. Med. Ctr. of Cent. Ga., Inc., No. 5:04-cv-185 (CAR), 2005 U.S. Dist. LEXIS 2614 (M.D. Ga. Jan. 21, 2005) (decided under former O.C.G.A. § 53-12-91).

Resulting trusts excepted from statute of frauds. — That the Code excepts from the statute of frauds resulting and constructive trusts is not open to doubt. Jackson v. Jackson, 150 Ga. 544, 104 S.E. 236 (1920) (decided under former Civil Code 1910, §§ 3740 and 3741).

Burden of proof. — Because a former husband did not present proof of the existence of an implied resulting trust under former O.C.G.A. §§ 53-12-2, 53-12-90, 53-12-91, and 53-12-92 (see O.C.G.A. §§ 53-12-2, 53-12-130, and 53-12-131), the trial court did not err when the court granted judgment notwithstanding the verdict to the executor and the beneficiaries. Burnett v. Holroyd, 278 Ga. 470, 604 S.E.2d 137 (2004) (decided under former O.C.G.A. § 53-12-91).

Cited in Edwards v. Edwards, 267 Ga. 780, 482 S.E.2d 701 (1997); Dodd v. Scott, 250 Ga. App. 32, 550 S.E.2d 444 (2001).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 135 et seq.

Am. Jur. Pleading and Practice Forms. — Am. Jur. Pleading and Practice Forms, Trusts, §§ 40 to 56.

Am. Jur. Proof of Facts. — Proof of Grantor's Intent that Grantee Hold Property in Trust, 74 POF3d 353.

53-12-131. Purchase money resulting trusts.

(a) A purchase money resulting trust is a resulting trust implied for the benefit of the person paying consideration for the transfer to another person of legal title to real or personal property.

(b) Except as provided in subsection (c) of this Code section, the payment of consideration as provided in subsection (a) of this Code section shall create a presumption in favor of a resulting trust, but such presumption shall be rebuttable by a preponderance of the evidence.

(c) If the payor of consideration and transferee of the property as provided in subsection (a) of this Code section are husband and wife, parent and child, or siblings, a gift shall be presumed, but such presumption shall be rebuttable by clear and convincing evidence.

History. — Code 1981, § 53-12-131, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Law reviews. — For article, "Are We Witnessing the Erosion of Georgia's Separate Property Distinction?," see 13 Ga. St. B.J. 14 (2007).

For note, "The Significance of Stokes v. Stokes: An Examination of Property Rights Upon Divorce in Georgia," see 16 Ga. L. Rev. 695 (1982).

For comment on Ashbaugh v. Ashbaugh, 222 Ga. 811, 152 S.E.2d 888 (1966), see 18 Mercer L. Rev. 513 (1967). For comment, "The Georgia Supreme Court's Creation of an Equitable Interest in Marital Property — Yours? Mine? Ours!," see 34 Mercer L. Rev. 449 (1982).

JUDICIAL DECISIONS

Analysis

General Consideration
Presumption of Gift
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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 3160, former Civil Code 1910, §§ 3739, 3740, and 3741, former Code 1933, §§ 108-106 and 108-116, former Code 1981, O.C.G.A. § 53-12-28, and former O.C.G.A. § 53-12-92 of the 1991 Trust Act are included in the annotations for this Code section.

Statute is applicable when the wife, child, or sister pays the purchase money as well as when the husband, parent, or brother pays it. Woodward v. Woodward, 245 Ga. 550, 266 S.E.2d 170 (1980) (decided under former Code 1933, § 108-116).

Intention to make a gift. — As between husband and wife, parent and child, brother and brother, or sister and sister, payment of the purchase money of land by one of the correlatives, and caus-

General Consideration (Cont'd)

ing the conveyance to be made to the other, will generally suggest an intention to make a gift. This may or may not prevent a resulting trust, according to the circumstances of the particular transaction. Certainly, a trust for the benefit of the one paying the money does not necessarily result. Printup v. Patton & Jackson, 91 Ga. 422, 18 S.E. 311 (1893) (decided under former law).

Property between spouses. — Whenever a husband acquires the separate property of his wife, with or without her consent, he must be deemed to hold the property in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of the property to him. Barber v. Barber, 125 Ga. 226, 53 S.E. 1017 (1906) (decided under former law).

When the court charged that if the husband conveyed property to the wife and she paid the remainder of the purchase price without anything showing that it was for the purpose of securing the part paid, a presumption arises that it was a gift which may be rebutted; there was no application and the principle announced in Gould v. Glass, 120 Ga. 50, 47 S.E. 505 (1904). Barnett v. Strain, 151 Ga. 553, 107 S.E. 530 (1921) (decided under former Civil Code 1910, § 3740).

With the undisputed evidence showing a voluntary, intentional, and deliberate gift of the property by the husband to the wife, who had no knowledge of the transaction, and made no promise or agreement to hold the property for the husband, such gift cannot be cut down to an implied or resulting trust by events subsequently transpiring; and therefore, the declarations of the wife, after she had knowledge of the deed, as to the ownership of the property, and the payment of taxes and the making of improvements on the property by the husband, are insufficient to establish a resulting trust. Williams v. Thomas, 200 Ga. 767, 38 S.E.2d 603 (1946) (decided under former Code 1933, § 108-106).

After a debtor appealed a bankruptcy court's order finding that the debtor's transfer of half interest in three lots of real property to the debtor's spouse was a fraudulent conveyance, the debtor's spouse was not entitled to an implied purchase money resulting trust. The spouse did not pay consideration for the property to be transferred to the debtor when the debtor initially acquired the property, and the spouse did not own a half interest in the property by virtue of a purchase money resulting trust or otherwise. McFarland v. Wallace (In re McFarland), No. 113-210, 2014 U.S. Dist. LEXIS 111198 (S.D. Ga. Aug. 8, 2014), aff'd, 619 Fed. Appx. 962 (11th Cir. Ga. 2015).

Requirements to show existence of purchase money resulting trust. — In order to establish the existence of a purchase money resulting trust, one must show that such a trust was contemplated by both parties by way of an agreement that is either express or implied by the circumstances or conduct of the parties and such an agreement must have existed at the time the transaction was consummated. Burt v. Skrzyniarz, 272 Ga. 35, 526 S.E.2d 848 (2000) (decided under former O.C.G.A. § 53-12-92).

An absolute gift cannot, by events transpiring after the gift is made, be metamorphosed into a trust. Whitworth v. Whitworth, 233 Ga. 53, 210 S.E.2d 9 (1974) (decided under former Code 1933, § 108-116).

An absolute gift will not be cut down by implication into a trust merely because the donor hoped and believed, at the time the gift was made, that the donee would share the beneficial interest of the property with the donor or with a third person. It must appear from the entire transaction that there is an obligation on the part of the holder of the legal title to hold the property for the benefit of someone else. Williams v. Thomas, 200 Ga. 767, 38 S.E.2d 603 (1946) (decided under former Code 1933, § 108-106).

Illegal acts may not constitute basis for trust. — Husband who, in order to delay or defeat the collection of a claim for alimony or other lawful demands against him, conveyed land to another person and put that person in possession, could not maintain against the latter an action for

the breach of a bond given by him to reconvey the land whenever so required. This is so, not because the law is disposed to aid one of the wrongdoers in retaining the fruits of the unlawful transaction, but because the law denies the benefit of the law's remedies to the other. Langan v. Langan, 224 Ga. 399, 162 S.E.2d 405 (1968) (decided under former Code 1933, §§ 108-106 and 108-116).

Joint purchasers of property cannot intend to simultaneously create both a tenancy in common and a purchase money resulting trust. — Resulting trust may be found to exist if it is found that a tenancy in common was not established when the property was purchased, however, joint purchasers of property cannot intend to simultaneously create both a tenancy in common and a purchase money resulting trust since the two cannot co-exist. Burt v. Skrzyniarz, 272 Ga. 35, 526 S.E.2d 848 (2000) (decided under former O.C.G.A. § 53-12-92).

After the debtor sought a determination of the validity and extent of a lien held by a creditor on certain properties and also asserted that, even if the lien was valid, the properties were subject to equitable interests held by other entities, the court could not weigh and balance the evidence needed to determine whether purchase money resulting trusts arose under Georgia law on summary judgment. High-Top Holdings, Inc. v. RREF II BB Acquisitions, LLC (In re High-Top Holdings, Inc.), 564 B.R. 784 (Bankr. N.D. Ga. 2017).

Contribution to purchase home for children constituted gift. — Plaintiff's monetary contributions to the purchase, renovation, and maintenance of a home created an implied trust, giving the plaintiff an interest in the real property. Inasmuch as plaintiff, who made a $10,000 down payment, was a parent of the persons to whom title to the property was transferred, it was presumed that the plaintiff's $10,000 payment was a gift. Eason v. Farmer, 261 Ga. 675, 409 S.E.2d 509 (1991) (decided under former O.C.G.A. § 53-12-92).

Genuine issue of material fact as to whether a constructive trust should be implied. — Trial court erred in granting summary judgment to a record title holder in a quiet title action because a disputed question of material fact existed whether the holder had agreed to deed back the properties at issue to the claimant after financing fell through, thus, a dispute existed as to whether a constructive trust should be implied under the circumstances. Ansley v. Raczka-Long, 293 Ga. 138, 744 S.E.2d 55 (2013).

Court denied a bankruptcy trustee's motion for summary judgment on the trustee's claim that the trustee was allowed under 11 U.S.C. § 548 to avoid a transfer of a partial interest in real property a Chapter 7 debtor made less than two years before the debtor declared bankruptcy; there were genuine issues of fact concerning the transferee's claim that the debtor's mother transferred an interest in the property to the debtor by mistake, that family members agreed that the property would be given to the transferee as compensation for care the transferee provided to the debtor's mother, that the debtor held an interest as a purchase money resulting trust or a constructive trust under Georgia law, and that the debtor made the transfer to correct that error. Gordon v. Merritt (In re Krieg), No. 17-5156, 2018 Bankr. LEXIS 2773 (Bankr. N.D. Ga. Sept. 12, 2018).

Burden of proof. — Because a former husband did not present proof of the existence of an implied resulting trust under former O.C.G.A. §§ 53-12-2, 53-12-90, 53-12-91, and 53-12-92 (see O.C.G.A. §§ 53-12-2, 53-12-130, and 53-12-131), the trial court did not err when the court granted judgment notwithstanding the verdict to the executor and the beneficiaries. Burnett v. Holroyd, 278 Ga. 470, 604 S.E.2d 137 (2004) (decided under former O.C.G.A. § 53-12-92).

Although there was no purchase money resulting trust created under former O.C.G.A. §§ 53-12-90 and 53-12-91 (see O.C.G.A. §§ 53-12-2 and 53-12-130), a decedent's mother was entitled to an equity interest in property of the deceased daughter because a constructive trust was established under former O.C.G.A. § 53-12-93 (see O.C.G.A. § 53-12-132) and there was evidence of a gift of land under O.C.G.A. § 23-2-132, as an exception to the statute of frauds, in that the

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mother lived on the property, made valuable improvements, and paid meritorious consideration. Oliver v. 4708 Old Highgate Entry, No. 1:07-cv-2117-ODE, 2009 U.S. Dist. LEXIS 73002 (N.D. Ga. Apr. 21, 2009) (decided under former O.C.G.A. § 53-12-92).

Cited in Rucker v. Hunt, 174 Ga. App. 596, 163 S.E. 612 (1932); Harrell v. Fiveash, 182 Ga. 324, 185 S.E. 327 (1936); Ward v. Ward, 186 Ga. 887, 199 S.E. 195 (1938); Allen v. Allen, 198 Ga. 269, 31 S.E.2d 483 (1944); Jackson v. Moultrie Prod. Credit Ass'n, 76 Ga. App. 768, 47 S.E.2d 127 (1948); Adams v. Pafford, 79 Ga. App. 477, 54 S.E.2d 329 (1949); Jackson v. Jackson, 206 Ga. 470, 57 S.E.2d 602 (1950); Hise v. Morgan, 91 Ga. App. 555, 86 S.E.2d 374 (1955); Adams v. Adams, 213 Ga. 875, 102 S.E.2d 566 (1958); Brackin v. Brackin, 222 Ga. 226, 149 S.E.2d 485 (1966); Brown v. Leggitt, 121 Ga. App. 183, 173 S.E.2d 265 (1970); Brown v. Leggitt, 226 Ga. 366, 174 S.E.2d 889 (1970); McCann v. McCraine, 228 Ga. 814, 188 S.E.2d 484 (1972); Ham v. Ham, 230 Ga. 43, 195 S.E.2d 429 (1973); Barnes v. Barnes, 230 Ga. 226, 196 S.E.2d 390 (1973); Hampton v. Taylor, 233 Ga. 63, 209 S.E.2d 634 (1974); Leachmon v. Leachmon, 239 Ga. 780, 238 S.E.2d 863 (1977); Ward v. Sebren, 146 Ga. App. 867, 247 S.E.2d 532 (1978); Ward v. Sebren, 242 Ga. 782, 251 S.E.2d 524 (1979); Gaul v. Kennedy, 246 Ga. 290, 271 S.E.2d 196 (1980); Young v. Hinton, 163 Ga. App. 692, 295 S.E.2d 150 (1982); Brown v. Citizens & S. Nat'l Bank, 253 Ga. 119, 317 S.E.2d 180 (1984); Cole v. Cole, 205 Ga. App. 332, 422 S.E.2d 230 (1992); Dodd v. Scott, 250 Ga. App. 32, 550 S.E.2d 444 (2001).

Presumption of Gift

Legislative intent. — Very fact that the General Assembly provided a procedure for the rebuttal of the presumption of a gift indicates that the legislature intended that the presumption of a gift would be created in all cases when the family relations enumerated existed. Trust Co. v. Kell, 49 Ga. App. 371, 175 S.E. 659 (1934) (decided under former Civil Code 1910, § 3740).

Presumption of gift. — As between husband and wife, parent and child, and brothers and sisters, payment of purchase money by one, and causing the conveyance to be made to the other, will be presumed to be a gift; but a resulting trust in favor of the one paying the money may be shown and the presumption rebutted. Hemphill v. Hemphill, 176 Ga. 585, 168 S.E. 878 (1933) (decided under former Civil Code 1910, §§ 3739, 3740, and 3741).

When money is paid on the debt of another, by a person who is under no legal or moral obligation to pay the debt, and one does not do so at the instance, request, or consent of the debtor, and the debtor does not ratify the act as one done in the debtor's behalf, or does not otherwise become liable therefor, the payment is a voluntary payment, and the person making the payment cannot recover from the debtor; this is particularly true if the parties are near relatives, as when the person making the payment is the mother of the debtor. Hartley v. Hartley, 50 Ga. App. 848, 179 S.E. 245 (1935) (decided under former Civil Code 1910, § 3740).

Statute provides that, when a son and husband pays the purchase money for property and causes the conveyance to be made to his mother and wife, it shall be presumed to be a gift. Mills v. Williams, 208 Ga. 425, 67 S.E.2d 212 (1951) (decided under former law).

Spouse of a bankruptcy debtor had no interest in real properties prior to a transfer from the debtor since no purchase money resulting trust was created in the absence of any consideration paid by the spouse for the purchase of the properties by the debtor and the lack of evidence of the intent of the debtor and the spouse to create the trust to rebut the presumption that the transfer was a gift. Wallace v. McFarland (In re McFarland), No. 11-01021, 2013 Bankr. LEXIS 4112 (Bankr. S.D. Ga. Sept. 30, 2013).

Bankruptcy court properly found that a debtor transferred the debtor's interest in property under 11 U.S.C. §§ 541 and 548(a)(1) by executing a deed of gift in favor of the debtor's spouse; they did not prove the existence of an implied resulting trust in an interest in the property as they failed to present clear and convincing ev-

idence to rebut the presumption that the spouse's contributions to the purchase of the property were a gift to the debtor. Wallace v. McFarland (In re McFarland), No. 14-14034, 2015 U.S. App. LEXIS 17960 (11th Cir. Oct. 16, 2015) (Unpublished).

Assuming that a widow's counterclaim against her late husband's two siblings for failure to continue mortgage payments on a home that the husband had bought for another sibling was for a constructive trust on the property, the widow was not entitled to summary judgment because the familial gift presumption applicable to purchase money resulting trusts could apply, or the husband's contributions toward the home could be considered gifts or voluntary payments. Roberts v. Smith, 341 Ga. App. 823, 801 S.E.2d 915 (2017).

Parent and child. — As between parent and child, payment of the purchase money by one and causing the conveyance to be made to another will be presumed to be a gift; but a resulting trust in favor of the one paying the money may be shown and the presumption rebutted. Bryant v. Green, 176 Ga. 874, 169 S.E. 123 (1933) (decided under former Civil Code 1910, §§ 3739 and 3740).

When there is a transfer of funds from father to son, the provisions of this statute are applicable, and hence, a gift is by law presumed. Reed v. Reed, 217 Ga. 303, 122 S.E.2d 253 (1961) (decided under former Code 1933, § 108-106).

Trial court properly granted summary judgment to a parent and trustee of the parent's trust in a suit brought by a child to obtain a half interest in certain real property by the imposition of a resulting trust as there was no dispute that no consideration was paid by the child for the property when the property was acquired. Rosado v. Rosado, 291 Ga. App. 670, 662 S.E.2d 761 (2008) (decided under former O.C.G.A. § 53-12-92).

Husband and wife. — When a husband pays the purchase money of land from his own funds and has the land conveyed to his wife, the presumption which the law makes is that the husband intended to make a gift to his wife; but the presumption is a rebuttable one, and a resulting trust in favor of the husband may be shown. Romano v. Finley, 172 Ga. 366, 157 S.E. 669 (1931) (decided under former Civil Code 1910, § 3740).

If a husband buys and pays for land, and takes a deed in his wife's name, a presumption arises that he intends to make an absolute gift to her; and in order to overcome this presumption he must show something which raises an obligation in her to hold the property in trust for him. An absolute gift cannot, by events transpiring after it is made, be metamorphosed into a trust. Williams v. Thomas, 200 Ga. 767, 38 S.E.2d 603 (1946) (decided under former Code 1933, § 108-106).

When a husband pays the purchase money of land from his own funds and has the land conveyed to his wife, the presumption which the law makes is that the husband intended to make a gift to his wife; but the presumption is a rebuttable one, and a resulting trust in favor of the husband may be shown. Parol evidence of the nature of the transaction, or the circumstances, or the conduct of the parties, is admissible to rebut the presumption of a gift; but in order to rebut the presumption of a gift the proof must be clear and convincing. Williams v. Thomas, 200 Ga. 767, 38 S.E.2d 603 (1946) (decided under former Code 1933, § 108-106).

Resulting trust, as between husband and wife where the husband pays the purchase money and title is taken in the name of the wife, rests upon the intention of the parties at the time of the transaction, with the presumption being that the transaction was a gift. Parol proof of conduct, circumstances, and declarations is admissible as tending to show the intent of the parties; and such evidence might ordinarily, if sufficiently clear and convincing, authorize a jury to find that the intention of the parties was that the conveyance should be in trust and not a gift. But when the undisputed testimony of the husband, who seeks to establish the trust, shows a deliberate and intentional gift, such gift cannot be cut down to a trust by proof of subsequent events. Williams v. Thomas, 200 Ga. 767, 38 S.E.2d 603 (1946) (decided under former Code 1933, § 108-106).

When the jury was authorized under the evidence to believe that the husband

Presumption of Gift (Cont'd)

purchased the property and placed title in his wife's name, the court did not err in charging this statute. Reddick v. Reddick, 224 Ga. 732, 164 S.E.2d 725 (1968) (decided under former Code 1933, § 108-116).

Section not applicable when property used by both husband and wife. — There is no presumption of a gift between husband and wife when one spouse purchases personal property and takes title in himself, and the property is subsequently used by both. Swanson v. Universal Promotions, Inc., 144 Ga. App. 591, 241 S.E.2d 474 (1978) (decided under former Code 1933, § 108-116).

Presumption of gift from marital relationship. — Prima facie from the relationship of the parties, husband and wife, there would arise the presumption of a gift. But this presumption may be rebutted, and the rebuttal may be based upon oral evidence. Implied or constructive trusts afford an instance of an exception to the statute of frauds. Bryant v. Green, 176 Ga. 874, 169 S.E. 123 (1933) (decided under former Civil Code 1910, § 3739).

Whenever the husband acquires the separate property of his wife, with or without her consent, he must be deemed to hold the property in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of the property to him. McCann v. McCrain, 228 Ga. 814, 188 S.E.2d 484 (1972) (decided under former Code 1933, §§ 108-104, 108-106, 108-107, and 108-117).

In a divorce, when a husband transferred the marital home to the wife for "love and affection" to protect the home from possible future creditors, and claimed that this created an implied resulting trust under which the wife held the home for the husband, he did not overcome the presumption that this was a gift, under former O.C.G.A. § 53-12-92 (see O.C.G.A. § 53-12-131), as the husband did not show by clear and convincing evidence that both parties contemplated a resulting trust, as there was no evidence of a mutual intent to create a trust when the conveyance was made. Brock v. Brock, 279 Ga. 119, 610 S.E.2d 29 (2005) (decided under former O.C.G.A. § 53-12-92).

Rebuttal of Presumption

Statutory presumption created by statute is a rebuttable one, and the rebuttal may be based upon oral evidence. Hinkle v. Hinkle, 167 Ga. App. 423, 306 S.E.2d 705 (1983) (decided under former O.C.G.A. § 53-12-28).

To rebut the presumption of a gift, one must show that a resulting trust was contemplated by both parties by way of an understanding or agreement. This understanding or agreement, either express or shown by the nature of the transaction, the circumstances or the conduct of the parties must have existed at the time the transaction was consummated. Whitworth v. Whitworth, 233 Ga. 53, 210 S.E.2d 9 (1974) (decided under former Code 1933, § 108-116); Scales v. Scales, 235 Ga. 509, 220 S.E.2d 267 (1975) (decided under former Code 1933, § 108-116); Adderholt v. Adderholt, 240 Ga. 626, 242 S.E.2d 11 (1978) (decided under former Code 1933, § 108-116); Ford v. Ford, 243 Ga. 763, 256 S.E.2d 446 (1979) (decided under former Code 1933, § 108-116).

Evidence to refute a gift must be clear and convincing. Bullard v. Bullard, 214 Ga. 122, 103 S.E.2d 570 (1958) (decided under former Code 1933, § 108-116).

Direct evidence denying the making of a gift is not sufficient to create a resulting trust. Adderholt v. Adderholt, 240 Ga. 626, 242 S.E.2d 11 (1978) (decided under former Code 1933, § 108-116).

Presumption established by statute may be repelled by evidence showing that the husband thereafter exercised acts of dominion over the property of such a character as were inconsistent with ownership by the wife. Acts of the wife apparently recognizing ownership in the husband are proper matters for consideration in determining whether there has been an acceptance of the gift. Ashbaugh v. Ashbaugh, 222 Ga. 811, 152 S.E.2d 888 (1966), for comment, see 18 Mercer L. Rev. 513 (1967). (decided under former Code 1933, § 108-116).

If a mother buys lands with her own funds and causes the title to be made to her son under an understanding and agreement that the property is to be hers, and that the son will make to her such

conveyance as she may require, a trust in favor of the mother will be implied. Wilder v. Wilder, 138 Ga. 573, 75 S.E. 654 (1912) (decided under former Civil Code 1910, § 3739).

When mother's funds were used in buying property under agreement that the son should convey the property to her upon her request, such circumstances are shown that the presumption of a gift is rebutted and a resulting trust is created. Gillespie v. Gillespie, 150 Ga. 106, 102 S.E. 824 (1920) (decided under former Civil Code 1910, § 3739).

In assessing an attempt to rebut presumption of a gift under former Code 1933, § 108-116, former Code 1933, § 48-101 (see O.C.G.A. § 44-5-80) was significant. Ashbaugh v. Ashbaugh, 222 Ga. 811, 152 S.E.2d 888 (1966) for comment, see 18 Mercer L. Rev. 513 (1967) (decided under former Code 1933, § 108-116).

Parol evidence admissible to rebut presumption of gift. — Parol evidence of the nature of the transaction, or the circumstances, or the conduct of the parties is admissible to rebut the presumption of a gift; but in order to rebut the presumption the proof must be clear and convincing. Ashbaugh v. Ashbaugh, 222 Ga. 811, 152 S.E.2d 888 (1966) for comment, see 18 Mercer L. Rev. 513 (1967) (decided under former Code 1933, § 108-116); Romano v. Finley, 172 Ga. 366, 157 S.E. 669 (1931) (decided under former Civil Code 1910, § 3740); Largan v. Largan, 224 Ga. 399, 162 S.E.2d 405 (1968) (decided under former Code 1933, § 108-116).

Prima facie from the relationship of the parties, husband and wife, there would arise the presumption of a gift. But this presumption may be rebutted, and the rebuttal may be based upon oral evidence. Implied or constructive trusts afford an instance of an exception to the statute of frauds. Bryant v. Green, 176 Ga. 874, 169 S.E. 123 (1933) (decided under former Civil Code 1910, § 3739).

Trust which arises from the facts and the nature of the transaction is not destroyed by the express, verbal, and therefore unenforceable, agreement of the wife to hold the title for the use of the husband. Romano v. Finley, 172 Ga. 366, 157 S.E. 669 (1931) (decided under former Civil Code 1910, § 3740).

If from all the facts and circumstances an implied trust is otherwise established, it is not destroyed by the express verbal agreement which may have constituted a part of the transaction; the express agreement may be shown, not as fixing the interests to be owned by parties, but as rebutting the inference of a gift by plaintiff. Hemphill v. Hemphill, 176 Ga. 585, 168 S.E. 878 (1933) (decided under former Civil Code 1910, § 3739).

Practice in prior marriage. — When a husband maintained that his practice with a former wife relative to legal and beneficial ownership was understood by his present wife, and that the practice was continued with her consent, evidence of the similar arrangement in the former marriage was relevant to illuminate the nature of transactions growing out of this marriage. Harrell v. Harrell, 249 Ga. 170, 290 S.E.2d 906 (1982) (decided under former Code 1933, § 108-116).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 135 et seq.

Am. Jur. Pleading and Practice Forms. — Am. Jur. Pleading and Practice Forms, Trusts, §§ 40 to 56.

Am. Jur. Proof of Facts. — Purchase-Money Resulting Trust, 29 POF2d 455.

Proof of Grantor's Intent that Grantee Hold Property in Trust, 74 POF3d 353.

Circumstances Establishing Purchase-Money Resulting Trust, 85 POF3d 225.

ALR. — Presumption of gift, advancement, or settlement where husband takes title from third person to property paid for by or with funds of wife, 113 A.L.R. 339.

Provision for relief or education of member of family or relatives as creating charitable trust, 131 A.L.R. 1277.

Unexplained gratuitous transfer of property from one relative to another as raising presumption of gift, 94 A.L.R.3d 608.

53-12-132. Constructive trusts.

(a) A constructive trust is a trust implied whenever the circumstances are such that the person holding legal title to property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity.

(b) The person claiming the beneficial interest in the property may be found to have waived the right to a constructive trust by subsequent ratification or long acquiescence.

History. — Code 1981, § 53-12-132, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Law reviews. — For note, "Vesting Title in a Murderer: Where is the Equity in the Georgia Supreme Court's Interpretation of the Slayer Statute in Levenson?," see 45 Ga. L. Rev. 877 (2011).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1910, § 3739, former Code 1933, §§ 108-104 and 108-107, former O.C.G.A. § 53-12-32, and former O.C.G.A. § 53-12-93 of the 1991 Trust Act are included in the annotations for this Code section.

Not a remedy for simple breach of contract. — While Georgia law recognizes that a constructive trust may be imposed upon property acquired by fraud, a constructive trust is not a remedy for a simple breach of contract or breach of a promise. Perkins v. Crown Fin., LLC (In re Int'l Mgmt. Assocs., LLC), No. 06-6421-PWB, 2016 Bankr. LEXIS 443 (Bankr. N.D. Ga. Feb. 9, 2016) (Unpublished).

Post-bankruptcy retirement benefits held in constructive trust for ex-spouse. — Debtor held any post-bankruptcy petition payment that the debtor might receive on the debtor's retirement benefit in constructive trust for the debtor's ex-spouse to the extent of one half of such net benefit, since established principles of equity would not allow the debtor to be unjustly enriched at the ex-spouse's expense by discharging in bankruptcy an interest in a benefit established by a final divorce decree. Farrow v. Farrow, 116 Bankr. 310 (Bankr. M.D. Ga. 1990) (decided under former O.C.G.A. § 53-12-32).

Loan funds deposited for the purpose of paying a specific creditor. — Repayment of the loan was not a transfer of an interest of the debtor's property and, therefore, not voidable as a preferential treatment, since the funds were loaned to be applied to pay a specific creditor, debtor deposited the funds into a checking account the sole purpose of which was to satisfy that obligation, the debtor understood that the funds could not be used for any other purpose, and the balance in the account always exceeded the amount of the loan before the debtor repaid defendant. Tidwell v. Hendricks (In re McDowell), 258 B.R. 296 (Bankr. M.D. Ga. 2001) (decided under former O.C.G.A. § 53-12-93).

No trust for nontitled tenant. — When evidence authorized the trial judge to conclude as a matter of law that defendant occupied premises as a tenant after conveying title to the property, no constructive trust implying a life estate was shown. Pope v. Hendley, 206 Ga. App. 773, 426 S.E.2d 607 (1992) (decided under former O.C.G.A. § 53-12-93 of the 1991 Trust Act).

Existence of constructive trust in condominium not contradicted. — Ap-

pellate court had to presume the trial court did not abuse the court's discretion ruling that the father had a constructive trust in the condominium because the son provided no transcript of the hearing and, thus, the son presented no evidence that the father waived the father's right to a constructive trust. Walia v. Walia, 356 Ga. App. 387, 847 S.E.2d 8 (2020).

Constructive trust arises not from the intent of the parties, but by equity with respect to property acquired by fraud, or although acquired without fraud, since it is against equity that the property should be retained by the one who holds the property. Aetna Life Ins. Co. v. Weekes, 241 Ga. 169, 244 S.E.2d 46 (1978) (decided under former Code 1933, § 108-104).

Constructive trust would defeat bankruptcy trustee's avoidance action. — Creditor could defeat a trustee's 11 U.S.C. §§ 547 and 548 actions by proving that the trustee could have successfully impressed a constructive trust on property under Georgia law prior to the debtor's transfer of the debtor's legal interest in that property to the trustee. Kelley v. McCormack (In re Mitchell), 548 B.R. 862 (Bankr. M.D. Ga. 2016).

Actions of guardian. — Guardian cannot, either directly or indirectly, buy property of the guardian's ward at a sale thereof by some other person or authority, as a creditor of the ward selling at public auction under a power of sale. If the guardian does by such means acquire the legal title to property of the guardian's ward, the guardian will be deemed a trustee as to such property at the election of the ward or the ward's heirs at law. Allen v. Wade, 203 Ga. 753, 48 S.E.2d 538 (1948) (decided under former Code 1933, § 108-107).

If, after appointment of one as guardian of another's property, one buys a tax claim against one's ward's estate, as by obtaining a deed to oneself from a county conveying land which the county had previously purchased as the property of the ward at a tax sale, one will be treated in equity as holding under such deed as trustee for one's ward. Allen v. Wade, 203 Ga. 753, 48 S.E.2d 538 (1948) (decided under former Code 1933, § 108-107).

Obtaining items by trick, fraud, or other wrong act. — When one by a trick, or a fraud, or other wrongful act, obtained money from the trustee of the victim, one was, unless one had some other or better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would have otherwise had the thing. Cordovano v. State, 61 Ga. App. 590, 7 S.E.2d 45 (1940) (decided under former Code 1933, § 108-107).

When defendant obtained money by fraud and trickery ("the telegram racket") in order to prevent the defendant from taking advantage of defendant's own wrong, a naked, constructive, ex maleficio trust would be imposed by operation of law upon the property thus obtained even though it was contrary to the defendant's intention and will, and the defendant became a trustee ex maleficio for such property; the defendant was trustee ex maleficio of a naked ex maleficio trust, which required no action on the defendant's part beyond the turning over or returning of the money to the beneficiary, the victim. Cordovano v. State, 61 Ga. App. 590, 7 S.E.2d 45 (1940) (decided under former Code 1933, § 108-107).

Liens upon crops. — When after signing a waiver of all liens upon the crops grown by a tenant in favor of a lien of a third party for advances to aid in making crops, the landlord receives the proceeds from the crops, which are sufficient to satisfy the lien for advances, and converts the land to the third party's own use, a petition of the holder of the lien for such advances against the landlord and the tenant, seeking judgment against them as trustees ex maleficio for the full amount of such advances, states a cause of action against both the owner and tenant. Trapnell v. Swainsboro Prod. Credit Ass'n, 208 Ga. 89, 65 S.E.2d 179 (1951) (decided under former Code 1933, § 108-107).

Implied trust created. — When land is purchased by one with the money of others, under an agreement and understanding that title is to be taken in the name of all, and the one procures a deed to the land but causes the deed to be made to oneself alone, an implied trust will arise in favor of the others as to an undivided interest in the land. Chapman v.

Faughnan, 183 Ga. 114, 187 S.E. 634 (1936) (decided under former Code 1933, § 108-107).

When the estate of the decedent consisted in part of land, and one of the heirs at law of the decedent is in possession thereof under an agreement with one's cotenants to act as their agent, and one procures another person to administer on the estate for the purpose of divesting the title of the other heirs at law and obtaining it personally, and does thus obtain the title, and conceals one's acts and doings with respect thereto from one's cotenants and principals, a court of equity would decree such title to be void, and the defendant to hold as trustee for those entitled to it. Lanier v. Dyer, 222 Ga. 30, 148 S.E.2d 432 (1966) (decided under former Code 1933, § 108-107).

Actions of agents and creation of trusts. — When an agency is established, the agent will be held to be a trustee as to any profits, advantages, rights, or privileges under any contract made and obtained within the scope and by reason of such agency; and where the agent invests such profits in property or places the same to one's credit in a bank, one will be held to hold the property as trustee for the principal, and the latter can maintain in a court of equity an action to trace such profits into such investments, and to enjoin the agent or the donee from selling, disposing of, or incumbering any such profits or any property in which the profits have been invested. Smith v. Harvey-Given Co., 182 Ga. 410, 185 S.E. 793 (1936) (decided under former Code 1910, § 3739).

Fraud in marriage. — When a woman marries a man, knowing that she has a living husband to whom she is married, such fact being unknown to the second husband, she perpetrates such fraud as will authorize cancellation of a deed to her made upon love and affection by her purported husband. Hargrett v. Hargrett, 242 Ga. 725, 251 S.E.2d 235 (1978), overruled on other grounds, Stokes v. Stokes, 246 Ga. 765, 273 S.E.2d 169 (1980) (decided under former Code 1933, § 108-107).

When a wife guilty of adultery unknown to her husband importunes him to make a gift of property to her in contemplation of her renewed adultery and possible elopement, the gift will be revoked as a fraud upon the husband. Hargrett v. Hargrett, 242 Ga. 725, 251 S.E.2d 235 (1978), overruled on other grounds, Stokes v. Stokes, 246 Ga. 765, 273 S.E.2d 169 (1980) (decided under former Code 1933, § 108-107).

When a promise of the wife was the consideration inducing execution of a deed, and such promise was fraudulently made with intent not to comply, such deed may be set aside for inceptive fraud. Hargrett v. Hargrett, 242 Ga. 725, 251 S.E.2d 235 (1978), overruled on other grounds, Stokes v. Stokes, 246 Ga. 765, 273 S.E.2d 169 (1980) (decided under former Code 1933, § 108-107).

Equity interest created. — Although there was no purchase money resulting trust created under former O.C.G.A. §§ 53-12-90, 53-12-91, and 53-12-92 (see O.C.G.A. §§ 53-12-2, 53-12-130, and 53-12-131), a decedent's mother was entitled to an equity interest in property of the deceased daughter because a constructive trust was established under former O.C.G.A. § 53-12-93 (see O.C.G.A. § 53-12-132) and there was evidence of a gift of land under O.C.G.A. § 23-2-132, as an exception to the statute of frauds, in that the mother lived on the property, made valuable improvements, and paid meritorious consideration. Oliver v. 4708 Old Highgate Entry, No. 1:07-cv-2117-ODE, 2009 U.S. Dist. LEXIS 73002 (N.D. Ga. Apr. 21, 2009) (decided under former O.C.G.A. § 53-12-93).

Material facts prevented imposition of constructive trust. — Trial court erred by granting the appellees' motion for summary judgment as to the claim for imposition of a constructive trust because material issues of fact remained as to whether the appellees, inconsistently with the appellants' rights and contrary to equity, exercised dominion over their property. Bo Phillips Company, Inc. v. R. L. King Properties, LLC, 336 Ga. App. 705, 783 S.E.2d 445 (2016).

Partition. — Plaintiff stated a claim upon which relief could be granted when the plaintiff sought partition of three parcels of property on the basis that plaintiff was induced to make valuable improvements to the parcels. Lathem v. Hestley,

270 Ga. 849, 514 S.E.2d 440 (1999) (decided under former O.C.G.A. § 53-12-93).

Property in which embezzled funds invested. — When funds are embezzled, the victim can trace such funds into the property in which the embezzler invested the funds and obtain an equitable lien on such property. First Nat'l Bank v. Hill, 412 F. Supp. 422 (N.D. Ga. 1976) (decided under former law).

Genuine issue of material fact as to whether a constructive trust should be implied. — Trial court erred in granting summary judgment to a record title holder in a quiet title action because a disputed question of material fact existed whether the holder had agreed to deed back the properties at issue to the claimant after financing fell through; thus, a dispute existed as to whether a constructive trust should be implied under the circumstances. Ansley v. Raczka-Long, 293 Ga. 138, 744 S.E.2d 55 (2013).

Trial court erred in granting an ex-husband summary judgment as to the ex-wife's and mother's implied trust claim because there was a genuine issue of material fact regarding whether an implied constructive trust arose at the time of the 2008 conveyance. Robertson v. Robertson, 333 Ga. App. 864, 778 S.E.2d 6 (2015).

Assuming that a widow's counterclaim against her late husband's two siblings for failure to continue mortgage payments on a home that the husband had bought for another sibling was for a constructive trust on the property, the widow was not entitled to summary judgment because the familial gift presumption applicable to purchase money resulting trusts could apply, or the husband's contributions toward the home could be considered gifts or voluntary payments. Roberts v. Smith, 341 Ga. App. 823, 801 S.E.2d 915 (2017).

Court denied a bankruptcy trustee's motion for summary judgment on the trustee's claim that the trustee was allowed under 11 U.S.C. § 548 to avoid a transfer of a partial interest in real property a Chapter 7 debtor made less than two years before the debtor declared bankruptcy; there were genuine issues of fact concerning the transferee's claim that the debtor's mother transferred an interest in the property to the debtor by mistake, that family members agreed that the property would be given to the transferee as compensation for care the transferee provided to the debtor's mother, that the debtor held an interest as a purchase money resulting trust or a constructive trust under Georgia law, and that the debtor made the transfer to correct that error. Gordon v. Merritt (In re Krieg), No. 17-5156, 2018 Bankr. LEXIS 2773 (Bankr. N.D. Ga. Sept. 12, 2018).

No constructive trust would be imposed on the property of an automobile dealer when there was no evidence that the dealer was aware of the fraudulent scheme of the buyer's agent to convert the buyer's money. Atlanta Classic Cars, Inc. v. Chih Hung USA Auto Corp., 209 Ga. App. 908, 439 S.E.2d 498 (1993) (decided under former O.C.G.A. § 53-12-93).

When clients of an absconding defendant were not the debtors or fiduciaries of other clients, and when no evidence of wrongdoing on their part was presented, there was no unjust enrichment in permitting their reclamation of investments, and no constructive trust was created. Deer Creek, Inc. v. Section 1031 Servs., Inc., 235 Ga. App. 891, 510 S.E.2d 853 (1999) (decided under former O.C.G.A. § 53-12-93).

In an action in which the patients alleged that the hospital was a not-for-profit corporation that charged inflated rates to uninsured patients and used excessively aggressive tactics to collect on unpaid bills, the tax exemption granted under I.R.C. § 501(c)(3) did not create a trust, express or implied, resulting or constructive; furthermore, the patients did not adequately allege a resulting or constructive trust pursuant to former O.C.G.A. §§ 53-12-91 and 53-12-93 (see O.C.G.A. §§ 53-12-130 and 53-12-131), respectively. Hogland v. Athens Reg'l Health Servs., No. 3:04-cv-50 (CAR), 2005 U.S. Dist. LEXIS 7763 (M.D. Ga. Jan. 21, 2005) (decided under former O.C.G.A. § 53-12-93).

Daughter-in-law was not entitled to a constructive trust under former O.C.G.A. § 53-12-93 (see O.C.G.A. § 53-12-132) on the marital home, which her former father-in-law had foreclosed upon and purchased, because the broken verbal

promise, that the daughter-in-law could continue to live there after the divorce, was not made with the intent to later break it so that the father-in-law could take her interest as the daughter-in-law voluntarily left the property when she remarried. Parris v. Leifels, 280 Ga. 135, 625 S.E.2d 390 (2006) (decided under former O.C.G.A. § 53-12-93).

Denial of a sister's and an executor's motions for a judgment notwithstanding the verdict was reversed as a constructive trust could not be imposed over the proceeds of a condemnation since: (1) a mother did not make any agreement with her children regarding the quitclaim deeds or the proceeds of the condemnation; (2) the documents signed by the siblings were unequivocal and unrestricted; (3) the mother did not make any promise with the intent not to carry it out; (4) there was nothing to indicate that when the mother obtained a certificate of deposit and opened a money market account in her and the executor's and the sister's names as joint tenants with right of survivorship, she meant to do anything other than that; and (5) the siblings did not raise the issue of a constructive trust in the condemnation proceedings and were collaterally estopped from raising the issue in a later action. Jenkins v. Jenkins, 281 Ga. App. 756, 637 S.E.2d 56 (2006), cert. denied, No. S07C0281, 2007 Ga. LEXIS 87 (Ga. 2007) (decided under former O.C.G.A. § 53-12-93).

Pursuant to former O.C.G.A. § 53-12-93 (see O.C.G.A. § 53-12-132), a creditor could not establish that it was a beneficiary of a constructive trust because such a determination depended upon a finding that an assignment of a debtor's insurance proceeds occurred, giving the creditor an identifiable interest in the insurance proceeds; here, there was no written assignment, and oral conversations between the creditor and debtor about the insurance proceeds were not enough to constitute an assignment, particularly in light of the parol evidence rule, O.C.G.A. § 13-2-2. Aero Housewares, LLC v. Interstate Restoration Group, Inc. (In re Aero Plastics, Inc.), No. 05-60451-MHM, 2006 Bankr. LEXIS 3245 (Bankr. N.D. Ga. Sept. 27, 2006) (decided under former O.C.G.A. § 53-12-93).

Sellers under a real estate contract that contained a merger clause were not entitled under former O.C.G.A. § 53-12-93 (see O.C.G.A. § 53-12-132) to impose a constructive trust against the buyer based on the buyer's alleged oral misrepresentations; by affirming the contract and the merger clause contained therein, the sellers had effectively disclaimed these misrepresentations and ratified the transfer of the property. Ekeledo v. Amporful, 281 Ga. 817, 642 S.E.2d 20 (2007) (decided under former O.C.G.A. § 53-12-93).

It was error not to direct a verdict pursuant to O.C.G.A. § 9-11-50(a) to a putative property owner in an action by various family members, seeking to impose a constructive trust on real property under former O.C.G.A. § 53-12-93 (see O.C.G.A. § 53-12-132), as it was inequitable to grant the family members an interest in the property because the putative owner had worked the farm on it for over 18 years and had spent significant sums on the property compared to the very minimal amounts contributed by the family members over the years; the doctrine of part performance as an exception to the Statute of Frauds under O.C.G.A. § 13-5-31(3) was inapplicable because the oral agreement was not sufficiently certain or definite for purposes of enforcement. Troutman v. Troutman, 297 Ga. App. 62, 676 S.E.2d 787 (2009) (decided under former O.C.G.A. § 53-12-93).

Property owner who sought part payment under insurance settlement not entitled to constructive trust. — In an action for equitable interpleader and declaratory relief which a bank filed, pursuant to O.C.G.A. § 23-3-90, against a wife who owned an undivided one-half interest in a residence, the trial court's judgment rejecting the wife's argument that the court should impose a constructive trust on half the proceeds of an insurance settlement that was reached after the residence was damaged by fire, and awarding the bank the entire amount of the settlement, was affirmed. Pearlman v. Sec. Bank & Trust Co., 261 Ga. App. 270, 582 S.E.2d 219 (2003) (decided under former O.C.G.A. § 53-12-93).

Mortgagee's administration of an escrow account does not give rise to

either a trust or an agency relationship. Telfair v. First Union Mortg. Corp., 216 F.3d 1333 (11th Cir. 2000), cert. denied, 531 U.S. 1073, 121 S. Ct. 765, 148 L. Ed. 2d 666 (2001) (decided under former O.C.G.A. § 53-12-93).

Constructive trust established. — Jury's finding that a decedent's purported second spouse was entitled to an equitable interest in a home that the spouse shared with the decedent was supported by the evidence, albeit slight, since the spouse and the decedent paid the mortgage from a joint account and the spouse continued to make payments on the house following the decedent's death. Singleton v. Wilburn, 262 Ga. App. 52, 584 S.E.2d 659 (2003) (decided under former O.C.G.A. § 53-12-93).

Though title to a strip of property was in the buyers, a resulting trust arose in favor of the selling wife, through payment of monthly payments to the financing company and taxes. Whiten v. Murray, 267 Ga. App. 417, 599 S.E.2d 346 (2004) (decided under former O.C.G.A. § 53-12-93).

Uninsured patients could not challenge a hospital's tax exempt status under 26 U.S.C. § 501(c)(3) by alleging that the hospital breached an implied charitable trust in its billing and collection policies for uninsured and indigent patients because the tax exempt status did not meet the definition of a constructive trust under former O.C.G.A. § 53-12-93, as entitlement to the exemption was a question of tax law and not a question of equity. Washington v. Med. Ctr. of Cent. Ga., Inc., No. 5:04-cv-185 (CAR), 2005 U.S. Dist. LEXIS 2614 (M.D. Ga. Jan. 21, 2005) (decided under former O.C.G.A. § 53-12-93).

Evidence supported a finding that the life insurance funds from the deaths of a daughter's parents in the hands of the daughter's grandmother were subject to a constructive trust since the insurance company paid the funds to the grandfather based on the acquiescence of the daughter's uncle, who was the administrator of the parents' estates, and the assertion that the parents' deaths were simultaneous, which acquiescence, in light of the contrary evidence and in light of the uncle's own conclusion that the mother died first, was a breach of the uncle's fiduciary duties owed to the daughter; the evidence showed that the grandfather would have been unjustly enriched by retaining those insurance funds that should have been paid to the daughter through the estates; receiving the proceeds under the grandfather's will, the grandmother was also not an innocent purchaser and therefore took title to the proceeds subject to the trust impressed upon them. Jonas v. Jonas, 280 Ga. App. 155, 633 S.E.2d 544 (2006) (decided under former O.C.G.A. § 53-12-93).

Denial of a sister's motion for a judgment notwithstanding the verdict was affirmed as there was evidence supporting the imposition of a constructive trust on a bank account owned jointly with right of survivorship by the mother, who passed away, and the sister since the sister acknowledged that the account was opened for the mother's convenience. Jenkins v. Jenkins, 281 Ga. App. 756, 637 S.E.2d 56 (2006), cert. denied, No. S07C0281, 2007 Ga. LEXIS 87 (Ga. 2007) (decided under former O.C.G.A. § 53-12-93).

Given evidence that the father performed part of the agreement at issue with a son for the latter to transfer title to a house, specifically by selling the father's house and paying the son the proceeds in exchange for the son's promise to convey, when the son failed to convey the house the trial court properly granted the father a constructive trust based on fraud, denied the son a directed verdict, and sustained the jury's verdict. Perry v. Perry, 285 Ga. App. 892, 648 S.E.2d 193 (2007) (decided under former O.C.G.A. § 53-12-93).

Beneficiaries of a will sued the decedent's grandchild for conversion of stock the beneficiaries alleged was intended to be part of the decedent's estate. A constructive trust arose under O.C.G.A. § 53-12-93 as the evidence showed the grandchild agreed to hold the stock in trust for the beneficiaries. Bunch v. Byington, 292 Ga. App. 497, 664 S.E.2d 842 (2008) (decided under former O.C.G.A. § 53-12-93).

In a case arising from a mortgage fraud scheme in which a title insurance com-

pany filed a 21 U.S.C. § 853(n)(2) petition for an ancillary hearing with regard to the company's interest in certain property that was subject to a criminal forfeiture order, the district court erred in dismissing the petition. The title insurance company had a constructive trust on the forfeited real estate, as defined by O.C.G.A. § 53-12-93(a), and the constructive trust could serve as a superior legal interest under 21 U.S.C. § 853(n)(6)(A) that could serve as grounds for invalidating the criminal forfeiture order. United States v. Shefton, 548 F.3d 1360 (11th Cir. 2008) (decided under former O.C.G.A. § 53-12-93).

No constructive trust for hotel occupancy taxes. — In a city's action to recover unpaid occupancy taxes from several online travel companies pursuant to O.C.G.A. § 48-13-50 et seq., summary judgment for the companies was proper on the city's breach of constructive trust claim under O.C.G.A. § 53-12-132(a) because, under the law of the case, O.C.G.A. § 9-11-60(h), that claim had been rejected by the trial court and affirmed in a prior appeal. City of Atlanta v. Hotels.com, L.P., 332 Ga. App. 888, 775 S.E.2d 276 (2015).

Constructive trust not established. — With respect to a Chapter 11 bankruptcy in which the debtor, a business that served as an intermediary for clients desiring to effect exchanges of real property qualifying for tax-deferred treatment under 26 U.S.C. § 1031, held funds in bank accounts that resulted from certain real estate sales, two real estate exchange investors were not entitled to turnover of proceeds from sales of their real estate, as opposed to having their claims payable on the same basis as the other unpaid exchangers, because the written agreements between the investors and the debtor specifically and unequivocally defined the circumstances under which the debtor acquired cash proceeds and the use and disposition of those proceeds, but did not create an express trust under O.C.G.A. § 53-12-20. Nor could the investors establish a resulting trust under O.C.G.A. § 53-12-91 or a constructive trust under O.C.G.A. § 53-12-93. McCamy v. Kerr (In re Real Estate Exch. Servs.), No. 08-85871-PWB, 2009 Bankr. LEXIS 3731 (Bankr. N.D. Ga. Oct. 9, 2009) (decided under former O.C.G.A. § 53-12-93).

Partial payment made to a contractor by a debtor consisted of "a transfer of an interest of the debtor in property," and was not held in constructive trust for the contractor because, although the contract between the debtor and the contractor contemplated payment upon the debtor's receipt of insurance proceeds, the contract in no way purported to transfer the debtor's interest in the proceeds to the contractor by assignment or other means. Flatau v. Curington, LLC (In re Nobles), No. 09-5106, 2010 Bankr. LEXIS 2726 (Bankr. M.D. Ga. Aug. 17, 2010).

Bankruptcy court did not abuse the court's discretion in concluding that equitable considerations did not support the establishment of a constructive trust in real estate the debtor transferred to the debtor's spouse, as they did not allege fraudulent conduct between them, or that the spouse was induced to make valuable improvements to the land based on a representation that the spouse would acquire an interest in the land by making the improvements. Wallace v. McFarland (In re McFarland), No. 14-14034, 2015 U.S. App. LEXIS 17960 (11th Cir. Oct. 16, 2015) (Unpublished).

As no party contended that a writing established the interests of certain entities, there could be no express trust under Georgia law. Nor was there a constructive trust as no wrongdoing was alleged on the part of the debtor. High-Top Holdings, Inc. v. RREF II BB Acquisitions, LLC (In re High-Top Holdings, Inc.), 564 B.R. 784 (Bankr. N.D. Ga. 2017).

In a widow's suit seeking to impose a constructive trust on accounts and assets conveyed by the decedent to the decedent's executor, the trial court did not err in excluding hearsay testimony of the widow's daughter and a close friend of the decedent stating that the assets had been conveyed to the executor for the care and support of the widow. The testimony was vague and was not proven to be admissible under the trustworthiness exception of O.C.G.A. § 24-8-807. Rabun v. Rabun, 341 Ga. App. 878, 802 S.E.2d 296 (2017).

Summary judgment precluded. — In an action by grandsons to impress an

implied trust on land acquired by their father under their mother's will, a fact question as to whether the father had agreed with the grandmother and mother that the land would remain in the family and eventually go to one of the grandsons as his share of his maternal grandparent's property precluded summary judgment. Edwards v. Edwards, 267 Ga. 780, 482 S.E.2d 701 (1997) (decided under former O.C.G.A. § 53-12-93).

Summary judgment in favor of a subcontractor against a building owner was reversed since, inter alia, even assuming that the building owner had possession of the heat pumps supplied by the building owner, there was no evidence that allowing the building owner to retain the heat pumps violated some principle of equity; since the building owner paid the general contractor for the heat pumps, when the general contractor failed to pay the subcontractor, when there was no evidence that the building owner knew or should have known that the general contractor did not intend to pay the subcontractor, the circumstances were insufficient to authorize summary judgment against the building owner on an implied constructive trust. Tabar, Inc. v. D & D Servs., 267 Ga. App. 659, 601 S.E.2d 143 (2004) (decided under former O.C.G.A. § 53-12-93).

In a dispute over the decedent's estate in which the decedent's son petitioned the trial court for a constructive trust to be imposed on the proceeds from savings bonds that the son alleged rightfully belonged to the decedent's estate, but which had been redeemed by the decedent's grandson, summary judgment was improperly granted to the grandson because there were genuine issues of material fact as to whether the grandson owed the decedent a fiduciary duty, whether the grandson breached that duty, and whether the grandson caused damages when the grandson did not comply with the decedent's request to return the bonds to the decedent's sole ownership. Ray v. Hadaway, 344 Ga. App. 642, 811 S.E.2d 80 (2018).

Directed verdict improperly granted. — In a suit seeking to impose a constructive trust on real property formerly belonging to the plaintiff's mother, a directed verdict was improperly granted to the defendants as the evidence supported a constructive trust theory because the plaintiff's allegations did not rest solely on evidence that a brother and the brother's wife broke a promise to hold the property for all the siblings' benefit as the plaintiff offered evidence that the mother had always intended for the children to share in the property and transferred the property to the brother to protect the property from a legal judgment; and the siblings agreed on an appropriate distribution plan after their mother's death, but the brother refused to apply the distribution plan to the plaintiff. Maxey v. Sapp, 340 Ga. App. 116, 796 S.E.2d 740 (2017).

Error to dismiss complaint for failure to state claim. — Trial court erred by dismissing the constructive trust claim because evidence could show within the framework of the complaint that would permit the imposition of a constructive trust over assets transferred. Lyle v. Fulcrum Loan Holdings, 354 Ga. App. 742, 841 S.E.2d 182 (2020), cert. denied, No. S20C1103, 2020 Ga. LEXIS 787 (Ga. 2020), cert. denied, No. S20C1327, 2020 Ga. LEXIS 789 (Ga. 2020).

Inordinate delay. — After an executor waited 36 years after certain property was titled in a brother's name to bring a constructive trust in favor of a decedent's estate under former O.C.G.A. § 53-12-93 (see O.C.G.A. § 53-12-132), the delay was inordinate; therefore, the claim was barred by laches under O.C.G.A. § 9-3-3 and summary judgment was properly granted. Cagle v. Cagle, 277 Ga. 219, 586 S.E.2d 665 (2003) (decided under former O.C.G.A. § 53-12-93).

Former wife was not entitled to impose a constructive trust on her former husband's military pension pursuant to O.C.G.A. § 53-12-132 because she failed to object to the absence of any provision for the pension in their divorce decree for 12 years and failed to bring suit until five years after payments allegedly became due. Davis v. Davis, 310 Ga. App. 512, 713 S.E.2d 694 (2011).

Whether laches should apply depends on a consideration of the particular circumstances, including the length of the delay in the claimant's assertion of rights,

the sufficiency of the excuse for the delay, the loss of evidence on disputed matters, the opportunity for the claimant to have acted sooner, and whether the claimant or the adverse party possessed the property during the delay; thus, where a party filed a complaint in equity less than a year after the action accrued, could not be found guilty of laches. Whiten v. Murray, 267 Ga. App. 417, 599 S.E.2d 346 (2004) (decided under former O.C.G.A. § 53-12-93).

Cited in McDonald v. Dabney, 161 Ga. 711, 132 S.E. 547 (1926); O'Callaghan v. Bank of Eastman, 180 Ga. 812, 180 S.E. 847 (1935); Guffin v. Kelly, 191 Ga. 880, 14 S.E.2d 50 (1941); Ross v. Rambo, 195 Ga. 100, 23 S.E.2d 687 (1942); Murray County v. Pickering, 196 Ga. 208, 26 S.E.2d 287 (1943); Groover v. Brandon, 200 Ga. 153, 36 S.E.2d 84 (1945); Clark v. Griffon, 207 Ga. 255, 61 S.E.2d 128 (1950); Westbrook v. Westbrook, 212 Ga. 472, 93 S.E.2d 683 (1956); Hodges v. Hodges, 221 Ga. 587, 146 S.E.2d 313 (1965); Presbyterian Church v. Eastern Heights Presbyterian Church, 225 Ga. 259, 167 S.E.2d 658 (1969); Parker v. Spurlin, 227 Ga. 183, 179 S.E.2d 251 (1971); McCann v. McCrain, 228 Ga. 814, 188 S.E.2d 484 (1972); Cheek v. J. Allen Couch & Son Funeral Home, 125 Ga. App. 438, 187 S.E.2d 907 (1972); Arey v. Davis, 233 Ga. 951, 213 S.E.2d 837 (1975); Carnes v. Smith, 236 Ga. 30, 222 S.E.2d 322 (1976); Jones v. Wolf, 443 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979); Eason v. Farmer, 261 Ga. 675, 409 S.E.2d 509 (1991); Parello v. Maio, 268 Ga. 852, 494 S.E.2d 331 (1998); Hood v. Smoak, 271 Ga. 86, 516 S.E.2d 301 (1999); Dodd v. Scott, 250 Ga. App. 32, 550 S.E.2d 444 (2001); Pearlman v. Sec. Bank & Trust Co., 261 Ga. App. 270, 582 S.E.2d 219 (2003).

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Am. Jur. Proof of Facts. — Constructive Trust Based on Confidential Relationship Between Parties to Transfer of Property, 31 POF2d 229.

Constructive Trust Formed Because of Abuse of Confidential Relationship Between Transferee and Transferor of Property, 79 POF3d 269.

Proof of Grantor's Intent that Grantee Hold Property in Trust, 74 POF3d 353.

Am. Jur. Pleading and Practice Forms. — Am. Jur. Pleading and Practice Forms, Trusts, §§ 57 to 78.

C.J.S. — 90 C.J.S., Trusts, § 14.

ALR. — Grantee's oral promise to grantor as giving rise to trust, 35 A.L.R. 280; 45 A.L.R. 851; 80 A.L.R. 195; 129 A.L.R. 689; 159 A.L.R. 997.

Rights of parties under oral agreement to buy land or bid it in at judicial sale for another, 42 A.L.R. 10; 135 A.L.R. 232.

Remedy of one whose money is fraudulently used in purchase or improvement of real property, 48 A.L.R. 1269.

Impossibility by reason of economic or other conditions of carrying out terms of testamentary trust profitably or without as ground for holding it invalid or terminating it, 92 A.L.R. 157; 97 A.L.R. 325.

Payments made or obligations incurred by a constructive trustee or a trustee ex maleficio as a charge upon or a liability of the trust estate, 124 A.L.R. 1409.

Liability of beneficiary to insured, his committee or estate, in respect of disability benefits resulting from insure insanity, which, pursuant to terms of policy, are paid to beneficiary, 159 A.L.R. 1206.

Doctrine of constructive trust or unjust enrichment as applicable between owner and one who fraudulently procures tax certificates, 175 A.L.R. 700.

Power of court to extend term of trust, 46 A.L.R.2d 907.

Imposition or declaration of constructive or resulting trust in United States saving bonds, 51 A.L.R.2d 163.

Imposition of constructive trust in property bought with stolen or embezzled funds, 38 A.L.R.3d 1354.

Determination of property rights between local church and parent church body: modern view, 52 A.L.R.3d 324.

Trusts: merger of legal and equitable estates where sole trustees are sole beneficiaries, 7 A.L.R.4th 621.

53-12-133. Parol evidence and implied trusts.

In all cases in which a trust is sought to be implied, the court may hear parol evidence of the nature of the transaction, the circumstances, and the conduct of the parties, either to imply or rebut the trust.

History. — Code 1981, § 53-12-133, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Law reviews. — For comment, "The Georgia Supreme Court's Creation of an Equitable Interest in Marital Property — Yours? Mine? Ours!," see 34 Mercer L. Rev. 449 (1982).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, §§ 2290 and 2291, former Civil Code 1910, §§ 3731, 3732, 3733, and 3739, former Code 1933, §§ 108-105, 108-106, 108-106.1, and 108-106.2, former O.C.G.A. § 53-12-34, and former O.C.G.A. § 53-12-94 of the 1991 Trust Act are included in the annotations for this Code section.

General rule. — In all cases when a trust is sought to be implied, parol evidence of the nature of the transaction, or the circumstances, or the conduct of the parties, is admissible either to imply or rebut a trust. Stern v. Howell, 160 Ga. 261, 127 S.E. 776 (1925) (decided under former Civil Code 1910, § 3739). See also Cook v. Powell, 160 Ga. 831, 129 S.E. 546 (1925) (decided under former law).

If from all the facts and circumstances an implied trust is otherwise established, it is not destroyed by the express verbal agreement which may have constituted a part of the transaction. The express agreement may be shown, not as fixing the interest to be owned by the parties, but as rebutting the inference of a gift by the plaintiff. Hudson v. Evans, 198 Ga. 775, 32 S.E.2d 793 (1945) (decided under former Code 1933, § 108-106); Harper v. Harper, 199 Ga. 26, 33 S.E.2d 154 (1945) (decided under former Code 1933, § 108-106); Lominick v. Lominick, 213 Ga. 53, 96 S.E.2d 587 (1957) (decided under former Code 1933, § 108-106).

Record title is not conclusive of beneficial ownership. Darby v. United States, 496 F. Supp. 943 (S.D. Ga. 1980) (decided under former Code 1933, § 108-106).

It must appear from the entire transaction that there is an obligation on the part of the holder of the legal title to hold the title for the benefit of someone else. Barnes v. Barnes, 230 Ga. 226, 196 S.E.2d 390 (1973) (decided under former Code 1933, § 108-106).

Proof generally. — An instrument relied upon as creating an implied trust must show facts from which it may be ascertained that legal title to the property is in one person and the beneficial interest in another. West v. Downer, 218 Ga. 235, 127 S.E.2d 359 (1962) (decided under former Code 1933, §§ 108-106.1 and 108-106.2).

Conduct and declarations of the parties subsequent to the transfer, which are consistent with an agreement to hold the property for the benefit of another, may be evidence of a constructive trust. Dodd v. Scott, 250 Ga. App. 32, 550 S.E.2d 444 (2001) (decided under former O.C.G.A. § 53-12-94).

Use of parol evidence. — An implied trust reflecting the true intentions of the parties may be established by parol evidence, although the effect of such evidence is to alter or vary a written instrument. In re Gaites, 466 F. Supp. 248 (M.D. Ga. 1979) (decided under former Code 1933, § 108-106).

Trial court did not err in allowing parol evidence to establish an implied trust in favor of the grantor, notwithstanding the warranty deed from the grantor to the grantor's brother, since it was agreed the grantor would continue residing in the house for the grantor's lifetime upon payment of taxes and insurance. Georgia Farm Bureau Mut. Ins. Co.

v. Smith, 179 Ga. App. 399, 346 S.E.2d 848 (1986) (decided under former O.C.G.A. § 53-12-34).

Parol evidence proper to determine creation of implied trust. — Earmarking doctrine did not apply because there was no substitution of one creditor for another, and although the only written documentation of the loan was a promissory note, parol evidence could be used to determine if the loan created an implied trust. Tidwell v. Hendricks (In re McDowell), 258 B.R. 296 (Bankr. M.D. Ga. 2001) (decided under former O.C.G.A. § 53-12-94).

Parol evidence rule. — Allegations and proof under former Code 1933, § 108-106 need not conform to the parol evidence rule as stated in former Code 1933, § 38-501 (see O.C.G.A. § 24-6-1). Guffin v. Kelly, 191 Ga. 880, 14 S.E.2d 50 (1941) (decided under former Code 1933, § 108-106).

Implied trusts not within statute of frauds. — Implied trusts are not within the statute of frauds, and the courts will hear parol evidence, showing the facts from which the trusts are sought to be implied. Alexander v. Alexander, 46 Ga. 283 (1872) (decided under former Code 1868, §§ 2290 and 2291); Jackson v. Jackson, 150 Ga. 544, 104 S.E. 236 (1920) (decided under former Civil Code 1910, §§ 3731, 3732, 3733, and 3739); Guffin v. Kelly, 191 Ga. 880, 14 S.E.2d 50 (1941) (decided under former Code 1933, § 108-108).

In all cases where a trust is sought to be implied, the court may hear parol evidence of the nature of the transaction, or the circumstances, or conduct of the parties, either to imply or rebut a trust. Hemphill v. Hemphill, 176 Ga. 585, 168 S.E. 878 (1933) (decided under former Civil Code 1910, §§ 3732 and 3739).

While an express trust must be created by writing, and cannot be proved by parol, implied trusts may be established by parol evidence, although the effect of such evidence is to alter or vary a written instrument, and although the defendant sets up and insists upon the statute of frauds. Sykes v. Reeves, 195 Ga. 587, 24 S.E.2d 688 (1943) (decided under former Code 1933, § 108-108); Hall v. Turner, 198 Ga. 763, 32 S.E.2d 829 (1945) (decided under former Code 1933, § 108-108).

To engraft an implied trust upon an absolute deed by parol evidence, such evidence ought to be clear and satisfactory. Brown v. Leggitt, 226 Ga. 366, 174 S.E.2d 889 (1970) (decided under former law); Georgia Farm Bureau Mut. Ins. Co. v. Smith, 179 Ga. App. 399, 346 S.E.2d 848 (1986) (decided under former O.C.G.A. § 53-12-34).

Parol evidence used to show deed made in trust. — Deed absolute in form may be shown by parol evidence to have been made in trust for the benefit of the grantor when the maker remains in possession of the land. Hall v. Turner, 198 Ga. 763, 32 S.E.2d 829 (1945) (decided under former Code 1933, § 108-108).

An express trust cannot be made by parol agreement. Nor can an allegation of an express, oral trust be employed to defeat a resulting trust. Wells v. Wells, 216 Ga. 384, 116 S.E.2d 586 (1960) (decided under former Code 1933, § 108-105).

Cited in Wilder v. Wilder, 138 Ga. 573, 75 S.E. 654 (1912); Rich v. Rich, 175 Ga. 258, 165 S.E. 109 (1932); Jansen v. Jansen, 180 Ga. 318, 178 S.E. 654 (1935); Smith v. Harvey-Given Co., 182 Ga. 410, 185 S.E. 793 (1936); Clark v. Griffon, 207 Ga. 255, 61 S.E.2d 128 (1950); Hodges v. Hodges, 221 Ga. 587, 146 S.E.2d 313 (1965); Ashbaugh v. Ashbaugh, 222 Ga. 811, 152 S.E.2d 888 (1966); Epps v. Wood, 243 Ga. 835, 257 S.E.2d 259 (1979); Edwards v. Edwards, 267 Ga. 780, 482 S.E.2d 701 (1997); Bunch v. Byington, 292 Ga. App. 497, 664 S.E.2d 842 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 638.

C.J.S. — 90 C.J.S., Trusts, § 68.

ALR. — Grantee's oral promise to grantor as giving rise to trust, 35 A.L.R. 280; 45 A.L.R. 851; 80 A.L.R. 195; 129 A.L.R. 689; 159 A.L.R. 997.

Enforceability, as regards proceeds of

sale of property, of real estate trust that does not satisfy statute of frauds, 154 A.L.R. 385.

Admissibility of subsequent declarations of settlor to aid interpretation of trust, 51 A.L.R.2d 820.

ARTICLE 8

CREATION BY DEED TO ACQUIRE BENEFICIAL INTEREST

Cross references. — Fiduciary powers of financial institutions, § 7-1-310. Time limitation on bringing of actions against trustees, § 9-3-27. Petitions for declaratory judgments involving action or abstention from action by trustees, § 9-4-4.

Law reviews. — For annual survey of law of wills, trusts, and administration of estates, see 40 Mercer L. Rev. 471 (1988).

53-12-150. Definitions.

As used in this article, the term:

(1) "Deed" means and includes any written agreement, declaration of trust, or other instrument which creates a trust estate in the trustee named therein and sets forth the terms and conditions of the trust and which indicates an intention, either expressly or by implication, that the trust estate created therein should be subject to this chapter, but such term shall not include a warranty deed, quitclaim deed, bill of sale, or other instrument that conveys title to property to a trustee merely by virtue of such fact alone.

(2) "Property" includes improved or unimproved property, real or personal, leaseholds, mortgages, notes, other obligations secured by property or any interest therein, or other interests in such property.

History. — Code 1981, § 53-12-150, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, §§ 28, 29 et seq., 34, 35.

C.J.S. — 26A C.J.S., Deeds, § 1 et seq.

53-12-151. Deeds to interests in property.

The owners of property located in this state or persons desiring to acquire beneficial ownership of such property may create by deed an estate therein and in the improvements made thereon and in the property to be acquired, for the benefit of themselves and such other persons, whether sui juris or not, who may contribute to the improvement or development or acquisition of the property and their assigns or transferees, provided that the deed creating the estate shall provide for the improvement or development of the property covered thereby or for

the acquisition of the property and the trustee therein named, and his or her successor shall have some active duty to perform in and about the trust property or the management or control of the same. The deed creating the estate shall be recorded as provided in Code Section 53-12-152. When such an estate is created, the legal title to the property and all the property added thereto or substituted therefor shall vest and remain in the trustee named and his or her successor, in accordance with the terms of the deed, with all the powers conferred thereby upon the trustee, and shall not during the continuance of the estate pass to or vest in the beneficiaries. At the end of 25 years from the date of the deed creating the estate, the title to such of the property as may then belong to the estate shall vest in the beneficiaries; and, if the deed creating the estate so provides, a renewal of the estate may be made at the end of the 25 years, upon the terms and conditions and in the manner therein set forth, for a like period; provided, however, that in the alternative to the period of 25 years and the renewal thereof, if the deed so provides, the estate may be created for any period of time specified therein which does not extend beyond any number of lives in being and 21 years thereafter.

History. — Code 1981, § 53-12-151, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 108-111 and 108-112, and O.C.G.A. § 53-12-51 of the 1991 Trust Act are included in the annotations for this Code section.

Cited in Erskine v. Klein, 218 Ga. 112, 126 S.E.2d 755 (1962); Ovrevik v. Ovrevik, 242 Ga. App. 95, 527 S.E.2d 586 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, §§ 60, 61.

C.J.S. — 26A C.J.S., Deeds, §§ 25, 26.

53-12-152. Filing of deeds and amendments thereto; filing of copies with Secretary of State.

(a) The deed creating a trust estate as provided in Code Section 53-12-151 shall, within 30 days of the execution thereof, be filed by the trustee in the office of the clerk of the superior court of the county in which the principal office of the trust is located. The trustee shall concurrently pay to the clerk the fee prescribed in Code Section 15-6-77. Upon the deed being filed with the clerk and the fees being paid, the clerk shall deliver to the trustee or his or her attorney two certified

copies of the deed, the filing of the clerk thereon, and a receipt for the costs which have been paid to the clerk.

(b) Upon receiving the two certified copies of the deed, the trustee or his or her attorney shall present the same to the Secretary of State and shall pay $5.00 to the Secretary of State. The Secretary of State shall thereupon attach to one of the certified copies of the deed a certificate in substantially the following form:

STATE OF GEORGIA

OFFICE OF THE SECRETARY OF STATE

This is to certify that a copy of the attached certified copy of a deed, declaration, or agreement of trust dated _____, by and between _____ as settlor(s) and _____ as trustee(s), which states that the trustee(s) may use the name of _____, has been duly filed in the office of the Secretary of State and the fees paid therefor, as provided by law.

WITNESS my hand and official seal this _____ day of _____, _____.

_____

Secretary of State

(c) The certified copy of the deed, together with the certificate of the Secretary of State thereon, shall be received as evidence in any court or proceeding as evidence of the existence of the trust and of its nature, terms, and conditions.

(d) The Secretary of State, at any time, upon the request of any person, shall make and certify additional copies of the deed, filing of the clerk, and certificate of the Secretary of State, upon payment to him or her of a fee of $1.00, plus 10¢ per 100 words for copying, and the additional certified copies shall be likewise admitted in evidence with like force and effect.

(e) Any amendment of a deed shall be filed with the clerk of the superior court and the Secretary of State in the same manner and under the same conditions required in the filing of the original deed, and the fees payable upon the filing shall be computed as if the filing were of an original deed.

History. — Code 1981, § 53-12-152, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

RESEARCH REFERENCES

C.J.S. — 26A C.J.S., Deeds, § 155.

53-12-153. Name of trust.

If the deed creating a trust estate under Code Section 53-12-151 so provides, the trustee may conduct and transact the affairs of the trust estate under a business or trade name, which name shall be set forth in the deed. The name may include the word "trust" but shall not include the words "trust company."

History. — Code 1981, § 53-12-153, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Law reviews. — For annual survey of law on wills, trusts, guardianships, and fiduciary administration, see 62 Mercer L. Rev. 365 (2010).

53-12-154. Certificates of beneficial interest by trustees.

When an estate is created pursuant to Code Section 53-12-151 and from time to time thereafter, the trustee shall issue such certificates of beneficial interest as may be provided for by the deed to the persons who are beneficially interested in the estate or who become so interested therein in accordance with the provisions of the deed. The certificates shall pass and be transferred as personalty and in the same manner as shares of stock in corporations and shall be subject to levy and sale under attachment or execution or any other process in like manner as shares of stock. The trustee or person in charge of the estate representing the trustee shall be subject to the same demand as that provided by Code Sections 9-13-58 and 11-8-112 for the levying officer to make upon the officers of a corporation. Persons having claims against the estate may enforce the same by action against the trustee thereof in like manner as actions against corporations, and service thereof may be perfected by serving the trustee, if a resident of this state, and if not, then by publication. The venue of such actions shall be the same as that of similar actions against private corporations, but neither the trustee nor the beneficiaries of the estate shall be personally or individually liable therefor except in cases where officers and stockholders of private corporations would be liable under the law.

History. — Code 1981, § 53-12-154, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1899, p. 57, are included in the annotations for this Code section.

Cited in Solomon v. Commissioner, 89 F.2d 569 (5th Cir. 1937).

53-12-155. Duties and powers of trustees; resignation or removal; successor trustees.

The trustee of a trust created under Code Section 53-12-151 shall have sole and exclusive management and control of the property, in accordance with the terms of the deed creating the estate. The exercise by the trustee of any power granted or conferred by the deed, including the power to lease, encumber, and sell, when exercised in accordance with the terms thereof, shall be as valid and effective to all intents and purposes as if the trustee was the sole and exclusive owner of the property in his or her own right. The trustee may resign or be removed and his or her successor may be appointed in the manner of and in accordance with the terms fixed by the deed creating the estate. The same rights, powers, and title over and to the property shall belong to and be vested in the new trustee as are conferred upon the original trustee by the deed creating the estate. The death of a trustee shall not operate to cast title upon his or her heirs, devisees, executors, or administrators, but the same shall vest in his or her successor, when appointed.

History. — Code 1981, § 53-12-155, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 108-111 and 108-112, and former O.C.G.A. § 53-12-55 are included in the annotations for this Code section.

Statute contemplates, as one of the primary features of the trust there authorized, transferability of the shares or interests of the beneficiaries. Erskine v. Klein, 218 Ga. 112, 126 S.E.2d 755 (1962) (decided under former Code 1933, §§ 108-111 and 108-112).

Cited in Devitt v. Close, 221 Ga. 555, 146 S.E.2d 286 (1965).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, §§ 317 et seq., 331 et seq.

ALR. — Power of guardian representing unborn future interest holders to consent to invasion of trust corpus, 49 A.L.R.2d 1095.

53-12-156. Investments by trustees.

In addition to investments in any property, the trustee of a trust created under Code Section 53-12-151 may invest any funds of the trust estate in investments authorized by trustees under the laws of this state; provided, however, that the deed creating the estate may further

limit or expand the powers and authority of the trustee with respect to investments, including the power to invest in property located outside this state. The trustee shall be authorized and empowered, in accordance with the terms of the deed creating the estate, from corpus or from income or from both, to repurchase or redeem any issued and outstanding certificates of beneficial interest.

History. — Code 1981, § 53-12-156, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 432.
C.J.S. — 90A C.J.S., Trusts, § 325.
ALR. — Authorization or approval by court of investments which are "nonlegal" or contrary to the terms of the trust instrument, 170 A.L.R. 1219.

53-12-157. Initial and annual returns.

Each trust created pursuant to this article shall make a return to the Secretary of State, upon the creation of the trust and annually thereafter, in the same manner and embracing the same information, insofar as applicable, as returns by corporations which are required to be made under Articles 1 and 16 of Chapter 2 of Title 14, including the provisions with regard to fees, penalty for noncompliance, and recording and certifying of copies of the returns.

History. — Code 1981, § 53-12-157, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-158. How title vests on termination of estate.

Upon the termination of the estate created under Code Section 53-12-151, the legal title to all the property belonging to the estate which is then undisposed of shall pass to and vest in the persons who are, at that time, the beneficiaries of the estate, in shares corresponding to their respective interest as beneficiaries.

History. — Code 1981, § 53-12-158, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 71.
C.J.S. — 90 C.J.S., Trusts, § 93.
ALR. — Power of sale given trustee by will or trust instrument as surviving termination of trust, 43 A.L.R.2d 1102.

53-12-159. Merger of trust into a domestic corporation.

(a) Any trust created pursuant to this article may be merged into a domestic corporation for profit organized under the laws of this state and subject to Title 14 if the deed creating the trust expressly authorizes the merger.

(b) With respect to the required procedure for the merger and the rights of dissenting shareholders:

(1) The trust shall comply with any applicable provisions of the deed creating the trust and with the following Code sections, as if the trust were a domestic corporation:

(A) Subsection (b) of Code Section 14-2-1103, as if the trustee of the trust were a board of directors of a domestic corporation;

(B) Subsections (c) through (i) of Code Section 14-2-1103 and Code Sections 14-2-1301 through 14-2-1332, as if the holders of certificates of beneficial interest in the trust were shareholders of a domestic corporation; and

(C) Code Sections 14-2-1105 and 14-2-1105.1; and

(2) The domestic corporation into which the trust is merged shall comply with the provisions of Title 14, relating to the merger of domestic corporations, in the same manner as if the trust being merged into it were a domestic corporation.

(c) Upon compliance with the requirements of this Code section and the filing of articles of merger providing for a merger of the trust into a domestic corporation in the manner provided in Code Sections 14-2-1105 and 14-2-1105.1, the Secretary of State shall treat the merger as if it were a merger of corporations under Code Sections 14-2-1105 and 14-2-1105.1.

(d) If the Secretary of State issues a certificate of merger, the merger shall become effective as of the time of delivery to the Secretary of State of the articles of merger so certified, as provided in Code Section 14-2-1105, or at such later time and date as the articles specify, not to exceed 60 days from the date of delivery of the articles to the Secretary of State. When the merger has become effective:

(1) The trust and the domestic corporation into which the trust is merged shall be a single domestic corporation;

(2) The separate existence of the trust shall cease;

(3) The domestic corporation shall continue to have all the rights, privileges, immunities, and powers and shall be subject to all the duties and liabilities of a corporation organized under Title 14;

(4) The domestic corporation shall possess all the rights, privileges, immunities, and franchises, of a public as well as of a private nature, of the trust; and all property, real, personal, and mixed, all debts due on whatever account, including subscriptions to shares, all other choses in action, and all and every other interest of or belonging to or due to the trust shall be taken and deemed to be transferred to and vested in the domestic corporation without further act or deed; and the title to any real property or any interest therein vested in the trust shall not revert or be in any way impaired by reason of the merger;

(5) The domestic corporation shall be responsible and liable for all the liabilities and obligations of the trust. Any claim existing or action or proceeding pending by or against the trust may be prosecuted as if the merger had not taken place, or the domestic corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of the trust shall be impaired by the merger; and

(6) The articles of incorporation of the domestic corporation shall be deemed to be amended to the extent, if any, that changes in its articles of incorporation are stated in the plan of merger.

History. — Code 1981, § 53-12-159, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

ARTICLE 9

CHARITABLE TRUSTS

RESEARCH REFERENCES

Am. Jur. 2d. — 15 Am. Jur. 2d, Charities, § 4 et seq.

53-12-170. Definition; charitable purposes.

(a) A charitable trust is a trust in which the settlor provides that the trust property shall be used exclusively for charitable purposes.

(b) Charitable purposes shall include:

(1) The relief of poverty;

(2) The advancement of education;

(3) The advancement of ethics and religion;

(4) The advancement of health;

(5) The advancement of science and the arts and humanities;

(6) The protection and preservation of the environment;

(7) The improvement, maintenance, or repair of cemeteries, other places of disposition of human remains, and memorials;

(8) The prevention of cruelty to animals;

(9) Governmental purposes; and

(10) Other similar subjects having for their object the relief of human suffering or the promotion of human civilization.

History. — Code 1981, § 53-12-170, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2020, p. 377, § 1-80/HB 865.

The 2020 amendment, effective January 1, 2021, inserted "exclusively" in subsection (a) and deleted former subsection (c), which read: "If the settlor provides for both charitable and noncharitable purposes, the provisions relating to the charitable purposes shall be governed by this article.".

Law reviews. — For article, "The Rule Against Perpetuities as Applied to Georgia Wills and Trusts," see 16 Ga. L. Rev. 235 (1982).

For note on discriminatory charitable trusts in Georgia, with regard to application of the cy pres doctrine, in light of Evans v. Newton, 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966), see 6 Ga. St. B.J. 428 (1970).

For comment on Creech v. Scottish Rite Hosp. for Crippled Children, 211 Ga. 195, 84 S.E.2d 563 (1954), see 17 Ga. B.J. 512 (1955).

JUDICIAL DECISIONS

Analysis

General Consideration
Relief of Aged, Impotent, Diseased, or Poor People
1. In General
2. Hospital
3. Home for the Elderly
Educational Purposes
Public Conveniences
Private Charity
Rule Against Perpetuities

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 108-203, former O.C.G.A. § 53-12-70, and former O.C.G.A. § 53-12-111 of the 1991 Trust Act are included in the annotations for this Code section.

Statute almost copies the statute of 43d Elizabeth, otherwise known as the statute of charitable uses, enacted by the English Parliament in the year 1601. Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938) (decided under former Code 1933, § 108-203).

Subjects stated in former Code 1933, § 108-203 may constitute proper matters for charitable bequests or devises under former Code 1933, §§ 108-201 and 108-202. Trust Co. v. Williams, 184 Ga. 706, 192 S.E. 913 (1937) (decided under former Code 1933, § 108-203).

Incorrect designation of legatee. — Charitable bequest will not fail merely because the legatee is not designated by its correct name, if from the will itself and admissible extrinsic evidence it can be determined whom the testator intended to receive and apply such bequest. Moss v. Youngblood, 187 Ga. 188, 200 S.E. 689 (1938) (decided under former Code 1933, §§ 108-201 and 108-203).

Courts look with special favor upon public charitable trusts. Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938) (decided under former Code

General Consideration (Cont'd)

1933, § 108-203); Hardage v. Hardage, 211 Ga. 80, 84 S.E.2d 54 (1954) (decided under former Code 1933, § 108-203).

Beneficiaries in public charities must necessarily be described in general terms. Hardage v. Hardage, 211 Ga. 80, 84 S.E.2d 54 (1954) (decided under former Code 1933, § 108-203).

Will devising property in trust for "religious, educational, charitable, and humanitarian" purposes creates an estate exclusively for charity, which a court of equity will enforce. Pace v. Dukes, 205 Ga. 835, 55 S.E.2d 367 (1949) (decided under former Code 1933, § 108-203).

Charitable bequests to the American Bible Society are valid. Beall v. Fox, 4 Ga. 404 (1848) (decided under former law).

Charitable trust was effectively created even though the testator did not use the words "trust" or "trustee" in the testator's will, since the testator bequeathed the bulk of the testator's estate to charitable organizations meeting certain requirements and imposing active duties on the executor in regard to the selection of specific charities. In re Estate of Chambers, 261 Ga. App. 737, 583 S.E.2d 565 (2003) (decided under former O.C.G.A. § 53-12-111).

No charitable trust created. — Breach of charitable trust claim against a nonprofit hospital that treated a patient and pursued a bill collection action when the patient was unable to pay was dismissed; allegation of the formation of a charitable trust when the hospital accepted tax-exempt status did not qualify as either an express or implied trust and no settlor existed. Hudson v. Cent. Ga. Health Servs., No. 5:04CV301 (DF), 2005 U.S. Dist. LEXIS 2613 (M.D. Ga. Jan. 13, 2005) (decided under former O.C.G.A. § 53-12-111).

Cited in Jones v. Habersham, 107 U.S. 174, 2 S. Ct. 336, 27 L. Ed. 401 (1883); Kelley v. Welborn, 110 Ga. 540, 35 S.E. 636 (1900); Egleston v. Trust Co., 147 Ga. 154, 93 S.E. 84 (1917); Eagan v. Commissioner, 43 F.2d 881 (5th Cir. 1930); First Nat'l Bank v. Knowles, 179 Ga. 377, 175 S.E. 791 (1934); Murphy v. Johnston, 190 Ga. 23, 8 S.E.2d 23 (1940); Perkins v. Citizens & S. Nat'l Bank, 190 Ga. 29, 8 S.E.2d 28 (1940); Tillman v. Mayor of Athens, 206 Ga. 289, 56 S.E.2d 624 (1949); Strother v. Kennedy, 218 Ga. 180, 127 S.E.2d 19 (1962); Williamson v. Southern Regional Council, Inc., 223 Ga. 179, 154 S.E.2d 21 (1967); Roughton v. Jones, 225 Ga. 774, 171 S.E.2d 536 (1969); Trammell v. Elliott, 230 Ga. 841, 199 S.E.2d 194 (1973); Marshall v. Trust Co., 231 Ga. 415, 202 S.E.2d 94 (1973); Molton v. Lizella Recreation Club, Inc., 172 Ga. App. 154, 322 S.E.2d 354 (1984).

Relief of Aged, Impotent, Diseased, or Poor People

1. In General

Gentlewomen are not ordinarily objects of "suffering humanity;" however, the phrase "Home for Gentlewomen," could be construed as creating an institution for the promotion of "human civilization." Bramblett v. Trust Co., 182 Ga. 87, 185 S.E. 72 (1936) (decided under former Code 1933, § 108-201).

2. Hospital

Hospital is not, any more than a drugstore, a charitable institution per se; and, in order for a devise or other gift establishing a hospital to come within the classification of a charitable institution, the terms of the gift must themselves require that it be operated in whole or at least in substantial part for the gratuitous relief of its inmates. Trust Co. v. Williams, 184 Ga. 706, 192 S.E. 913 (1937) (decided under former Code 1933, §§ 108-201 and 108-202); Moss v. Youngblood, 187 Ga. 188, 200 S.E. 689 (1938) (decided under former Code 1933, §§ 108-201 and 108-203).

Fact that a hospital is to be created as a memorial to the testator and others does not operate to change the rule that hospitals are not per se charitable institutions, so as to make the legacy a valid charitable trust. Trust Co. v. Williams, 184 Ga. 706, 192 S.E. 913 (1937) (decided under former Code 1933, §§ 108-201, 108-202, and 108-203).

While a hospital is not per se a subject

of charity, and it depends upon the service given as to whether or not it is a subject of charity within the meaning thereof, nevertheless a devise "to the Masonic Hospital of Georgia, for tubercular children" is a charitable bequest within the meaning of the statute. Creech v. Scottish Rite Hosp. for Crippled Children, 211 Ga. 195, 84 S.E.2d 563 (1954), for comment, see 17 Ga. B.J. 512 (1955) (decided under former Code 1933, § 108-203).

Test which determines whether a hospital is charitable or otherwise is the hospital's purpose, that is, whether the hospital is maintained for gain, profit, or advantage, or not; and the question of whether a hospital is maintained for the purpose of charity or for that of profit is to be determined, in case the hospital is incorporated, not only from the hospital's powers as defined in the hospital's charter, but also from the manner in which the hospital is conducted. Moss v. Youngblood, 187 Ga. 188, 200 S.E. 689 (1938) (decided under former Code 1933, § 108-203).

When the finding was authorized that hospital owned and maintained by the City of Augusta, commonly known as the "University Hospital of Augusta, Georgia," and thus designated in the will in question, was a charitable institution, owned by the city and maintained primarily for the gratuitous treatment of the sick and needy of the city and county, and that by that item the testator intended the estate therein bequeathed to be applied to the promotion of the charitable objects of such hospital, the charitable bequest, being valid, would be given effect. Moss v. Youngblood, 187 Ga. 188, 200 S.E. 689 (1938) (decided under former Code 1933, § 108-203).

Hospital is not per se a subject of charity; whether a hospital is such subject of charity depends on requirement of hospital service rendered for relief of human suffering as related to the poor, and to be free of charge where there is inability to pay. When such is the purpose and the hospital operates in pursuance of that purpose, it is a subject of charity within the meaning of the law. Taylor v. Trustees of Jesse Parker Williams Hosp., 190 Ga. 349, 9 S.E.2d 165 (1940) (decided under former Code 1933, § 108-203).

When residuary bequest, construed in connection with all the items of the will and the statutory law showed the intent of the testator to require hospital service free of charge to poor people who were unable to pay, the proposed hospital was a proper subject of charity within the meaning of the law, and this result was not altered because of the further intent to charge persons able to pay, since the receipts from that service were to be devoted to maintenance or improvement of the hospital, with no element of private gain. Taylor v. Trustees of Jesse Parker Williams Hosp., 190 Ga. 349, 9 S.E.2d 165 (1940) (decided under former Code 1933, § 108-203).

Requirement of compensation from patients able to pay. — When a hospital can otherwise be classed as a charitable institution, the fact that patients who are able to pay are required to do so does not deprive the hospital of the hospital's charitable character. Moss v. Youngblood, 187 Ga. 188, 200 S.E. 689 (1938) (decided under former Code 1933, § 108-203).

3. Home for the Elderly

Testamentary trust to an "old folk's home" was not invalidated as not being for a proper object of charity because poverty was not imposed as a condition to the receipt of benefits under such a charity. Houston v. Mills Mem. Home, Inc., 202 Ga. 540, 43 S.E.2d 680 (1947) (decided under former Code 1933, § 108-203).

Educational Purposes

Formalities of trust law are inappropriate to the administration of colleges and universities which, in this era, operate as businesses. The actions of the directors of nonprofit colleges must be reviewed in light of corporate rather than trust principles. Corporation of Mercer Univ. v. Smith, 258 Ga. 509, 371 S.E.2d 858 (1988) (decided under former O.C.G.A. § 53-12-79).

Manifest intention required. — While educational purposes are proper matters of charity, and while no formal words are necessary to create a trust estate, there must be a manifest intention to do so. Moore v. Wells, 212 Ga. 446, 93

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S.E.2d 731 (1956) (decided under former Code 1933, § 108-203).

Public Conveniences

Parks and pleasure grounds. — Georgia cities and towns are authorized to accept devises of property for the establishment and preservation of "parks and pleasure grounds" and to hold the property thus received in charitable trust for the exclusive benefit of the class of persons named by the testator. Evans v. Abney, 396 U.S. 435, 90 S. Ct. 628, 24 L. Ed. 2d 634 (1970) (decided under former Code 1933, § 108-203).

Private Charity

Gift to poor relations or for their benefit is a private gift, although it would prevent their becoming a public charge; but a gift may constitute a public charity and not a private trust, when it provides for the poor generally and gives a preference to relatives of the donor. Hardage v. Hardage, 211 Ga. 80, 84 S.E.2d 54 (1954) (decided under former Code 1933, § 108-203).

To establish a permanent charity for one family, and thus permit the perpetual holding together of property, which the statute against perpetuities was designed to prohibit, is not justified by the slight prospective public good that might come from educating or keeping off of the public charity rolls the poor of one family. Hardage v. Hardage, 211 Ga. 80, 84 S.E.2d 54 (1954) (decided under former Code 1933, § 108-203).

Devise for the purpose of defraying medical expenses of blood relatives of the testator who because of poverty or old age were unable to pay for such services, and for educational loans to deserving persons who were dependents of testator's blood relatives, was not a devise for public charity; and the trial court did not err in holding that the intended trust was void and in ordering that the residuum of the estate be distributed under the laws of descent and distribution as in the case of intestacy. Hardage v. Hardage, 211 Ga. 80, 84 S.E.2d 54 (1954) (decided under former Code 1933, § 108-203).

Rule Against Perpetuities

Estate obnoxious to rule against perpetuities. — Courts will not permit the execution of a power when the effect will be to create an estate obnoxious to the rule against perpetuities. However, there is no merit in the contention that a devise in trust to the trustees of the University of Georgia for the use and benefit of the Georgia School of Technology is invalid as a perpetuity. Regents of Univ. Sys. v. Trust Co., 186 Ga. 498, 198 S.E. 345 (1938) (decided under former Code 1933, § 108-203).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 108-203, are included in the annotations for this Code section.

Relief "for the maintenance and medical or surgical treatment of the poor of Atlanta," is a charitable purpose. 1960-61 Op. Att'y Gen. p. 518 (decided under former Code 1933, § 108-203).

RESEARCH REFERENCES

Am. Jur. 2d. — 15 Am. Jur. 2d, Charities, § 68.

C.J.S. — 14 C.J.S., Charities, §§ 11, 26 et seq.

ALR. — Validity of trust for religious purposes not limited by sect or denomination, 22 A.L.R. 697.

Revocability of some of subscriptions for charitable purpose in reliance on which money was expended or liability incurred, affecting enforceability of irrevocable subscription, 33 A.L.R. 625.

Gift to boy or girl scouts as a valid charitable trust, 46 A.L.R. 827.

Gift for retirement or pension fund of teachers or other public officers or employ-

ees as a valid charitable trust, 47 A.L.R. 63; 110 A.L.R. 1369.

Provision for public utility or convenience commonly supplied at expense of taxpayers as subject of valid charitable trust, 50 A.L.R. 593.

Gift to preserve or develop beauties or nature as a valid charitable trust, 52 A.L.R. 980.

Preservation or protection of animals or birds as subject of charitable trust, 66 A.L.R. 465.

Gift to prohibit or minimize manufacture, sale, or use of intoxicating liquor as a valid charitable trust, 73 A.L.R. 1361.

Validity of charitable trust in respect to certainty of beneficiaries designated as "the poor," "the needy poor," "worthy poor," etc., 99 A.L.R. 657.

Validity of charitable trust which employs term "unfortunate" or "unfortunates" as descriptive of intended beneficiaries, 111 A.L.R. 719.

Effect on certainty of purpose or beneficiaries of a charitable gift, of the possible, but not required, inclusion of a noncharitable object, 115 A.L.R. 1123.

Provision for relief or education of member of family or relatives as creating charitable trust, 131 A.L.R. 1277.

When existence of institution named as beneficiary deemed to have ended, within contemplation of provision of will in that regard, 152 A.L.R. 1303.

Validity, as for a charitable purpose, of trust for dissemination or preservation of material of historical or other educational interest or value, 12 A.L.R.2d 849; 34 A.L.R.4th 419.

Trust for school children as charitable, or merely benevolent, 25 A.L.R.2d 1114.

Gift to or for employees' pension fund as valid charitable gift or trust, 28 A.L.R.2d 428.

Validity, as a charity, of trust to lend money to students, 33 A.L.R.2d 1183.

Gift for maintenance or care of private cemetery or burial lot, or of tomb or of monument, including the erection thereof, as valid trust, 47 A.L.R.2d 592.

Validity, as charitable trust, of gift for prize or award to person or persons accomplishing specified results, 7 A.L.R.3d 1281.

Validity of charitable trust to promote change in laws or systems or methods of government, 22 A.L.R.3d 886.

Validity and effect of gift for charitable purposes which excludes otherwise qualified beneficiaries because of their race or religion, 25 A.L.R.3d 736.

Validity and construction of testamentary gift to political party, 41 A.L.R.3d 833.

Effect on charitable trust or bequest for particular school or school district, or students or graduates thereof, of change in school or district structure or organization, 68 A.L.R.3d 997.

Validity, as for a charitable purpose, of trust for publication or distribution of particular books or writings, 34 A.L.R.4th 419.

Validity of charitable gift or trust containing gender restrictions on beneficiaries, 90 A.L.R.4th 836.

53-12-171. Power to select purposes or beneficiaries.

The settlor of a charitable trust may retain the power to select the charitable purposes or charitable beneficiaries, or may grant the trustee or any other person the power to select charitable purposes or charitable beneficiaries or to engage in the charitable purposes, without rendering the trust void for indefiniteness.

History. — Code 1981, § 53-12-171, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 108-207, 108-208, and 108-209 are included in the annotations for this Code section.

Words "religious, charitable, educational, and humanitarian purposes" are of sufficient definiteness to satisfy requirements of the statute. Marshall v. Trust Co., 231 Ga. 415, 202 S.E.2d 94 (1973) (decided under former Code 1933, §§ 108-207, 108-208, and 108-209).

Cited in Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938).

RESEARCH REFERENCES

Am. Jur. 2d. — 15 Am. Jur. 2d, Charities, §§ 8, 9.

C.J.S. — 14 C.J.S., Charities, §§ 5, 6, 7, 15.

ALR. — Validity of trust for religious purposes not limited by sect or denomination, 22 A.L.R. 697.

Gift to preserve or develop beauties of nature as a valid charitable trust, 52 A.L.R. 980.

Validity of charitable trust which employs term "unfortunate" or "unfortunates" as descriptive of intended beneficiaries, 111 A.L.R. 719.

Effect on certainty of purpose or beneficiaries of a charitable gift, of the possible, but not required, inclusion of a noncharitable object, 115 A.L.R. 1123.

Charitable trust as affected by lack of territorial limitation as regards beneficiaries, 141 A.L.R. 346.

Failure of trustee to carry out purposes of charitable trust, or diversion of trust property to other purposes, as ground of suit by trustor or his heirs for adjudication of title to him or them, 143 A.L.R. 395.

Control of discretion of trustee as to turning over entire principal of fund to beneficiary, 143 A.L.R. 467.

Charitable gifts; definiteness, 163 A.L.R. 784.

Trust for school children as charitable, or merely benevolent, 25 A.L.R.2d 1114.

Gift to or for employees' pension fund as valid charitable gift or trust, 28 A.L.R.2d 428.

Gift, other than one to pension fund, for employees or former employees of a particular business or company, or their families, as valid charitable gift or trust, 51 A.L.R.2d 1290.

Validity, as a charitable trust, of gift to church, church society, or trustees or officers thereof, without declaration or restriction as to its use or purpose, 81 A.L.R.2d 819.

Validity, as charitable trust, of gift or prize or award to person or persons accomplishing specified results, 7 A.L.R.3d 1281.

Charitable trusts: elimination or modification, by court, of restrictions on amount of donation or expenditure which trustee may make for purposes of trust, 50 A.L.R.3d 1116.

Validity, construction, and effect of provisions of charitable trust providing for accumulation of income, 6 A.L.R.4th 903.

53-12-172. Cy pres.

If a charitable trust or gift cannot be executed in the manner provided by the settlor or donor, the superior court shall exercise equitable powers in such a way as will as nearly as possible effectuate the intention of the settlor or donor.

History. — Code 1981, § 53-12-172, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

History of Code section. — This Code section is derived from the decision in Kelly v. Welborn, 110 Ga. 540, 35 S.E. 636 (1900).

Law reviews. — For article, "Private Trusts for the Provision of Private Goods," see 37 Emory L.J. 295 (1988).

For note on discriminatory charitable trusts in Georgia, with regard to application of the cy pres doctrine, in light of Evans v. Newton, 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966), see 6 Ga. St. B.J. 428 (1970).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 108-202 and 108-203, former O.C.G.A. § 53-12-77, and former O.C.G.A. § 53-12-113 of the 1991 Trust Act are included in the annotations for this Code section.

Subjects stated in former Code 1933, § 108-203 may constitute proper matters for charitable bequests or devises under former Code 1933, §§ 108-201 and 108-202. Trust Co. v. Williams, 184 Ga. 706, 192 S.E. 913 (1937) (decided under former Code 1933, § 108-102).

Courts look with special favor upon trusts for public charitable purposes. Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938) (decided under former Code 1933, §§ 108-102 and 108-103).

Rules governing establishment and administration of charitable trusts are different from those applicable to private trusts in giving effect to the intention of the donor and in establishing the charity. Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938) (decided under former Code 1933, § 108-102).

Cited in Murphy v. Johnston, 190 Ga. 23, 8 S.E.2d 23 (1940); Perkins v. Citizens & S. Nat'l Bank, 190 Ga. 29, 8 S.E.2d 28 (1940); Taylor v. Trustees of Jesse Parker Williams Hosp., 190 Ga. 349, 9 S.E.2d 165 (1940); Houston v. Mills Mem. Home, Inc., 202 Ga. 540, 43 S.E.2d 680 (1947); Alexander v. Georgia Baptist Found., Inc., 245 Ga. 545, 266 S.E.2d 165 (1980); Hospital Auth. v. First Nat'l Bank, 250 Ga. 55, 296 S.E.2d 54 (1982).

Purpose of Cy Pres

Purpose of cy pres. — Fundamental purpose of cy pres provisions is to allow the court to carry out the general charitable intent of the testator when this intent might otherwise be thwarted by the impossibility of the particular plan or scheme provided by the testator. Evans v. Abney, 396 U.S. 435, 90 S. Ct. 628, 24 L. Ed. 2d 634 (1970) (decided under former Code 1933, § 108-202).

Applicability

Applicability generally. — As a general rule, the doctrine of cy pres is applied in cases: (1) where there is the presence of an otherwise valid charitable grant or trust, that is, one that has charity as its purpose and sufficiently offers benefits to an indefinite public; (2) where the specific intention of the settlor may not be legally or practicably carried into effect; and (3) where there is exhibited a general charitable intent on the part of the settlor. Trammell v. Elliott, 230 Ga. 841, 199 S.E.2d 194 (1973) (decided under former Code 1933, §§ 108-202 and 108-203).

When it was apparent from entire will and codicil that bequest to the governing authorities of a named association, "same being an Orphan's Home located at Macon, Georgia," was intended as a charitable trust for the benefit of orphans as a

Applicability (Cont'd)

class, and that the designated "governing authorities" were merely to perform the office of trustee, the bequest was sufficiently definite and specific to be capable of execution, and since a trust will not fail for the want of a trustee, the legacy would not lapse merely because there may have been no such orphan's home and "governing authorities" as were mentioned in the will; in such case a court of equity could, by approximation, effectuate the general charitable purpose of the testator in a manner most similar to that indicated by the testator. Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938) (decided under former Code 1933, §§ 108-202 and 108-203).

If a gift is made for a public charitable purpose, it is immaterial that the trustee is uncertain or incapable of taking, or that the objects of the charity are uncertain and indefinite; it will nevertheless be sustained. Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938) (decided under former Code 1933, §§ 108-202 and 108-203).

Organization discontinuing active functions. — Fact that a religious, charitable, or educational organization named as a beneficiary in a will discontinues its active functions after the execution of the will does not impair its right to take the gift so long as its identity, whether corporate or associative, continues without dissolution until the death of the testator. Crisp Area YMCA, Inc. v. NationsBank, N.A., 272 Ga. 182, 526 S.E.2d 63 (2000) (decided under former O.C.G.A. § 53-12-113).

Doctrine of cy pres cannot be applied to establish trust for entirely different purpose from that intended by testator. Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968), aff'd, 396 U.S. 435, 90 S. Ct. 628, 24 L. Ed. 2d 634 (1970) (decided under former Code 1933, § 108-202).

Cy pres will not be applied when there is demonstrated an intention of the settlor contrary to the inference of general charitable intent that the property should be applied exclusively to the purpose which is or has become impracticable or illegal. Such demonstration of a specific intent of the settlor as would result in a failure of the devise must be clear, definite, and unambiguous. In such event the trust will fail, and a resulting trust will be implied for the benefit of the testator or the testator's heirs. Trammell v. Elliott, 230 Ga. 841, 199 S.E.2d 194 (1973) (decided under former Code 1933, §§ 108-202 and 108-203).

When the accomplishment of the particular purpose and only that purpose was desired by the testator and the testator had no more general charitable intent and the testator would presumably have preferred to have the whole trust fail if the particular purpose is impossible of accomplishment, the cy pres doctrine is not applicable. Evans v. Abney, 396 U.S. 435, 90 S. Ct. 628, 24 L. Ed. 2d 634 (1970) (decided under former Code 1933, § 108-202).

Cy pres doctrine improperly applied. — Trial court's application of cy pres doctrine to impose a constructive trust in a corporation's favor was error under circumstances in which the decedent improperly named the corporation as a payable on death beneficiary of certificates of deposit and a trust account because, while the trial court may have been able to apply the doctrine of cy pres to as nearly as possible effectuate the decedent's intentions by, for example, allowing the decedent's charitable gift to go to some authorized entity that served much the same function as the corporation, the trial court did not do that; the trial court specifically imposed a constructive trust in favor of the corporation on the financial instruments, and this was error. Indeed, the trial court's use of cy pres in a manner that would have effectuated a payment that expressly violated the law turned the doctrine of cy pres on its head. Tuvim v. United Jewish Cmtys., Inc., 285 Ga. 632, 680 S.E.2d 827 (2009) (decided under former O.C.G.A. § 53-12-113).

Jurisdiction

Special chancery (now equity) jurisdiction over charitable bequests grows out of rule that, in cases of private right, courts will not enforce uncertainties, and that the parties at interest must be capable of definite ascertainment; but

it is of the very nature of a charity that this is impossible, and from the most ancient times courts of chancery in England have applied very different rules in determining the validity of charitable bequests from the rules applied to such as were not charitable. Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938) (decided under former Code 1933, §§ 108-202 and 108-203).

When the framers of the Code declared the courts of chancery (now equity) to have jurisdiction to enforce charitable bequests, declared what were charities and recognized the doctrine of cy pres, the framers intended to say something more than that courts of equity could enforce trusts; there was no propriety in giving this special jurisdiction or in defining charitable purposes if a bequest for charitable purposes, to be valid, must have the same certainty and definiteness as to its objects and mode of division, as bequests, not for charitable purposes. Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938) (decided under former Code 1933, §§ 108-202 and 108-203).

RESEARCH REFERENCES

Am. Jur. 2d. — 15 Am. Jur. 2d, Charities, § 157.

Am. Jur. Proof of Facts. — Charitable Intent of Trust Settlor — Cy Pres Doctrine, 9 POF2d 199.

Circumstances Warranting Application of Cy Pres Doctrine to Modify Terms of Charitable Trusts, 88 POF3d 469.

C.J.S. — 90 C.J.S., Trusts, § 84.

ALR. — Validity of trust for religious purposes not limited by sect or denomination, 22 A.L.R. 697.

Avoidance or reverter of valid charitable trust, purpose of which has failed, in absence of express provision therefor, 38 A.L.R. 44.

General charitable intent as essential to application of cy pres doctrine, 74 A.L.R. 671.

Legacy or devise to religious or other society as affected by discontinuance of its active functions, or its merger or association with other organization, 91 A.L.R. 840.

Who may maintain suit or proceeding to enforce or administer benevolent or charitable trusts, 124 A.L.R. 1237.

Charitable trust as affected by insufficiency of assets, 169 A.L.R. 266.

Cy pres doctrine as affected by sectarian or doctrinal differences or factors, 3 A.L.R.2d 78.

Devolution of property to testator's heirs or next of kin, or to his residuary devisees or legatees, where testamentary charitable trust which became operative later fails, 62 A.L.R.2d 763.

Validity, as a charitable trust, of gift to church, church society, or trustees or officers thereof, without declaration or restriction as to its use or purpose, 81 A.L.R.2d 819.

Allowance of attorneys' fees in litigation involving cy pres doctrine, 89 A.L.R.2d 691.

Validity and effect of gift for charitable purposes which excludes otherwise qualified beneficiaries because of their race or religion, 25 A.L.R.3d 736.

Merger or consolidation of corporation as terminating charitable trust of which corporation is beneficiary, 34 A.L.R.3d 749.

Validity and construction of testamentary gift to political party, 41 A.L.R.3d 833.

Application of cy pres doctrine to trust for promulgation of particular political or philosophical doctrines, 67 A.L.R.3d 417.

Division of charitable gift among several claimants where named donee is nonexistent, 67 A.L.R.3d 442.

Effect on charitable trust or bequest for particular school or school district, or students or graduates thereof, of change in school or district structure or organization, 68 A.L.R.3d 997.

Extension of charitable trust benefits to persons residing outside geographic area prescribed by trust instrument, under doctrines of cy pres or equitable deviation, 68 A.L.R.3d 1049.

Disposition of surplus trust income after payment of specific sum to charity, 96 A.L.R.3d 954.

53-12-173. Duration of charitable trusts.

A charitable trust shall be valid even though under the trust provisions it is to continue for an indefinite or unlimited period.

History. — Code 1981, § 53-12-173, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-174. Attorney general or district attorney as representative of charitable beneficiaries.

In all cases in which the rights of beneficiaries under a charitable trust are involved, the Attorney General or the district attorney of the circuit in which the major portion of trust property lies shall represent the interests of the beneficiaries and the interests of this state as parens patriae in all legal matters pertaining to the administration and disposition of such trust. The Attorney General or the district attorney may bring or defend actions, and, insofar as an action of this nature may be deemed an action against the state, the state expressly gives its consent thereto. The venue of such actions may be in any county in this state in which a substantial number of persons who are the beneficiaries of the trust reside. Process shall be directed to the Attorney General or to the district attorney of the circuit in which the major portion of the trust property lies. Service may be perfected by mailing a copy of the petition and process by the clerk of the superior court of the county in which it is filed to the Attorney General or to the district attorney of the circuit in which the major portion of the trust property lies. Any judgment determining rights under any charitable trusts shall be binding on the beneficiaries if the Attorney General or the district attorney of the circuit in which the major portion of the trust property lies is a party and is served as provided in this Code section.

History. — Code 1981, § 53-12-174, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Cross references. — Provisions regarding exemption of financial institutions from fiduciary bond or security requirements, § 7-1-311. Bond requirements for testamentary guardians, § 29-4-3.

Law reviews. — For note on discriminatory charitable trusts in Georgia, with regard to application of the cy pres doctrine, in light of Evans v. Newton, 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966), see 6 Ga. St. B.J. 428 (1970). For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-12-79 and former O.C.G.A. § 53-12-115 of the 1991 Trust Act are included in the annotations for this Code section.

Standing to allege breach of fiduciary duty. — Neither contributors to a trust which established a chair in financial accounting nor faculty members who might have been eligible to be named to the chair had standing to allege a breach of fiduciary duty by the trustees arising from their alleged disregarding of the appointment criteria under the trust and university hiring procedures and naming of an unqualified, non-certified public accountant personal friend as the first holder of the chair as they did not have the special interest required to maintain such an action. Warren v. Board of Regents of the Univ. Sys., 247 Ga. App. 758, 544 S.E.2d 190 (2001) (decided under former O.C.G.A. § 53-12-115).

Standing. — Pursuant to former O.C.G.A. § 53-12-115 (see O.C.G.A. § 53-12-174), the Attorney General had standing to bring the instant action against the executor even though the testator did not use the words "trust" or "trustee" in the testator's will since the testator effectively created a charitable trust by bequeathing the bulk of the testator's estate to charitable organizations meeting certain requirements and imposing active duties on the executor in regard to the selection of specific charities. In re Estate of Chambers, 261 Ga. App. 737, 583 S.E.2d 565 (2003) (decided under former O.C.G.A. § 53-12-115).

No standing to enforce bequests to cemetery. — Although the Attorney General had standing under O.C.G.A. § 53-12-115 to enforce a provision in a testator's will that created a charitable trust for education, the Attorney General lacked standing to enforce outright bequests to specific private cemeteries. Cronic v. Baker, 284 Ga. 452, 667 S.E.2d 363 (2008) (decided under former O.C.G.A. § 53-12-115).

Cited in Meyer v. Citizens & S. Nat'l Bank, 677 F. Supp. 1196 (M.D. Ga. 1988); Warren v. Board of Regents of the Univ. Sys., 272 Ga. 142, 527 S.E.2d 563 (2000); New Cingular Wireless PCS, LLC v. Dep't of Revenue, 308 Ga. 729, 843 S.E.2d 431 (2020).

RESEARCH REFERENCES

Am. Jur. 2d. — 15 Am. Jur. 2d, Charities, § 136.

C.J.S. — 14 C.J.S., Charities, § 61 et seq.

ALR. — Who may maintain suit or proceedings to enforce or administer benevolent or charitable trusts, 62 A.L.R. 881; 124 A.L.R. 1237.

Standing of minister or member of religious society to seek enforcement, termination, or proper administration of charitable trust, 94 A.L.R.3d 1204.

53-12-175. Enforcement by settlor.

The settlor of a charitable trust may maintain a civil action to enforce the trust.

History. — Code 1981, § 53-12-175, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

ARTICLE 10
PRIVATE FOUNDATIONS

RESEARCH REFERENCES

Am. Jur. 2d. — 15 Am. Jur. 2d, Charities, § 4 et seq. 15 Am. Jur. 2d, Charities, § 171 et seq.

PART 1
CORPORATIONS

COMMENT

This part was carried forward. It formerly was codified at OCGA § 53-12-120 *et seq.*

53-12-180. Automatic amendment of articles of incorporation of corporate private foundation.

Notwithstanding any provision therein to the contrary and except as provided in Code Section 53-12-181, the articles of incorporation of any corporation which is a private foundation shall be amended automatically as of the later of the date of incorporation or January 1, 1972, to provide that the corporation shall:

(1) Not engage in any act of self-dealing, as defined in Section 4941(d) of the federal Internal Revenue Code, which would give rise to any liability for the tax imposed by Section 4941 of the federal Internal Revenue Code;

(2) Not retain any excess business holdings, as defined in Section 4943(c) of the federal Internal Revenue Code, which would give rise to any liability for the tax imposed by Section 4943 of the federal Internal Revenue Code;

(3) Not make any investments which would jeopardize the carrying out of any of the exempt purposes of the corporation, within the meaning of Section 4944 of the federal Internal Revenue Code, so as to give rise to any liability for the tax imposed by Section 4944 of the federal Internal Revenue Code;

(4) Not make any taxable expenditures, as defined in Section 4945(d) of the federal Internal Revenue Code, which would give rise to any liability for the tax imposed by Section 4945 of the federal Internal Revenue Code; and

(5) Distribute for the purpose specified in its articles of incorporation for each taxable year amounts at least sufficient to avoid any

liability for the tax imposed by Section 4942 of the federal Internal Revenue Code.

History. — Code 1981, § 53-12-180, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-181. Amendment of articles of incorporation to exclude application of Code Section 53-12-180.

Any corporation which is a private foundation may amend its articles of incorporation expressly to exclude the application of Code Section 53-12-180 or any portion thereof in the manner provided by Article 10 of Chapter 2 of Title 14 or Article 8 of Chapter 3 of Title 14, whichever is applicable.

History. — Code 1981, § 53-12-181, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2010, Code Section 53-112-181, as enacted by Ga. L. 2010, p. 579, § 1, was redesignated as Code Section 53-12-181.

53-12-182. Effect of Code Sections 53-12-180 and 53-12-181 as to forfeiture or reversion of trust property.

Nothing contained in Code Sections 53-12-180 and 53-12-181 shall cause or be construed to cause a forfeiture or reversion of any of the property of a corporation which is subject to such Code sections.

History. — Code 1981, § 53-12-182, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-183. Election of private foundation to distribute such property as will enable corporation to avoid tax liability.

With respect to property held by a corporation which is a private foundation and which is subject to conditions which permit distributions to the extent of the net income of the property each year but do not permit distributions of the property or any part thereof itself, the directors of the corporation may elect to distribute so much of the property as may be necessary to enable the corporation to avoid liability for any tax imposed by Section 4942 of the federal Internal Revenue Code in the same manner as if the corporation were a trust described in Code Section 53-12-193 and the property were the only property held in the trust and as if the directors were the trustees of the trust.

History. — Code 1981, § 53-12-183, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-184. Effect of Code Sections 53-12-180 through 53-12-183 on powers of the courts or the Attorney General.

Nothing in Code Sections 53-12-180 through 53-12-183 shall impair the rights and powers of the courts or the Attorney General of this state with respect to any corporation.

History. — Code 1981, § 53-12-184, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Part 2

Trusts

53-12-190. Automatic amendment of governing instrument of private foundation trust, charitable trust, or split-interest trust.

Notwithstanding any provision therein to the contrary and except as provided in Code Section 53-12-192, the governing trust instrument of any trust which is a private foundation, a charitable trust, as defined in Section 4947(a)(1) of the federal Internal Revenue Code, or a split-interest trust, as defined in Section 4947(a)(2) of the federal Internal Revenue Code, shall be amended automatically as of the later of the inception of the trust or January 1, 1972, to include provisions which prohibit the trustees of the trust from:

(1) Engaging in any act of self-dealing, as defined in Section 4941(d) of the federal Internal Revenue Code, which would give rise to any liability for the tax imposed by Section 4941 of the federal Internal Revenue Code;

(2) Retaining any excess business holdings, as defined in Section 4943(c) of the federal Internal Revenue Code, which would give rise to any liability for the tax imposed by Section 4943 of the federal Internal Revenue Code;

(3) Making any investments which would jeopardize the carrying out of any of the exempt purposes of the trust, within the meaning of Section 4944 of the federal Internal Revenue Code, so as to give rise to any liability for the tax imposed by Section 4944 of the federal Internal Revenue Code; and

(4) Making any taxable expenditures, as defined in Section 4945(d) of the federal Internal Revenue Code, which would give rise to any

liability for the tax imposed by Section 4945 of the federal Internal Revenue Code;

provided, however, that in the case of a split-interest trust, as defined in Section 4947(a)(2) of the federal Internal Revenue Code, paragraphs (1) through (4) of this Code section shall apply only to the extent required by Section 4947 of the federal Internal Revenue Code.

History. — Code 1981, § 53-12-190, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 752, § 53/HB 142.

53-12-191. Automatic amendment of governing instrument of private foundation trust or charitable trust as to distribution of trust funds.

Notwithstanding any provision therein to the contrary and except as provided in Code Section 53-12-192, the governing trust instrument of any trust which is a private foundation or which is a charitable trust, as defined in Section 4947(a)(1) of the federal Internal Revenue Code, shall be amended automatically as of the later of the inception of the trust or January 1, 1972, to include a provision which requires the trustees to distribute, for the purposes specified in the governing trust instrument, for each taxable year, amounts at least sufficient to avoid any liability for the tax imposed by Section 4942 of the federal Internal Revenue Code.

History. — Code 1981, § 53-12-191, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-192. Amendment of governing instrument of private foundation trust, charitable trust, or split-interest trust to exclude application of Code Section 53-12-190 or 53-12-191.

The trustees of any trust which is a private foundation, a charitable trust, as defined in Section 4947(a)(1) of the federal Internal Revenue Code, or a split-interest trust, as defined in Section 4947(a)(2) of the federal Internal Revenue Code, may, without judicial proceedings, amend the governing trust instrument of the trust expressly to exclude the application of Code Section 53-12-190 or 53-12-191, or both, by executing a written amendment to the trust and filing a duplicate original of the amendment with the Attorney General of this state, whereupon the Code section or Code sections, as the case may be, shall not apply to the trust.

History. — Code 1981, § 53-12-192, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-193. Election of trustees of private foundation or charitable trust to distribute such trust principal as will enable trust to avoid tax liability; filing of written election with Attorney General; form of distribution; revocation of election.

(a) With respect to any trust which is a private foundation or a charitable trust, as defined in Section 4947(a)(1) of the federal Internal Revenue Code, the governing trust instrument of which permits distributions to the extent of the net income of the trust each year but does not permit distributions from trust principal, the trustees of the trust may elect, without judicial proceedings and notwithstanding any provision to the contrary contained in the governing trust instrument of the trust, to distribute in any year, for the purposes specified in the governing trust instrument, that amount from the principal of the trust which, when added to the income of the trust available for distribution during such year, will enable the trust to avoid any liability for the tax imposed by Section 4942 of the federal Internal Revenue Code by filing a written election, which may be a continuing one, with the Attorney General of this state to have this Code section and Code Section 53-12-183 apply to the trust. A distribution from trust principal pursuant to the election shall only be in the form of cash or securities which are either listed or admitted to unlisted trading privileges upon any stock exchange or are quoted regularly in any newspaper having a general circulation in this state.

(b) Any election made under subsection (a) of this Code section may be revoked at any time by filing written notice of revocation with the Attorney General of this state.

History. — Code 1981, § 53-12-193, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Cited in Reliance Trust Co. v. Candler, 294 Ga. 15, 751 S.E.2d 47 (2013).

53-12-194. Effect of Code Sections 53-12-190 through 53-12-193 as to forfeiture or reversion of trust property or failure of trust.

Nothing contained in Code Sections 53-12-190 through 53-12-193 shall cause or be construed to cause a forfeiture or reversion of any of

the property of a trust which is subject to such Code sections or to make the purposes of such trust impossible of accomplishment.

History. — Code 1981, § 53-12-194, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-195. Effect of Code Sections 53-12-190 through 53-12-193 on powers of courts and Attorney General.

Nothing in Code Sections 53-12-190 through 53-12-193 shall impair the rights and powers of the courts or the Attorney General of this state with respect to any trust.

History. — Code 1981, § 53-12-195, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

ARTICLE 11

TRUSTEES

Cross references. — Fiduciary powers of financial institutions, § 7-1-310. Time limitation on bringing of actions against trustees, § 9-3-27. Petitions for declaratory judgments involving action or abstention from action by trustees, § 9-4-4.

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, §§ 205 to 239.

Am. Jur. Pleading and Practice Forms. — Am. Jur. Pleading and Practice Forms, Trusts, §§ 83 to 172.

Part 1

Appointment and Acceptance

53-12-200. Capacity of trustee.

A trustee shall have legal capacity under Georgia law to acquire, hold, and transfer title to property. An individual shall be eligible to serve as a trustee regardless of citizenship or residency. If the trustee is a corporation, partnership, or other entity, it shall be required to have the power to act as a trustee in Georgia.

History. — Code 1981, § 53-12-200, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-12-24 of the 1991 Trust Act are included in the annotations for this Code section.

Successor trustee properly appointed. — Probate court did not err by appointing a successor trustee pursuant to O.C.G.A. § 15-9-127 and former O.C.G.A. § 53-12-170 (see O.C.G.A. § 53-12-201) as even if a corporation had not rejected the trust property, the corporation did not have the power to act as a trustee in Georgia since the corporation had not received approval from the Georgia Department of Banking and Finance to act as a trust company; a county board of commissioners was properly appointed as the successor trustee in spite of the corporation's speculation over a possible future event that might result in a conflict of interest. Chattowah Open Land Trust, Inc. v. Jones, 281 Ga. 97, 636 S.E.2d 523 (2006) (decided under former O.C.G.A. § 53-12-24).

53-12-201. Appointment and vacancies.

(a) A settlor may appoint trustees or grant that power to others, including trust beneficiaries.

(b) A trust shall never fail for want of a trustee.

(c) If the trust instrument names a person to fill a vacancy or provides a method of appointing a trustee, any vacancy shall be filled or appointment made as provided in the trust instrument.

(d) The qualified beneficiaries may appoint a trustee by unanimous consent.

(e) In all other cases, the court, on petition of an interested person, may appoint any number of trustees consistent with the intention of the settlor and the interests of the beneficiaries.

(f) The petition provided for in subsection (e) of this Code section shall be served upon all qualified beneficiaries.

(g) A trustee appointed as a successor trustee shall have all the authority of the original trustee.

History. — Code 1981, § 53-12-201, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 551, § 10/SB 134; Ga. L. 2018, p. 262, § 14/HB 121.

Law reviews. — For article on the 2018 amendment of this Code section, see 35 Ga. St. U. L. Rev. 219 (2018).

JUDICIAL DECISIONS

Analysis

General Consideration
Appointment Generally
Authority and Liability of Newly Appointed Trustee

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1895, §§ 3197, 4008, and 4009, former Civil Code 1910, § 3746, former Code 1933, §§ 3-710, 108-118, 108-302, and 108-315, former O.C.G.A. §§ 51-12-5.1, 53-12-33, 53-13-2, and 53-13-8, and former O.C.G.A. §§ 53-12-6 and 53-12-170 of the 1991 Trust Act are included in the annotations for this Code section.

Lack of trustee will not invalidate trust. — Resignation of the assignee of a trust arising under general assignments for the benefit of creditors was not a revocation of the deed of assignment. The title having passed into the trustee, the trust should not be allowed to fail for the want of a trustee. A successor will be appointed. McFerran, Shallcross & Co. v. Davis, 70 Ga. 661 (1883) (decided under former law).

Trust for the maintenance of a school will not fail because of the failure of trustees; and when the office is vacant with no provision for appointments the superior court sitting in equity upon petition by the beneficiaries will make the appointment. Thompson v. Hale, 123 Ga. 305, 51 S.E. 383 (1905) (decided under former Code 1895, §§ 4008 and 4009).

When a deed creating a religious and educational trust provides that successive trustees shall be appointed by proper authorities, when the office becomes vacant, the trust will not fail because of there being no trustee but a court of equity will appoint one. Harris v. Brown, 124 Ga. 310, 52 S.E. 610, 2 L.R.A. (n.s.) 828 (1905) (decided under former Code 1895, § 3197).

When it was apparent from entire will and codicil that bequest to the governing authorities of a named association, "same being an Orphan's Home located at Macon, Georgia," was intended as a charitable trust for the benefit of orphans as a class, and that the designated "governing authorities" were merely to perform the office of trustee, the bequest was sufficiently definite and specific to be capable of execution, and since a trust will not fail for the want of a trustee, the legacy would not lapse merely because there may have been no such orphan's home and "governing authorities" as were mentioned in the will; in such case a court of equity could, by approximation, effectuate the general charitable purpose of the testator in a manner most similar to that indicated by the testator. Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938) (decided under former Code 1933, § 113-815).

When the manifest intention was to create a charitable trust for tubercular children, even though the charitable institution named never existed, the purpose and object for which the trust was created still exists and the legacy does not lapse, and the cy pres doctrine applies. Creech v. Scottish Rite Hosp. for Crippled Children, 211 Ga. 195, 84 S.E.2d 563 (1954) (decided under former Code 1933, § 108-102).

If a gift is made for a public charitable purpose, it is immaterial that the trustee is uncertain or incapable of taking, or that the objects of the charity are uncertain and indefinite. It will, nevertheless, be sustained. Roughton v. Jones, 225 Ga. 774, 171 S.E.2d 536 (1969) (decided under former Code 1933, § 108-118).

Court of equity will not allow the trust to be destroyed by the refusal of the person nominated as trustee to accept the trust, or the person's declination or failure to execute the trust, if by any possibility the trust is capable of execution by the court. Roughton v. Jones, 225 Ga. 774, 171 S.E.2d 536 (1969) (decided under former Code 1933, § 108-118).

Refusal to create trust for support of children. — When the defendant declined to agree upon a trustee and refused to create a trust for defendant's minor children in compliance with a contempt order from an alimony decree, the court had the jurisdiction and power to appoint a trustee. Wallace v. Graves, 229 Ga. 82, 189 S.E.2d 447 (1972) (decided under former Code 1933, § 108-302).

Petitioners seeking summary removal of trustees must reveal essential facts. — Petitioners coming into a court of equity seeking the summary removal of trustees and the appointment of a new trustee are not relieved by the language of the statute from revealing the essential facts which entitle the petitioners to this relief. Devitt v. Close, 221 Ga.

General Consideration (Cont'd)

555, 146 S.E.2d 286 (1965) (decided under former Code 1933, § 108-315).

Cited in Boardman v. Taylor, 66 Ga. 638 (1881); Sanders v. Hinton, 171 Ga. 702, 156 S.E. 812 (1931); Caldwell v. Hill, 179 Ga. 417, 176 S.E. 381 (1934); Regents of Univ. Sys. v. Trust Co., 186 Ga. 498, 198 S.E. 345 (1938); Mason v. Young, 203 Ga. 121, 45 S.E.2d 643 (1947); Williams v. J.M. High Co., 200 Ga. 230, 36 S.E.2d 667 (1946); Bethel Farm Bureau v. Anderson, 217 Ga. 529, 123 S.E.2d 754 (1962); Scott v. Scott, 218 Ga. 732, 130 S.E.2d 499 (1963); Simpson v. Anderson, 220 Ga. 155, 137 S.E.2d 638 (1964).

Appointment Generally

Nonresident trustee. — Nonresident of Georgia may serve as trustee of a trust created in and to be administered in Georgia, even if the entire corpus of the trust property is located in the state. Munford v. Maclellan, 258 Ga. 679, 373 S.E.2d 368 (1988) (decided under former O.C.G.A. § 53-13-8).

Appointment of new trustee by superior court. — When a will creates a trust estate, imposing upon the executor the additional duty to hold the legal title until the death of the daughter, the trust continues until the trust is fully executed by a sale of the property and distribution of the proceeds according to the terms of the will. In such case the superior court is empowered, after the death of the executor trustee, to appoint a new trustee in the place of such deceased. Sanders v. Hinton, 171 Ga. 702, 156 S.E. 812 (1931) (decided under former Civil Code 1910, § 3746).

When it appears without dispute that the trustee had moved the trustee's residence to the state of New York, the court did not err in directing a verdict removing the trustee as trustee and entering the court's judgment on the verdict. King v. King, 228 Ga. 818, 188 S.E.2d 502 (1972) (decided under former Code 1933, § 108-315).

Probate court did not err by appointing a successor trustee pursuant to O.C.G.A. § 15-9-127 and former O.C.G.A. § 53-12-170 (see O.C.G.A. § 53-12-201) as even if a corporation had not rejected the trust property, the corporation did not have the power to act as a trustee in Georgia since the corporation had not received approval from the Georgia Department of Banking and Finance to act as a trust company; a county board of commissioners was properly appointed as the successor trustee in spite of the corporation's speculation over a possible future event that might result in a conflict of interest. Chattowah Open Land Trust, Inc. v. Jones, 281 Ga. 97, 636 S.E.2d 523 (2006) (decided under former O.C.G.A. § 53-12-170).

Petition by beneficiaries. — It matters not how large the number of beneficiaries may be; the petition of two of the beneficiaries is sufficient in this respect to bring the petition within the jurisdiction of the superior court. Sanders v. Hinton, 171 Ga. 702, 156 S.E. 812 (1931) (decided under former Civil Code 1910, § 3746).

All of the beneficiaries stand alike and have equal rights not only in the division of the proceeds arising from a sale of the property, but as to the forum in which the application for the appointment of a trustee should be made. The proceeding may be had as well in the county of the residence of the testator, and where the trust property is located, as in the county of the residence of the nonpetitioning beneficiaries. Sanders v. Hinton, 171 Ga. 702, 156 S.E. 812 (1931) (decided under former Civil Code 1910, § 3746).

Power and authority of superior courts to appoint new trustees when the sole or surviving trustee has become disqualified in some manner cannot be exercised when the trust instrument provides the method of appointment of successors unless some reason appears that the method provided by the trust instrument cannot be followed. Devitt v. Close, 221 Ga. 853, 148 S.E.2d 316 (1966) (decided under former Code 1933, § 108-315).

Filling vacancies by looking at trust instrument. — Trial court had to look to trust instrument to determine how a vacancy in position of trustee was to be filled as the law directed the trial court to start there in determining how to fill that position after the settlor and a trustee died, and the two successor co-trustees resigned before the trustee died, leaving

the trust unrepresented. Thus, a trial court was authorized to allow the trust's beneficiaries to be appointed as successor trustees as the law allowed interested parties to petition and be appointed as trustees, especially since the law did not limit the number of successor trustees it could appoint and appointment of the successor trustees was neither inconsistent with the settlor's intentions nor the interests of the beneficiaries. Turner v. Bynum, 255 Ga. App. 173, 564 S.E.2d 784 (2002) (decided under former O.C.G.A. § 53-12-170).

Authority and Liability of Newly Appointed Trustee

New trustee has authority subject to same liabilities as predecessor trustee. — When plaintiffs are suing as successor trustees, plaintiffs are barred by the statute of limitations if the original trustee is barred. Skinner v. DeKalb Fed. Sav. & Loan Ass'n, 246 Ga. 561, 272 S.E.2d 260 (1980) (decided under former Code 1933, § 3-710).

Change of trustees will not defeat claims against trust. — In a quantum meruit claim against a trust, as well as in a breach of contract claim, the mere fact alone that the trustees have changed during the time of any agreement or receipt of services will not operate to defeat the claims against the trust. Trust Co. Bank v. Citizens & S. Trust Co., 260 Ga. 124, 390 S.E.2d 589 (1990) (decided under former O.C.G.A. § 51-12-5.1).

Effect of appointment when no trust estate. — There being no trust at the time of the grant of the order appointing the trustee, one's appointment as such was inoperative and afforded the trustee no authority to institute actions in such representative capacity. Smith v. Frost, 144 Ga. 115, 86 S.E. 235 (1915) (decided under former law).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, §§ 214, 217, 224, 308.

Am. Jur. Pleading and Practice Forms. — 24 Am. Jur. Pleading and Practice Forms, Trusts, § 84 et seq.

C.J.S. — 90 C.J.S., Trusts, §§ 215, 216, 219.

ALR. — Right of surviving or remaining trustee or trustees to act without substitution of another trustee in place of one who has died or resigned or been removed, where the will or other trust instrument provides for substitution or replacement, 142 A.L.R. 1099.

Appointment and qualification of one of several trustees named in will as affecting power or duty of court to appoint a co-trustee, 151 A.L.R. 1308.

Court's power to appoint trustee to preserve, manage, and control personal property of nontrust life estate or other particular estate notwithstanding terms of will, 46 A.L.R.2d 502.

Hostility between trustee and beneficiary as ground for removal, 63 A.L.R.2d 523.

Court's power to appoint additional trustees over number specified in trust instrument, 59 A.L.R.3d 1129.

Propriety of sale of trust assets without consent despite trust provision requiring consent, 39 A.L.R.4th 158.

Liability of trustee for payments or conveyances under a trust subsequently held to be invalid, 77 A.L.R.4th 1177.

53-12-202. Acceptance.

(a) The acceptance of a trust shall be necessary to constitute a person as trustee. Acceptance may be effected by acts as well as words. After acceptance, the trustee shall not decline the trusteeship.

(b) Except as otherwise provided in subsection (c) of this Code section, a person designated as trustee accepts the trusteeship:

(1) By substantially complying with a method of acceptance provided in the trust instrument; or

(2) If the trust instrument does not provide a method or the method provided in the trust instrument is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

(c) A person designated as trustee, without accepting the trusteeship, may act to preserve the trust property if, as soon as practicable, the person rejects or declines the trusteeship.

History. — Code 1981, § 53-12-202, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 2339, former Civil Code 1895, § 3190, former Code 1933, §§ 108-113 and 108-313, and former O.C.G.A. § 53-13-1 are included in the annotations for this Code section.

Acceptance not giving rise to valid trust. — Bank's ostensible acceptance of a trusteeship cannot give rise to a valid trust if, as a matter of law, no such valid trust was then capable of being created by the settlor. Smith v. Hawks, 182 Ga. App. 379, 355 S.E.2d 669 (1987) (decided under former O.C.G.A. § 53-13-1).

Disclaimer of trusteeship. — After accepting trust as trustee, bank could not thereafter disclaim its trusteeship. Merritt v. Citizens Trust Bank, 164 Ga. App. 716, 298 S.E.2d 264 (1982) (decided under former Code 1933, § 108-313).

Burden of proof. — Purported trustee who denies acceptance of the trust has the burden of showing that the trustee's actions in regard to the property were not in the guise of discharging the duties of the trustee. Dunaway v. Clark, 536 F. Supp. 664 (S.D. Ga. 1982) (decided under former Code 1933, § 108-313).

Necessity of writing. — It is not necessary that an acceptance of a trust should be in writing. It may be done by acts as well as words. Mounger v. Duke, 53 Ga. 277 (1874) (decided under former Code 1873, § 2339).

Acts establishing acceptance. — When a person as next friend filed a bill to set up equity in property and was decreed to be a trustee with the title vested in the trustee as trustee for the wife and children, this amounted to an acceptance of the trust by the trustee; and if there was no renunciation of the trust, the trustee continued to be the trustee for the children, and if the trustee failed to act when the trustee should have done so, the trustee is liable to the children for the trustee's nonaction. Salter v. Salter, 80 Ga. 178, 4 S.E. 391, 12 Am. St. R. 249 (1887) (decided under former law).

When one enters one's acceptance on the back of a deed appointing one trustee, one has accepted the trust and "no disclaimer will remove the character of trustee". New S. Bldg. & Loan Ass'n v. Gann, 101 Ga. 678, 29 S.E. 15 (1897) (decided under former Code 1895, § 3190).

When one appointed trustee, with notice of the trust, voluntarily undertakes to discharge duties devolving upon the trustee, and interferes with the trust fund in such a manner and to such an extent as that one's interference therewith cannot be plainly referred to some other ground of action, one will be conclusively presumed to have accepted the trust. Freeman v. Brown, 115 Ga. 23, 41 S.E. 385 (1902) (decided under former law).

When one was appointed trustee for one's spouse and one began to function in

such capacity by selling the land upon application and obtaining an order from the proper court, one will be deemed to have accepted the trust by one's actions. Johnson v. Cook, 122 Ga. 524, 50 S.E. 367 (1905) (decided under former Civil Code 1895, § 3190).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 220 .
C.J.S. — 90 C.J.S., Trusts, § 59.
ALR. — Appointee's renunciation of appointment, 9 A.L.R.2d 1382.

53-12-203. Trustee's bond.

(a) A trustee shall not be required to give a bond to secure performance of the trustee's duties unless:

(1) The trust instrument requires a bond; or

(2) A bond is found by the court to be necessary to protect the interests of beneficiaries or creditors of the trust, even though the trust instrument waives the requirement of a bond.

(b) Even though a bond has been required pursuant to subsection (a) of this Code section or the trust instrument requires a bond, the court may excuse the requirement, reduce or increase the amount of a bond, release a surety, or permit the substitution of another bond with the same or different sureties.

(c) The cost of any bond shall be charged against the trust.

(d) If a bond is required, the bond shall be:

(1) Secured by an individual who is a domiciliary of this state or by a licensed commercial surety authorized to transact business in this state;

(2) Payable to the court for the benefit of interested persons as their interests may appear;

(3) Conditioned upon the faithful discharge of the trustee's duties; and

(4) If imposed by the court, in an amount and with sureties and liabilities as required by the court.

(e) Notwithstanding any other law to the contrary:

(1) A financial institution, trust company, national or state bank, savings bank, or savings and loan association described in Code Section 7-1-242 that seeks to serve as a trustee under any trust created under or governed by the laws of this state shall not be required to give bond for the faithful performance of its duties unless its combined capital, surplus, and undivided profits are less than $3

million as reflected in its last statement filed with the Comptroller of the Currency of the United States or the commissioner of banking and finance; and

(2) In every case in which the trustee of any trust is required to give bond for the faithful performance of the trustee's duties in such fiduciary capacity, the bond shall be in a value equal to double the value of the trust estate; provided, however, that the trustee may give bond in an amount equal to the value of the trust estate if the bond is secured by a licensed commercial surety authorized to transact business in this state. For purposes of this paragraph, the term "trust estate" shall exclude real property and improvements thereon held by the trustee in a fiduciary capacity; provided, however, that upon the conversion of any such real property into personalty, the trustee shall give a new bond including the value of the personalty into which the real property has been converted.

(f) The trustee and any surety shall be held and deemed joint and several obligors and may be subjected jointly and severally to liability in the same action. No prior judgment establishing the liability of the trustee shall be necessary before an action is brought against the sureties on the bond.

(g) When a judgment has been obtained against the principal and surety or sureties on the bond of a trustee, a levy may be made upon any property of any defendant in fi. fa.

(h) A court of competent jurisdiction shall be authorized to enter a judgment and to issue a writ of execution against the principal and surety on the bond of a trustee and shall be further authorized to grant judgment and execution in favor of the surety against the principal upon payment of the judgment by the surety.

(i) Failure to comply with this Code section shall not make void or voidable or otherwise affect an act or transaction of a trustee with any third party.

History. — Code 1981, § 53-12-203, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, §§ 397, 564.

C.J.S. — 90A C.J.S., Trusts, § 486.

53-12-204. Cotrustees generally.

The authority of cotrustees to act on behalf of the trust shall be as follows:

(1) A power vested in two or more trustees shall only be exercised by their unanimous action; provided, however, that a cotrustee may delegate to one or more other cotrustees the performance of ministerial acts;

(2) If a vacancy occurs in the office of a cotrustee, the remaining cotrustee or cotrustees may act unless or until the vacancy is filled; and

(3) While a cotrustee is unable to act because of inaccessibility, illness, or other temporary incapacity, the remaining cotrustee or cotrustees may act as if they were the only trustees when necessary to accomplish the purposes of the trust.

History. — Code 1981, § 53-12-204, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-12-172 of the 1991 Trust Act are included in the annotations for this Code section.

Paragraph (3) inapplicable to acts prior to effective date. — Trustee's appointment of a successor trustee before the trustee's death was not permitted under a trust instrument which provided for appointment of a successor for any deceased trustee by a majority of the surviving trustees, nor was paragraph (3) of former O.C.G.A. § 53-12-172 (see O.C.G.A. § 53-12-204) applicable, since it did not become effective until July 1, 1991, after the appointment of the successor and after the death of the appointing trustee, and the trustee was not authorized by the trust instrument to appoint the trustee's successor. Ferst v. Ferst, 208 Ga. App. 846, 432 S.E.2d 227 (1993) (decided under former O.C.G.A. § 53-12-172).

Absence of co-trustee's signature. — Because nothing in the trust instrument authorized any actions contrary to former O.C.G.A. § 53-12-172 (see O.C.G.A. § 53-12-204), a co-trustee's failure to sign a purchase and sales agreement involving trust property did not make the contract unenforceable, despite the co-trustee's awareness of the sales negotiations, because the co-trustee: (1) did not have a duty to speak during the negotiations without any direct involvement therein; (2) had not been approached by anyone to sign the agreement; and (3) was entirely unaware that a signature was necessary to convey the trust property; thus, the co-trustee was not precluded from objecting to the sale of the trust property. Peach Consol. Props., LLC v. Carter, 278 Ga. App. 273, 628 S.E.2d 680 (2006) (decided under former O.C.G.A. § 53-12-172).

Part 2

Trustee Compensation

53-12-210. Compensation of trustee.

(a) Trustees shall be compensated in accordance with either the trust instrument or any separate written agreement between the trustee and

the settlor. After the settlor's death or incapacity or while the trust is irrevocable, the trust instrument or the agreement relating to such trustee's compensation may be modified as follows:

(1) The trustee and all qualified beneficiaries may by unanimous consent modify the trust instrument or agreement relating to the trustee's compensation without receiving the approval of any court; or

(2) By petition pursuant to Code Section 53-12-61.

(b) If there is no provision for trustee compensation in the trust instrument and there is no separate written agreement between the trustee and the settlor relating to such trustee's compensation, a separate written agreement relating to such trustee's compensation may be entered into between such trustee and the qualified beneficiaries as follows:

(1) The trustee and all qualified beneficiaries may by unanimous consent enter into an agreement relating to such trustee's compensation without receiving the approval of any court; or

(2) Any qualified beneficiary may petition the court to approve an agreement relating to such trustee's compensation. Such petition shall be served upon all qualified beneficiaries.

(c) In cases other than those described in subsections (a) and (b) of this Code section, the trustee shall be entitled to compensation as follows:

(1) With respect to a corporate trustee, its published fee schedule, provided that such fees are reasonable under the circumstances; and

(2) With respect to an individual trustee:

(A) One percent of cash and the fair market value of any other principal asset received upon the initial funding of the trust and at such time as additional principal assets are received; and

(B) An annual fee calculated in accordance with the following schedule based upon the cash and the market value of the other principal assets valued as of the last day of the trust accounting year prorated based on the length of service by such trustee during that year:

If the cash and market value of the other principal assets are:	Annual fee:
$500,000.00 or less	1.75 percent of the cash and market value of the other principal assets.

More than $500,000.00 but not more than $1 million	$8,750.00 plus 1.25 percent of the excess over $500,000.00.
More than $1 million but not more than $2 million	$15,000.00 plus 1.00 percent of the excess over $1 million.
More than $2 million but not more than $5 million	$25,000.00 plus 0.85 percent of the excess over $2 million.
More than $5 million ...	$50,500.00 plus 0.50 percent of the excess over $5 million.

History. — Code 1981, § 53-12-210, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 752, § 53/HB 142; Ga. L. 2018, p. 262, § 15/HB 121; Ga. L. 2020, p. 377, § 1-81/HB 865.

The 2020 amendment, effective January 1, 2021, substituted "The trustee and all" for "All" at the beginning of paragraphs (a)(1) and (b)(1); substituted "or" for "and" at the end of paragraph (a)(1); inserted "that" in paragraph (c)(1); and substituted "not more" for "less" three times in the table in subparagraph (c)(2)(B).

Law reviews. — For article on the problems and benefits of multiple fiduciaries in estate planning, see 33 Mercer L. Rev. 355 (1981). For annual survey of law on wills, trusts, guardianships, and fiduciary administration, see 62 Mercer L. Rev. 365 (2010). For article on the 2018 amendment of this Code section, see 35 Ga. St. U. L. Rev. 219 (2018).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 108-432, former O.C.G.A. § 53-13-29, and former O.C.G.A. § 53-12-173 of the 1991 Trust Act are included in the annotations for this Code section.

Trustee allowed distribution fee of up to 3 percent of value of assets distributed. Lettie Pate Whitehead Found., Inc. v. United States, 606 F.2d 534 (5th Cir. 1979) (decided under former Code 1933, § 108-432).

Administrator not entitled to compensation as trustee. — Administrator was not entitled to additional compensation under former O.C.G.A. § 53-12-173 (see O.C.G.A. §§ 53-12-210 and 53-12-211), governing compensation of a trustee, when assets were never transferred from the estate to a trust, the administrator did not manifest any act to hold the property as trustee, and the administrator's conduct did not show assent to the estate property being passed to the trust under O.C.G.A. § 53-8-15(b). In re Estate of Moore, 292 Ga. App. 236, 664 S.E.2d 259 (2008) (decided under former O.C.G.A. § 53-12-173).

Cited in Trust Co. v. Woodruff, 236 Ga. 220, 223 S.E.2d 91 (1976); Trust Co. Bank v. Heyward, 240 Ga. 557, 242 S.E.2d 257 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 574.

C.J.S. — 90 C.J.S., Trusts, §§ 259. 90A C.J.S., Trusts, § 383.

ALR. — Right to double commission where same person, natural or corporate, is named as executor and trustee, 84 A.L.R. 667; 85 A.L.R.2d 537.

Trustee's commission in case of successive trusts, or of single trust for benefit of different persons in succession, 85 A.L.R. 163.

Compensation of executor, administrator, or trustee as affected by change in statute after decedent's death and before final account, or after creation of trust, 91 A.L.R. 1421.

Compensation of testamentary trustee for conducting business or taking active part in management of corporation, 99 A.L.R. 961.

Compensation of trustee as affected by neglect or violation of his duties, 110 A.L.R. 566.

Trustee's compensation as payable from income or corpus, 117 A.L.R. 1154.

Expenses of trust administration, such as court costs, costs of litigation, bond premiums, attorneys' fees, etc., as payable from income or corpus, 124 A.L.R. 1183.

Right of creditors to reach by garnishment or other process, commissions of debtor, as executor, administrator, or trustee, 143 A.L.R. 190.

Trustee's right to compensation as affected by provision of trust instrument that contemplates future agreement in that regard between trustee and beneficiary or other person, 165 A.L.R. 772.

Right to double compensation where same person (natural or corporate) acts as executor and trustee, 85 A.L.R.2d 537.

Limiting effect of provision in contract, will, or trust instrument fixing trustee's or executor's fees, 19 A.L.R.3d 520.

Resignation or removal of executor, administrator, guardian, or trustee, before final administration or before termination of trust, as affecting his compensation, 96 A.L.R.3d 1102.

53-12-211. Compensation of cotrustees and successor trustees.

Unless any separate written agreement provides otherwise:

(1) Each cotrustee shall be compensated as specified by the terms of the trust, as each trustee may have agreed or in accordance with a published fee schedule, and such compensation among cotrustees shall not be apportioned unless they shall agree otherwise; and

(2) The annual fee paid pursuant to subparagraph (c)(2)(B) of Code Section 53-12-210 shall be apportioned among trustees and successor trustees according to the proportion of time each rendered services during the year.

History. — Code 1981, § 53-12-211, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 551, § 11/SB 134.

Law reviews. — For article on the problems and benefits of multiple fiduciaries in estate planning, see 33 Mercer L. Rev. 355 (1981).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 108-432, former O.C.G.A. § 53-13-29, and former

O.C.G.A. § 53-12-173 of the 1991 Trust Act are included in the annotations for this Code section.

Trustee allowed distribution fee of up to 3 percent of value of assets distributed. Lettie Pate Whitehead Found., Inc. v. United States, 606 F.2d 534 (5th Cir. 1979) (decided under former Code 1933, § 108-432).

Administrator not entitled to compensation as trustee. — Administrator was not entitled to additional compensation under former O.C.G.A. § 53-12-173 (see O.C.G.A. §§ 53-12-210 and 53-12-211), governing compensation of a trustee, when assets were never transferred from the estate to a trust, the administrator did not manifest any act to hold the property as trustee, and the administrator's conduct did not show assent to the estate property being passed to the trust under O.C.G.A. § 53-8-15(b). In re Estate of Moore, 292 Ga. App. 236, 664 S.E.2d 259 (2008) (decided under former O.C.G.A. § 53-12-173).

Cited in Trust Co. v. Woodruff, 236 Ga. 220, 223 S.E.2d 91 (1976); Trust Co. Bank v. Heyward, 240 Ga. 557, 242 S.E.2d 257 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 574.

C.J.S. — 90 C.J.S., Trusts, § 259. 90A C.J.S., Trusts, § 402.

ALR. — Right to double commission where same person, natural or corporate, is named as executor and trustee, 84 A.L.R. 667; 85 A.L.R.2d 537.

Trustee's commission in case of successive trusts, or of single trust for benefit of different persons in succession, 85 A.L.R. 163.

Compensation of executor, administrator, or trustee as affected by change in statute after decedent's death and before final account, or after creation of trust, 91 A.L.R. 1421.

Compensation of testamentary trustee for conducting business or taking active part in management of corporation, 99 A.L.R. 961.

Compensation of trustee as affected by neglect or violation of his duties, 110 A.L.R. 566.

Trustee's compensation as payable from income or corpus, 117 A.L.R. 1154.

Expenses of trust administration, such as court costs, costs of litigation, bond premiums, attorneys' fees, etc., as payable from income or corpus, 124 A.L.R. 1183.

Right of creditors to reach by garnishment or other process, commissions of debtor, as executor, administrator, or trustee, 143 A.L.R. 190.

Trustee's right to compensation as affected by provision of trust instrument that contemplates future agreement in that regard between trustee and beneficiary or other person, 165 A.L.R. 772.

Right to double compensation where same person (natural or corporate) acts as executor and trustee, 85 A.L.R.2d 537.

Limiting effect of provision in contract, will, or trust instrument fixing trustee's or executor's fees, 19 A.L.R.3d 520.

Resignation or removal of executor, administrator, guardian, or trustee, before final administration or before termination of trust, as affecting his compensation, 96 A.L.R.3d 1102.

53-12-212. Extra compensation.

(a) A trustee who is receiving compensation as described in subsection (c) of Code Section 53-12-210 may petition the court for compensation that is greater than the compensation allowed under that subsection. Notice of the petition for extra compensation shall be given to all qualified beneficiaries.

(b) After hearing any objection, the court shall allow such extra compensation as the court deems reasonable. The allowance of extra compensation shall be conclusive as to all parties in interest.

History. — Code 1981, § 53-12-212, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2018, p. 262, § 16/HB 121.

Law reviews. — For article on the 2018 amendment of this Code section, see 35 Ga. St. U. L. Rev. 219 (2018).

53-12-213. Reimbursement of expenses.

A trustee shall be entitled to be reimbursed out of the trust property for reasonable expenses that were properly incurred in the administration of the trust.

History. — Code 1981, § 53-12-213, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-214. Compensation from business enterprise.

(a) Any trustee may receive compensation for services, as specified in this subsection, from a corporation or other business enterprise, where the trust estate owns an interest in the corporation or other business enterprise, provided that:

(1) The services provided by the trustee to the corporation or other business enterprise are of a managerial, executive, or business advisory nature;

(2) The compensation received for the services is reasonable; and

(3) The services are performed and the trustee is paid pursuant to a contract executed by the trustee and the corporation or business enterprise, which contract is approved by a majority of those members of the board of directors or other similar governing authority of the corporation or business enterprise who are not officers or employees of the trustee and are not related to the trustee and provided, further, that the contract is approved by the court.

(b) Any trustee receiving compensation from a corporation or other business enterprise for services to it as described in subsection (a) of this Code section shall not receive extra compensation in respect to such services as provided in Code Section 53-12-212; provided, however, that nothing in this Code section shall prohibit the receipt by the trustee of extra compensation for services rendered in respect to other assets or matters involving the trust estate.

(c) Nothing in this Code section shall prohibit the receipt by trustees of normal commissions and compensation for the usual services performed by trustees pursuant to law or pursuant to any fee agreement executed by the settlor.

(d) The purpose of this Code section is to enable additional compensation to be paid to trustees for business management and advisory services to corporations and business enterprises pursuant to contract, without the necessity of petitioning for extra compensation pursuant to Code Section 53-12-212.

History. — Code 1981, § 53-12-214, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Part 3

Resignation and Removal

53-12-220. Resignation of trustee.

(a) A trustee may resign:

(1) In the manner and under the circumstances described in the trust instrument;

(2) Upon at least 30 days' written notice to the qualified beneficiaries, the settlor, if living, and all cotrustees; or

(3) Upon a trustee's petition to the court.

(b) The petition to the court provided for in paragraph (3) of subsection (a) of this Code section shall be served upon all qualified beneficiaries. In approving a trustee's resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

(c) The resignation of a trustee shall not relieve such trustee from liability for any actions prior to the resignation except to the extent such trustee is relieved by the court in the appropriate proceeding or to the extent relieved by the trust instrument.

(d) If the resignation would create a vacancy required to be filled, then the trustee's resignation shall not be effective until the successor trustee accepts the trust and the resigning trustee shall remain liable for any actions until such acceptance, except as such liability may be limited by court order or the trust instrument.

History. — Code 1981, § 53-12-220, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2018, p. 262, § 17/HB 121.

Law reviews. — For article on the 2018 amendment of this Code section, see 35 Ga. St. U. L. Rev. 219 (2018).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-12-175 of the 1991 Trust Act are included in the annotations for this Code section.

Resignation ineffective when vacancy created that was required to be filled. — Pursuant to former O.C.G.A. § 53-12-175 (see O.C.G.A. § 53-12-220), when the resignation of a co-trustee created a vacancy that was required to be filled, the resignation was not effective; accordingly, service on the co-trustee after the purported resignation was effective, and with no answer having been filed, entry of a default judgment was proper. Hays v. Hamblen Family Irrevocable Trust (In re Hamblen), NO. 05-95215-JB, 2007 Bankr. LEXIS 2162 (Bankr. N.D. Ga. May 9, 2007) (decided under former O.C.G.A. § 53-12-175).

Cited in Ledbetter v. First State Bank & Trust Co., 85 F.3d 1537 (11th Cir. 1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 223 et seq.

C.J.S. — 90 C.J.S., Trusts, §§ 229 et seq., 246. 90A C.J.S., Trusts, § 383.

53-12-221. Removal of trustee.

(a) A trustee may be removed:

(1) In accordance with the provisions of the trust instrument; or

(2) Upon petition to the court by any interested person showing good cause.

(b) In the discretion of the court, in order to protect the trust property or the interests of any beneficiary, on its own motion or on motion of a cotrustee or other interested person, the court may compel the trustee whose removal is being sought to surrender trust property to a cotrustee, a receiver, or temporary trustee pending a decision on a petition for removal of a trustee or pending appellate review of such decision. To the extent the court deems necessary, the powers of the trustee also may be suspended.

History. — Code 1981, § 53-12-221, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Trust properly modified to remove trustees with consent of beneficiaries. — Trial court did not err in modifying the trust to remove the trustees under O.C.G.A. § 53-12-61(c)(1), which provided that a petition to modify "shall" be granted if certain conditions were met; allowing the beneficiaries to change the trustees by modifying the trust did not conflict with O.C.G.A. § 53-12-221(a), the trustee removal statute. Glass v. Faircloth, 354 Ga. App. 326, 840 S.E.2d 724 (2020), cert. denied, 2020 Ga. LEXIS 972 (Ga. 2020).

Removal of trustee proper. — Trial court did not err in granting a settlor summary judgment on his son's claim regarding the son's removal as a co-trustee because before his removal as

trustee, the son refused to sign legal documents after verbally promising to do so, he placed his girlfriend on the company payroll, and he threatened to sue his siblings; that evidence gave the settlor what the trust instrument described as "reasonable cause" to remove the son. McPherson v. McPherson, 307 Ga. App. 548, 705 S.E.2d 314 (2011).

ARTICLE 12

ACCOUNTING BY TRUSTEE

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 371 et seq.

Am. Jur. Pleading and Practice Forms. — Am. Jur. Pleading and Practice Forms, Trusts, § 248 et seq.

Am. Jur. Proof of Facts. — Trustee's Failure to Diversify Investments, 14 POF2d 253.

Trustee's Representation That It Possessed Expert Knowledge or Skill, 19 POF2d 45.

Self-Dealing by Trustee, 38 POF3d 279.

53-12-230. Interim accounting.

(a) At any time following 12 months from the date of acceptance of a trust, but not more frequently than once every 12 months, a trustee may petition the court to approve an interim accounting relieving the trustee from liability for the period covered by the interim accounting.

(b) The petition shall set forth:

(1) The name and address of the trustee;

(2) Any provisions of the trust relating to matters that will be covered by the interim accounting;

(3) The beneficiaries of the trust, specifying any beneficiary believed to be in need of a guardian ad litem;

(4) The period which the accounting covers;

(5) A statement of receipts and disbursements of the trust that have occurred since the trustee's acceptance of the trust or since the effective date of the last accounting;

(6) In a separate schedule, the principal on hand at the beginning of the accounting period and the status at that time of its investment; the investments received from the settlor and still held; additions to principal during the accounting period, with dates and sources of acquisition; investments collected, sold, or charged off during the accounting period, with the consequent loss or gain and whether credited to principal or income; investments made during the accounting period, with the date, source, and cost of each; deductions from the principal during the accounting period, with the date and purpose of each; and principal on hand at the end of the accounting

period, how invested, and the estimated market value of each investment;

(7) In a separate schedule, the income on hand at the beginning of the accounting period and in what form held; income received during the accounting period, when, and from what source; income paid out during the accounting period, when, to whom, and for what purpose; and income on hand at the end of the accounting period and how invested;

(8) A statement of the assets and liabilities of the trust as of the end of the accounting period; and

(9) Other information reasonably necessary to explain or understand the accounting.

(c) The petition shall be served on the beneficiaries of the trust and the surety on the trustee's bond, if any.

(d) Upon review of the petition and after considering any objections thereto and any evidence presented, the court may approve the trustee's interim accounting or enter judgment granting appropriate relief. If no objection to the petition is filed within the time allowed by law after service, or if the parties consent, the petition may be approved without notice, hearing, or further proceedings. The final judgment of the court shall be binding on all parties.

(e) Costs and expenses, including reasonable attorney's fees of the trustee, shall be taxed against the trust, unless otherwise directed by the court.

History. — Code 1981, § 53-12-230, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-231. Final accounting.

(a) If the trustee resigns, is removed, or dies or upon the termination of the trust, a beneficiary or the successor trustee may petition the court to require the trustee or the trustee's personal representative to appear before the court for a final accounting. Alternatively, the trustee or the trustee's personal representative may petition the court to approve a final accounting relieving the trustee from liability for the period covered by the final accounting. The settlement period shall begin from the acceptance of the trusteeship by the trustee or the end of the period covered by the last interim accounting.

(b) The petition shall set forth:

(1) The name and address of the trustee;

(2) The beneficiaries of the trust, specifying any beneficiary believed to be in need of a guardian ad litem;

(3) The period which the accounting covers; and

(4) If the petition is filed by the trustee or the trustee's personal representative, the petition shall also include the information required to be filed by trustees in conjunction with the approval of an interim accounting as set forth in subsection (b) of Code Section 53-12-230.

(c) The petition shall be served on the beneficiaries, the trustee, the trustee's personal representative, if any, and the surety on the trustee's bond, if any.

(d) Upon review of the trustee's final accounting and after considering any objections thereto and any evidence presented, the court may approve the final accounting or enter judgment granting appropriate relief. If no objection to the petition is filed within the time allowed by law after service, or if the parties consent, the petition may be approved without notice, hearing, or further proceedings. The final judgment of the court shall be binding on all parties.

(e) Costs and expenses, including reasonable attorney's fees of the trustee, shall be taxed against the trust, unless otherwise directed by the court.

History. — Code 1981, § 53-12-231, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-232. Equitable accounting.

Nothing in this article shall restrict the right of any party to seek an equitable accounting.

History. — Code 1981, § 53-12-232, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Cited in Myers v. Myers, 297 Ga. 490, 775 S.E.2d 145 (2015).

ARTICLE 13

TRUSTEES' DUTIES AND POWERS

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 331 et seq.

PART 1

DUTIES OF TRUSTEE

53-12-240. Duties generally.

(a) The duties contained in this part are in addition to and not in limitation of the common law duties of the trustee, except to the extent inconsistent therewith.

(b) Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its provisions and purposes.

History. — Code 1981, § 53-12-240, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Law reviews. — For article, "The Scope of Permissible Investments by Fiduciaries Under Georgia Law," see 19 Ga. St. B.J. 6 (1982).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 108-112, and former O.C.G.A. § 53-13-51 are included in the annotations for this Code section.

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Standing to bring suit. — In a class action brought by a beneficiary of a trust holding a participating unit in the common trust fund of a bank, alleging that the bank made imprudent investments which resulted in losses, the class members, i.e., beneficiaries of other participating trusts, had standing, having possibly suffered injury. The bank, which had an adverse interest in the litigation, was not required to bring suit against itself. Meyer v. Citizens & S. Nat'l Bank, 106 F.R.D. 356 (M.D. Ga. 1985) (decided under former O.C.G.A. § 53-13-51).

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required to dispose of trust property, under Georgia law, each trustee has the duty and is clothed with the authority necessary to protect the corpus of the trust. Smith v. Francis, 221 Ga. 260, 144 S.E.2d 439 (1965) (decided under former Code 1933, § 108-112).

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Cited in Mobley v. Phinizy, 42 Ga. App. 33, 155 S.E. 73 (1930); Fine v. Saul, 183 Ga. 309, 188 S.E. 439 (1936); Clayton v. First Nat'l Bank, 237 Ga. 604, 229 S.E.2d 346 (1976); Fox v. First Nat'l Bank, 145 Ga. App. 1, 243 S.E.2d 291 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 331 et seq.

C.J.S. — 90 C.J.S., Trusts, § 258.

ALR. — Care required of trustee or guardian with respect to retaining securities coming into his hands as assets of the estate, 77 A.L.R. 505; 112 A.L.R. 355.

Provisions of will or other trust instrument exempting trustee from or limiting his liability, 83 A.L.R. 616; 158 A.L.R. 276.

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Duty of trustee or other fiduciary in respect of existing life insurance policy, 150 A.L.R. 840.

Discretion given trustee respecting payment, application, or distribution of income or corpus as conditioning the gift itself, or as governing merely the time or method of permitting enjoyment, 172 A.L.R. 455.

Power of guardian representing unborn future interest holders to consent to invasion of trust corpus, 49 A.L.R.2d 1095.

Duty of trustees of charitable trust to furnish information and records to attorney general relating to trust administration, 86 A.L.R.2d 1375.

Validity and construction of trust provision authorizing trustee to purchase trust property, 39 A.L.R.3d 836.

Liability of executor, administrator, trustee, or his counsel, for interest, penalty, or extra taxes assessed against estate because of tax law violations, 47 A.L.R.3d 507.

Liability of testamentary trustee for failure to assert claim against executor of testator's estate for mistake resulting in overpayment of taxes, 68 A.L.R.3d 1265.

Absence of market therefor as justifying trustee's retention of unauthorized or nonlegal securities received from creator of trust, 88 A.L.R.3d 894.

Payment or distribution under invalid instruction as breach of trustee's duty, 6 A.L.R.4th 1196.

Right of trustee of land having interest therein to purchase on his own behalf in association with foreclosure by third-party lienor, in absence of express trust provision, 30 A.L.R.4th 732.

Liability of trustee for payments or conveyances under a trust subsequently held to be invalid, 77 A.L.R.4th 1177.

53-12-241. Duty of prudent administration.

(a) In administering a trust, the trustee shall exercise the judgment and care of a prudent person acting in a like capacity and familiar with such matters, considering the purposes, provisions, distribution requirements, and other circumstances of the trust.

(b) A trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in Article 16 of this chapter.

History. — Code 1981, § 53-12-241, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2020, p. 377, § 1-82/HB 865.

The 2020 amendment, effective January 1, 2021, designated the previously existing provisions as subsection (a) and added subsection (b).

JUDICIAL DECISIONS

Trustee's powers did not entitle trustee to ignore purpose of trust or commit waste. — Trial court erred in concluding that a widow's considerable powers of control over two trusts entitled her to summary judgment on two of the children's/beneficiaries' claims against the trust created for the purpose of supporting them during their lifetimes; she was required to diligently and in good faith ascertain whether they required support, and her powers over the assets did not entitle her to commit waste. Peterson v. Peterson, 303 Ga. 211, 811 S.E.2d 309 (2018).

Breach of trust properly found. — Trial court correctly ruled that a trustee breached the trustee's duty to faithfully administer a marital trust, and the trustee's alleged reliance on professional advice would not shield the trustee from potential liability for such breach of trust because under the plain language of the will, the trustee overreached the narrowly-tailored power to encroach upon the principal of the trust only for purposes related to the widow's welfare, not for a gift to a university. Hasty v. Castleberry, 293 Ga. 727, 749 S.E.2d 676 (2013).

Jury question as to whether duty breached. — Jury question was presented as to whether two trustees of their children's trusts acted against the interests of the beneficiaries (their children) in bad faith by amending a partnership agreement to concentrate all voting power in themselves to the exclusion of the beneficiaries, who otherwise would have become partners when they turned 45. Likewise, the trustees as partners owed duties to the trusts as partners in the partnership. Rollins v. Rollins, 338 Ga. App. 308, 790 S.E.2d 157 (2016).

53-12-242. Duty to inform as to existence of trust.

(a) Within 60 days after the date of creation of an irrevocable trust or of the date on which a revocable trust becomes irrevocable, the trustee shall notify the qualified beneficiaries of such trust of the existence of such trust and the name and mailing address of such trustee.

(b) All irrevocable trusts in existence on July 1, 2010, shall be deemed to have waived this provision unless the trust instrument says otherwise.

History. — Code 1981, § 53-12-242, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2018, p. 262, § 18/HB 121.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2010, "in existence on July 1, 2010," was substituted for "in existence on the effective date of this part" in subsection (b).

Law reviews. — For article on the 2018 amendment of this Code section, see 35 Ga. St. U. L. Rev. 219 (2018).

53-12-243. Duty to provide reports and accounts.

(a) On reasonable request by any qualified beneficiary, the trustee shall provide the qualified beneficiary with a report of information, to the extent relevant to that beneficiary's interest, about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of such trust, including the trust provisions that describe or affect such beneficiary's interest.

(b)(1) A trustee shall account at least annually, at the termination of the trust, and upon a change of trustees to each beneficiary of an irrevocable trust to whom income is required or authorized in the trustee's discretion to be distributed currently, and to any person who may revoke the trust. At the termination of the trust, the trustee shall also account to each remainder beneficiary. Upon a change of trustees, the trustee shall also account to the successor trustee.

(2) An accounting furnished to a beneficiary pursuant to paragraph (1) of this subsection shall contain a statement of receipts and disbursements of principal and income that have occurred during the last complete fiscal year of the trust or since the last accounting to that beneficiary and a statement of the assets and liabilities of the trust as of the end of the accounting period.

(c) A trustee shall not be required to report information or account to a beneficiary who has waived in writing the right to a report or accounting and has not withdrawn that waiver.

(d) Subsections (a) and (b) of this Code section and the common law duty of the trustee to keep the beneficiaries of the trust reasonably informed of the trust and its administration shall not apply to the extent that the provisions of the trust provide otherwise or the settlor of the trust directs otherwise in a writing delivered to the trustee.

(e) Nothing in this Code section shall affect the power of a court to require or excuse an accounting.

History. — Code 1981, § 53-12-243, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2018, p. 262, § 19/HB 121; Ga. L. 2020, p. 377, § 1-83/HB 865.

The 2020 amendment, effective January 1, 2021, deleted "qualified" preceding the first instance of "beneficiary" in paragraphs (b)(1) and (b)(2) and subsection (c); deleted the former last sentence in paragraph (b)(1), which read: "In full satisfaction of this obligation, the trustee may deliver the accounting to the guardian or conservator of any qualified beneficiary who is not sui juris."; and, in subsection (d), inserted "and the common law duty of the trustee to keep the beneficiaries of the trust reasonably informed of the trust and its administration", and substituted "provisions" for "terms".

Law reviews. — For article, "The Scope of Permissible Investments by Fiduciaries Under Georgia Law," see 19 Ga. St. B.J. 6 (1982). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 66 Mercer L. Rev. 231 (2014). For article on the 2018 amend-

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JUDICIAL DECISIONS

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Standing to bring suit. — In a class action brought by a beneficiary of a trust holding a participating unit in the common trust fund of a bank, alleging that the bank made imprudent investments which resulted in losses, the class members, i.e., beneficiaries of other participating trusts, had standing, having possibly suffered injury. The bank, which had an adverse interest in the litigation, was not required to bring suit against itself. Meyer v. Citizens & S. Nat'l Bank, 106 F.R.D. 356 (M.D. Ga. 1985) (decided under former O.C.G.A. § 53-13-51).

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While recognizing the general rule that the unified action of all the trustees is required to dispose of trust property, under Georgia law, each trustee has the duty and is clothed with the authority necessary to protect the corpus of the trust. Smith v. Francis, 221 Ga. 260, 144 S.E.2d 439 (1965) (decided under former Code 1933, § 108-112).

Failure to order accounting. — Appellate court erred by reversing a trial court and ordering that the trustees provide the beneficiaries of a family trust the accounting sought because the appellate court failed to give any consideration to the trial court's discretion to require or excuse an accounting. Rollins v. Rollins, 294 Ga. 711, 755 S.E.2d 727 (2014).

Suit against trustee governed by six year limitations period, not two year. — Because the letter to a trustee from the trustee's accountants was simply a form of general correspondence that did not contain the type of detailed information contemplated by the Georgia General Assembly for the letter to qualify as a report, the letter was not a report for purposes of the Trust Code, O.C.G.A. § 53-12-307; therefore, a beneficiary's cause of action against the trustee was not subject to the two-year statute of limitations but, rather, the six-year statute of limitations applied. Hasty v. Castleberry, 293 Ga. 727, 749 S.E.2d 676 (2013).

Account statement insufficient report to shorten statute of limitations. — Trust's account statement reflecting a sale of the principal asset of the trust was not a "report" because there was insufficient disclosure of the nature of the transaction to trigger the running of the shortened two-year limitation period under O.C.G.A. § 53-12-307(a). Smith v. SunTrust Bank, 325 Ga. App. 531, 754 S.E.2d 117 (2014).

Cited in Mobley v. Phinizy, 42 Ga. App. 33, 155 S.E. 73 (1930); Fine v. Saul, 183 Ga. 309, 188 S.E. 439 (1936); Clayton v. First Nat'l Bank, 237 Ga. 604, 229 S.E.2d 346 (1976); Fox v. First Nat'l Bank, 145 Ga. App. 1, 243 S.E.2d 291 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 331 et seq.

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C.J.S. — 90 C.J.S., Trusts, § 258.

ALR. — Care required of trustee or guardian with respect to retaining securities coming into his hands as assets of the estate, 77 A.L.R. 505; 112 A.L.R. 355.

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Control of discretion of trustee as to turning over entire principal of fund to beneficiary, 143 A.L.R. 467.

Duty of trustee or other fiduciary in respect of existing life insurance policy, 150 A.L.R. 840.

Discretion given trustee respecting payment, application, or distribution of income or corpus as conditioning the gift itself, or as governing merely the time or method of permitting enjoyment, 172 A.L.R. 455.

Power of guardian representing unborn future interest holders to consent to invasion of trust corpus, 49 A.L.R.2d 1095.

Duty of trustees of charitable trust to furnish information and records to attorney general relating to trust administration, 86 A.L.R.2d 1375.

Validity and construction of trust provision authorizing trustee to purchase trust property, 39 A.L.R.3d 836.

Liability of executor, administrator, trustee, or his counsel, for interest, penalty, or extra taxes assessed against estate because of tax law violations, 47 A.L.R.3d 507.

Liability of testamentary trustee for failure to assert claim against executor of testator's estate for mistake resulting in overpayment of taxes, 68 A.L.R.3d 1265.

Absence of market therefor as justifying trustee's retention of unauthorized or nonlegal securities received from creator of trust, 88 A.L.R.3d 894.

Payment or distribution under invalid instruction as breach of trustee's duty, 6 A.L.R.4th 1196.

53-12-244. Duty to distribute income.

A trustee shall distribute all net income derived from the trust at least annually.

History. — Code 1981, § 53-12-244, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Law reviews. — For article, "The Scope of Permissible Investments by Fiduciaries Under Georgia Law," see 19 Ga. St. B.J. 6 (1982).

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Absence of market therefor as justifying trustee's retention of unauthorized or nonlegal securities received from creator of trust, 88 A.L.R.3d 894.

Payment or distribution under invalid instruction as breach of trustee's duty, 6 A.L.R.4th 1196.

53-12-245. No duty to investigate resources.

A trustee shall not be under any duty to investigate the resources of any beneficiary when determining whether to distribute trust property to such beneficiary.

History. — Code 1981, § 53-12-245, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Resources of beneficiary not required to be considered. — In an appeal of an order granting a trustees' motion for summary judgment on a claim for breach of trust and breach of fiduciary duty, the court of appeals proceeded under the Revised Georgia Trust Code, O.C.G.A. § 53-12-1 et seq., as supplemented by the common law because even assuming that past distributions under the trust amounted to vested rights, the plaintiff could not show that the Revised Trust Code created any new trustees' obligations or impaired those rights in any relevant way; although the Revised Trust Code did not require a trustee to consider the resources of any beneficiary when determining whether to distribute trust property, O.C.G.A. § 53-12-245, the trust instrument affirmatively directed the trustees to do so. McPherson v. McPherson, 307 Ga. App. 548, 705 S.E.2d 314 (2011).

53-12-246. Duty to avoid conflict of interest.

(a) A trustee shall administer the trust solely in the interests of the beneficiaries.

(b) This Code section shall not preclude the following transactions, if fair to the beneficiaries:

(1) An agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;

(2) Payment of reasonable compensation to the trustee; or

(3) Performing and receiving reasonable compensation for performing services of a managerial, executive, or business advisory nature for a corporation or other business enterprise, where the trust estate owns an interest in the corporation or other business enterprise.

History. — Code 1981, § 53-12-246, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Dual role permitted. — O.C.G.A. § 53-12-246(b) expressly recognizes that trustees may act in a dual role when the trust estate owns an interest in a corpo-

ration or business enterprise, as long as it is fair to the beneficiaries. Rollins v. Rollins, 294 Ga. 711, 755 S.E.2d 727 (2014).

Sale of trust asset to a co-trustee through a straw man. — Because there were genuine issues as to whether trustees fraudulently concealed their breach of fiduciary duty in selling the principal trust asset to a co-trustee at a discount through a straw man in 1979, tolling the statute of limitations, and whether the beneficiaries exercised diligence in discovering the fraud, summary judgment was improper. Smith v. SunTrust Bank, 325 Ga. App. 531, 754 S.E.2d 117 (2014).

Making offer to distribute contingent on immunity violated trustee's fiduciary duty. — Trustee's offer to execute the mandatory duty to distribute trust property contingent on immunity from liability for trustee actions violated the trustee's fiduciary duties and was for the trustee's sole benefit and possibly to the detriment of the beneficiaries. Callaway v. Willard, 351 Ga. App. 1, 830 S.E.2d 464 (2019), cert. denied, No. S19C1589, 2020 Ga. LEXIS 165 (Ga. 2020).

No conflict of interest existed. — Trial court erred by awarding summary judgment to a beneficiary on the question of whether the trustee acted under a conflict of interest simply by serving as trustee of the marital trust while at the same time serving as co-chair of a university's capital campaign committee to which a gift was made from trust assets because the trustee did not stand to gain any tangible benefit solely by being co-chair of the committee while concurrently serving as trustee of the marital trust. Hasty v. Castleberry, 293 Ga. 727, 749 S.E.2d 676 (2013).

Trustee's/executor's powers did not entitle trustee to ignore purpose of trust or commit waste. — Trial court erred in concluding that a widow's considerable powers of control over two testamentary trusts as trustee and executor entitled her to summary judgment on two of the children's/beneficiaries' claims against the trust created for the purpose of supporting them during their lifetimes; she was required to diligently and in good faith ascertain whether they required support, and her powers over the assets did not entitle her to commit waste. Peterson v. Peterson, 303 Ga. 211, 811 S.E.2d 309 (2018).

Fiduciary duty of co-trustee breached. — Trial court erred by finding that the decedent's widow, who was also a co-trustee, did not owe the appellants, two sons of the decedent and the widow, a fiduciary duty when the widow exercised power of appointment under both the marital and by-pass trusts because the court found no law excusing the widow from the widow's fiduciary duty under the trust, even if acting solely as a beneficiary under the trust, and prior appellate decisions had found that the primary purpose of the by-pass trust was to support both the widow and the decedent's children. Peterson v. Peterson, 352 Ga. App. 675, 835 S.E.2d 651 (2019).

Jury question as to whether duty breached. — Jury question was presented as to whether two trustees of their children's trusts acted against the interests of the beneficiaries (their children) in bad faith by amending a partnership agreement to concentrate all voting power in themselves to the exclusion of the beneficiaries, who otherwise would have become partners when they turned 45. Likewise, the trustees as partners owed duties to the trusts as partners in the partnership. Rollins v. Rollins, 338 Ga. App. 308, 790 S.E.2d 157 (2016).

53-12-247. Duty of impartiality.

Except to the extent that the governing trust instrument clearly manifests an intention that the trustee shall or may favor one or more of the beneficiaries, a trustee shall administer a trust impartially based on what is fair and reasonable to all of the beneficiaries and with due

regard to the respective interests of income beneficiaries and remainder beneficiaries.

History. — Code 1981, § 53-12-247, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Jury question as to whether duty breached. — Jury question was presented as to whether two trustees of their children's trusts acted against the interests of the beneficiaries (their children) in bad faith by amending a partnership agreement to concentrate all voting power in themselves to the exclusion of the beneficiaries, who otherwise would have become partners when they turned 45. Likewise, the trustees as partners owed duties to the trusts as partners in the partnership. Rollins v. Rollins, 338 Ga. App. 308, 790 S.E.2d 157 (2016).

Part 2

Trustees' Powers

Law reviews. — For annual survey on wills, trusts, guardianships, and fiduciary administration, see 66 Mercer L. Rev. 231 (2014).

COMMENT

This article preserves a collection of statutory powers formerly codified in Title 53, Chapter 13, Article 2 (OCGA § 53-13-50 *et seq.*). Virtually all trusts either include extensive express powers or incorporate by reference the powers set forth in Article 11, *supra.* The powers set forth in this chapter are relevant only to those rare trusts that fail to do so.

53-12-260. Discretionary powers.

Notwithstanding the breadth of discretion granted to a trustee in the trust instrument, including the use of such terms as "absolute," "sole," or "uncontrolled," the trustee shall exercise a discretionary power in good faith.

History. — Code 1981, § 53-12-260, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Law reviews. — For annual survey on wills, trusts, guardianships, and fiduciary administration, see 64 Mercer L. Rev. 325 (2012).

JUDICIAL DECISIONS

No evidence of bad faith. — Trial court did not err when the court granted the trustees summary judgment on the son's claims for breach of trust and breach of fiduciary duty because there was no evidence of bad faith, and, therefore, judicial intervention into the trustees' consistent decisions to treat all beneficiaries, including themselves, equally in the form of per stirpes distributions was not authorized; the son produced no evidence that the trustees ignored the beneficiaries' means of support, but even if the trustees had done so, the trustees could, in the

trustees' discretion, exclude the beneficiaries' resources from their consideration on the basis of both: (i) the trust instrument's grant to distribute either equal or unequal amounts to each of the settlor's children; and (ii) the trustees' personal knowledge concerning the settlor's intended treatment of the children. McPherson v. McPherson, 307 Ga. App. 548, 705 S.E.2d 314 (2011).

Trustee's/executor's powers did not entitle trustee to ignore purpose of trust or commit waste. — Trial court erred in concluding that a widow's considerable powers of control over two testamentary trusts as trustee and executor entitled her to summary judgment on two of the children's/beneficiaries' claims against the trust created for the purpose of supporting them during their lifetimes; she was required to diligently and in good faith ascertain whether they required support, and her powers over the assets did not entitle her to commit waste. Peterson v. Peterson, 303 Ga. 211, 811 S.E.2d 309 (2018).

Jury instruction on standard of care. — In a breach of trust action, the trial court did not apply an incorrect standard of care in that a co-trustee could only be held liable if the co-trustee failed to act in good faith because if there was any error, the error was created by the co-trustee since the co-trustee consented to the instructions given and failed to request a charge that clearly set forth what the co-trustee asserted to be the proper standard for acts performed with absolute discretion. Reliance Trust Co. v. Candler, 294 Ga. 15, 751 S.E.2d 47 (2013).

Jury question as to whether duty of good faith breached. — Jury question was presented as to whether two trustees of their children's trusts acted against the interests of the beneficiaries (their children) in bad faith by amending a partnership agreement to concentrate all voting power in themselves to the exclusion of the beneficiaries, who otherwise would have become partners when they turned 45. Likewise, the trustees as partners owed duties to the trusts as partners in the partnership. Rollins v. Rollins, 338 Ga. App. 308, 790 S.E.2d 157 (2016).

53-12-261. Powers of trustee; limitation based on fiduciary duties.

(a) A trustee of an express trust, without court authorization, shall be authorized to exercise:

(1) Powers conferred by the trust instrument; and

(2) Except as limited by the trust instrument:

(A) All powers over the trust property that an unmarried competent owner has over individually owned property;

(B) Any other powers appropriate to achieve the proper investment, management, and distribution of the trust property; and

(C) Any other powers conferred by this chapter.

(b) Without limiting the authority conferred by subsection (a) of this Code section, a trustee of an express trust, without court authorization, shall be authorized:

(1) To sell, exchange, grant options upon, partition, or otherwise dispose of any property or interest therein which the fiduciary may hold from time to time, at public or private sale or otherwise, with or without warranties or representations, upon such terms and condi-

tions, including credit, and for such consideration as the fiduciary deems advisable and to transfer and convey the property or interest therein which is at the disposal of the fiduciary, in fee simple absolute or otherwise, free of all trust. The party dealing with the fiduciary shall not be under a duty to follow the proceeds or other consideration received;

(2) To invest and reinvest in any property which the fiduciary deems advisable, including, but not limited to, common or preferred stocks, bonds, debentures, notes, mortgages, or other securities, in or outside the United States; insurance contracts on the life of any beneficiary or of any person in whom a beneficiary has an insurable interest or in annuity contracts for any beneficiary; any real or personal property; investment trusts, including the securities of or other interests in any open-end or closed-end management investment company or investment trust registered under the federal Investment Company Act of 1940, 15 U.S.C. Section 80a-1, et seq.; and participations in common trust funds;

(3) To the extent and upon such terms and conditions and for such periods of time as the fiduciary shall deem necessary or advisable, to continue or participate in the operation of any business or other enterprise, whatever its form or organization, including, but not limited to, the power:

(A) To effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise;

(B) To dispose of any interest therein or acquire the interest of others therein;

(C) To contribute or invest additional capital thereto or to lend money thereto in any such case upon such terms and conditions as the fiduciary shall approve from time to time; and

(D) To determine whether the liabilities incurred in the conduct of the business are to be chargeable solely to the part of the property held by the fiduciary set aside for use in the business or to the property held by the fiduciary as a whole.

In all cases in which the fiduciary is required to file accounts in any court or in any other public office, it shall not be necessary to itemize receipts, disbursements, and distributions of property; but it shall be sufficient for the fiduciary to show in the account a single figure or consolidation of figures, and the fiduciary shall be permitted to account for money and property received from the business and any payments made to the business in lump sum without itemization;

(4) To form a corporation or other entity and to transfer, assign, and convey to the corporation or entity all or any part of the property

held by the fiduciary in exchange for the stock, securities, or obligations of or other interests in any such corporation or entity and to continue to hold the stock, securities, obligations, and interests;

(5) To continue any farming operation and to do any and all things deemed advisable by the fiduciary in the management and maintenance of the farm and the production and marketing of crops and dairy, poultry, livestock, orchard, and forest products, including, but not limited to, the power:

(A) To operate the farm with hired labor, tenants, or sharecroppers;

(B) To lease or rent the farm for cash or for a share of the crops;

(C) To purchase or otherwise acquire farm machinery, equipment, and livestock;

(D) To construct, repair, and improve farm buildings of all kinds needed, in the fiduciary's judgment, for the operation of the farm;

(E) To make or obtain loans or advances at the prevailing rate or rates of interest for farm purposes, such as for production, harvesting, or marketing; or for the construction, repair, or improvement of farm buildings; or for the purchase of farm machinery, equipment, or livestock;

(F) To employ approved soil conservation practices, in order to conserve, improve, and maintain the fertility and productivity of the soil;

(G) To protect, manage, and improve the timber and forest on the farm and to sell the timber and forest products when it is to the best interest of the persons to whom the fiduciary owes a duty of care;

(H) To ditch, dam, and drain damp or wet fields and areas of the farm when and where needed;

(I) To engage in the production of livestock, poultry, or dairy products and to construct such fences and buildings and to plant pastures and crops as may be necessary to carry on such operations;

(J) To market the products of the farm; and

(K) In general, to employ good husbandry in the farming operation;

(6) To manage real property:

(A) To improve, manage, protect, and subdivide any real property;

(B) To dedicate, or withdraw from dedication, parks, streets, highways, or alleys;

(C) To terminate any subdivision or part thereof;

(D) To borrow money for the purposes authorized by this paragraph for the periods of time and upon the terms and conditions as to rates, maturities, and renewals as the fiduciary shall deem advisable and to mortgage or otherwise encumber the property or part thereof, whether in possession or reversion;

(E) To lease the property or part thereof, the lease to commence at the present or in the future, upon the terms and conditions, including options to renew or purchase, and for the period or periods of time as the fiduciary deems advisable even though the period or periods may extend beyond the duration of the estate or trust;

(F) To make gravel, sand, oil, gas, and other mineral leases, contracts, licenses, conveyances, or grants of every nature and kind which are lawful in the jurisdiction in which the property lies;

(G) To manage and improve timber and forests on the property, to sell the timber and forest products, and to make grants, leases, and contracts with respect thereto;

(H) To modify, renew, or extend leases;

(I) To employ agents to rent and collect rents;

(J) To create easements and to release, convey, or assign any right, title, or interest with respect to any easement on the property or part thereof;

(K) To erect, repair, or renovate any building or other improvement on the property and to remove or demolish any building or other improvement in whole or in part; and

(L) To deal with the property and every part thereof in all other ways and for such other purposes or considerations as it would be lawful for any person owning the same to deal with such property either in the same or in different ways from those specified elsewhere in this paragraph;

(7) To lease personal property held by the fiduciary or part thereof, the lease to commence at the present or in the future, upon the terms and conditions, including options to renew or purchase, and for the period or periods of time as the fiduciary deems advisable even though the period or periods may extend beyond the duration of the estate or trust;

(8)(A) To pay debts, taxes, assessments, compensation of the fiduciary, and other expenses incurred in the collection, care,

administration, and protection of the property held by the fiduciary; and

(B) To pay from the estate or trust all charges that the fiduciary deems necessary or appropriate to comply with laws regulating environmental conditions and to remedy or ameliorate any such conditions which the fiduciary determines adversely affect the property held by the fiduciary or otherwise are liabilities of the estate or trust and to apportion all such charges among the several bequests and trusts and the interests of the beneficiaries in such manner as the fiduciary deems fair, prudent, and equitable under the circumstances;

(9) To receive additional property from any source and to administer the additional property as a portion of the appropriate estate or trust under the management of the fiduciary, provided that the fiduciary shall not be required to receive the property without the fiduciary's consent;

(10) In dealing with one or more fiduciaries of the estate or any trust created by the decedent or the settlor or any spouse or child of the decedent or settlor and irrespective of whether the fiduciary is a personal representative or trustee of such other estate or trust:

(A) To sell real or personal property of the estate or trust to such fiduciary or to exchange such property with such fiduciary upon such terms and conditions as to sale price, terms of payment, and security as shall seem advisable to the fiduciary; and the fiduciary shall be under no duty to follow the proceeds of any such sale; and

(B) To borrow money from the estate or trust for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and securities as the fiduciary shall deem advisable for the purpose of paying debts of the decedent or settlor, taxes, the costs of the administration of the estate or trust, and like charges against the estate or trust or any part thereof or of discharging any other liabilities of the estate or trust and to mortgage, pledge, or otherwise encumber such portion of the estate or trust as may be required to secure the loan and to renew existing loans;

(11) To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the fiduciary shall deem advisable for the purpose of paying debts, taxes, or other charges against the estate or trust or any part thereof and to mortgage, pledge, or otherwise encumber such portion of the property held by the fiduciary as may be required to secure the loan and to renew existing loans either as maker or endorser;

(12) To make loans out of the property held by the fiduciary, including loans to a beneficiary on terms and conditions the fiduciary

considers to be fair and reasonable under the circumstances, and the fiduciary has a lien on future distributions for repayment of those loans;

(13) To vote shares of stock or other ownership interests held by the fiduciary, in person or by proxy, with or without power of substitution;

(14) To hold a security in the name of a nominee or in other form without disclosure of the fiduciary relationship, so that title to the security may pass by delivery; but the fiduciary shall be liable for any act of the nominee in connection with the security so held;

(15) To exercise all options, rights, and privileges to convert stocks, bonds, debentures, notes, mortgages, or other property into other stocks, bonds, debentures, notes, mortgages, or other property; to subscribe for other or additional stocks, bonds, debentures, notes, mortgages, or other property; and to hold the stocks, bonds, debentures, notes, mortgages, or other property so acquired as investments of the estate or trust so long as the fiduciary shall deem advisable;

(16) To unite with other owners of property similar to any which may be held at any time by the fiduciary, in carrying out any plan for the consolidation or merger, dissolution or liquidation, foreclosure, lease, or sale of the property or the incorporation or reincorporation, reorganization, or readjustment of the capital or financial structure of any corporation, company, or association the securities of which may form any portion of an estate or trust; to become and serve as a member of a shareholders' or bondholders' protective committee; to deposit securities in accordance with any plan agreed upon; to pay any assessments, expenses, or sums of money that may be required for the protection or furtherance of the interest of the beneficiaries to whom the fiduciary owes a duty of care with reference to any such plan; and to receive as investments of the estate or trust any securities issued as a result of the execution of such plan;

(17) To adjust the interest rate from time to time on any obligation, whether secured or unsecured, constituting a part of the estate or trust;

(18) To continue any obligation, whether secured or unsecured, upon and after maturity, with or without renewal or extension, upon such terms as the fiduciary shall deem advisable, without regard to the value of the security, if any, at the time of the continuance;

(19) To foreclose, as an incident to the collection of any bond, note, or other obligation, any deed to secure debt or any mortgage, deed of trust, or other lien securing the bond, note, or other obligation and to bid in the property at the foreclosure sale or to acquire the property

by deed from the mortgagor or obligor without foreclosure; and to retain the property so bid in or taken over without foreclosure;

(20) To carry such insurance coverage as the fiduciary shall deem advisable;

(21) To collect, receive, and issue receipts for rents, issues, profits, and income of the estate or trust;

(22)(A) To compromise, adjust, mediate, arbitrate, or otherwise deal with and settle claims involving the fiduciary or the property held by the fiduciary;

(B) To compromise, adjust, mediate, arbitrate, bring or defend actions on, abandon, or otherwise deal with and settle claims in favor of or against the estate or trust as the fiduciary shall deem advisable; the fiduciary's decision shall be conclusive between the fiduciary and the beneficiaries to whom the fiduciary owes a duty of care and the person against or for whom the claim is asserted, in the absence of fraud by such persons and, in the absence of fraud, bad faith, or gross negligence of the fiduciary, shall be conclusive between the fiduciary and the beneficiaries to whom the fiduciary owes a duty of care; and

(C) To compromise all debts, the collection of which are doubtful, belonging to the estate or trust when such settlements will advance the interests of those represented;

(23) To employ and compensate, out of income or principal or both and in such proportion as the fiduciary shall deem advisable, persons deemed by the fiduciary needful to advise or assist in the administration of the estate or trust, including, but not limited to, agents, accountants, brokers, attorneys at law, attorneys in fact, investment brokers, rental agents, realtors, appraisers, and tax specialists; and to do so without liability for any neglect, omission, misconduct, or default of any such agent or representative selected and retained with due care on the part of the fiduciary; provided, however, that, if an attorney in fact is appointed by a power of attorney to which Chapter 6B of Title 10 is applicable under Code Section 10-6B-81, the exercise of the fiduciary powers of the trustee by the attorney in fact shall be subject to Code Section 10-6B-40;

(24) To acquire, receive, hold, and retain undivided the principal of several trusts created by a single trust instrument until division shall become necessary in order to make distributions; to hold, manage, invest, reinvest, and account for the several shares or parts of shares by appropriate entries in the fiduciary's books of account and to allocate to each share or part of share its proportionate part of all receipts and expenses; provided, however, that this paragraph shall

not defer the vesting in possession of any share or part of share of the trust;

(25) To set up proper and reasonable reserves for taxes, assessments, insurance premiums, depreciation, obsolescence, amortization, depletion of mineral or timber properties, repairs, improvements, and general maintenance of buildings or other property out of rents, profits, or other income received;

(26) To value property held by the fiduciary and to distribute such property in cash or in kind, or partly in cash and partly in kind, in divided or undivided interests, as the fiduciary finds to be most practical and in the best interest of the distributees, the fiduciary being able to distribute types of assets differently among the distributees;

(27) To transfer money or other property distributable to a beneficiary who is under age 21, an adult for whom a guardian or conservator has been appointed, or an adult who the fiduciary reasonably believes is incapacitated by distributing such money or property directly to the beneficiary or applying it for the beneficiary's benefit, or by:

(A) Distributing it to the beneficiary's conservator or, if the beneficiary does not have a conservator, the beneficiary's guardian;

(B) Distributing it to the beneficiary's custodian under "The Georgia Transfers to Minors Act" or similar state law and, for that purpose, creating a custodianship and designating a custodian;

(C) Distributing it to the beneficiary's custodial trustee under the Uniform Custodial Trust Act as enacted in another state and, for that purpose, creating a custodial trust; or

(D) Distributing it to any other person, whether or not appointed guardian or conservator by any court, who shall, in fact, have the care and custody of the person of the beneficiary.

The fiduciary shall not be under any duty to see to the application of the distributions so made if the fiduciary exercised due care in the selection of the person, including the beneficiary, to whom the payments were made; and the receipt of the person shall be full acquittance to the fiduciary;

(28) To determine:

(A) What is principal and what is income of any estate or trust and to allocate or apportion receipts and expenses, as between principal and income, in the exercise of the fiduciary's discretion and, by way of illustration and not limitation of the fiduciary's

discretion, to charge premiums on securities purchased at a premium against principal or income or partly against each;

(B) Whether to apply stock dividends and other noncash dividends to income or principal or to apportion them as the fiduciary shall deem advisable; and

(C) What expenses, costs, and taxes, other than estate, inheritance, and succession taxes and other governmental charges, shall be charged against principal or income or apportioned between principal and income and in what proportions; and

(29) To make, modify, and execute contracts and other instruments, under seal or otherwise, as the fiduciary deems advisable.

(c) The exercise of a power shall be subject to the fiduciary duties prescribed by this title.

(d) If a testator incorporates by reference into a will or a probate court grants to a personal representative any or all of the powers contained in this Code section, then:

(1) As used in this Code section, the term:

(A) "Beneficiary" includes a distributee of the estate;

(B) "Trust" includes the estate held by the personal representative; and

(C) "Trustee" or "fiduciary" includes the personal representative; and

(2) A conferral upon a personal representative of the powers provided by paragraph (1) of subsection (b) of this Code section shall not authorize such personal representative to bind the estate by any warranty in any conveyance or contract in violation of subsection (a) of Code Section 53-8-14.

History. — Code 1981, § 53-12-261, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 551, § 12/SB 134; Ga. L. 2011, p. 752, § 53/HB 142; Ga. L. 2018, p. 262, § 20/HB 121; Ga. L. 2020, p. 377, § 1-84/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (b), in (b)(23), substituted "any such agent or representative" for "the agent or representative, provided such person was" and added the proviso at the end, added "and" at the end of subparagraph (b)(28(C), deleted "; and" at the end of paragraph (b)(29), and deleted former paragraph (b)(30) which read: "To serve without making and filing inventory and appraisement, without filing any annual or other returns or reports to any court, and without giving bond; but a personal representative shall furnish to the income beneficiaries, at least annually, a statement of receipts and disbursements"; in subsection (c), substituted "title" for "chapter"; and, in subsection (d), inserted "testator incorporates by reference into a will or a", inserted "or all", substituted ": (1) As" for "as", inserted a comma preceding "the term", redesignated former paragraph (d)(1) through (d)(3) as subparagraphs (d)(1)(A) through

(d)(1)(C), added "; and" to the end of subparagraph (d)(1)(C), and added paragraph (d)(2).

Law reviews. — For article on the 2018 amendment of this Code section, see 35 Ga. St. U. L. Rev. 219 (2018). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 70 Mercer L. Rev. 275 (2018).

For note, "Trade Secrets and Confidential Information Under Georgia Law," see 19 Ga. L. Rev. 623 (1984).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-12-232 of the 1991 Trust Act are included in the annotations for this Code section.

No excuse from fiduciary duties. — Even if a will granted expanded powers to co-executors, the co-executors were not excused from their fiduciary duties. Bloodworth v. Bloodworth, 260 Ga. App. 466, 579 S.E.2d 858 (2003) (decided under former O.C.G.A. § 53-12-232).

Trustee could encumber trust corpus. — Pursuant to former O.C.G.A. § 53-12-232 (see O.C.G.A. § 53-12-261), a trustee was permitted to encumber trust property, which consisted of the marital residence, up to 30% of its equity, because this permitted the widow to live in the marital residence rent-free and provided funds to pay expenses of the residence and the trustee as desired by the clear terms of the decedent's will. Martin v. Martin, 286 Ga. 69, 685 S.E.2d 288 (2009) (decided under former O.C.G.A. § 53-12-232).

Estate administrator had right to inspect. — Order granting an estate administrator of a deceased shareholder the right to inspect the defendant's corporate books and denying the defendant's motions to compel and stay pending arbitration was affirmed because the statutes governing the transfer of stock to the estate vested ownership of the shares in the administrator of the estate and the probate court's order granted the adminstrator trustee's powers over those shares. Regal Nissan, Inc. v. Scott, 348 Ga. App. 91, 821 S.E.2d 561 (2018).

No authority existed for administratrix to sign arbitration agreement on behalf of disabled child. — Order compelling arbitration was reversed because the administratrix of an adult child, who was an incapacitated person, had no authority to sign the arbitration agreement as the child did not personally assent and there was no evidence that the administratrix had actual authority as there existed no power of attorney or any other document authorizing the administratrix to sign the arbitration agreement or to take any action on the child's behalf. Lynn v. Lowndes County Health Servs., LLC, 354 Ga. App. 242, 840 S.E.2d 623 (2020), cert. denied, 2020 Ga. LEXIS 712 (Ga. 2020).

Removal for cause upheld. — Probate court order removing an executor for cause was affirmed because the executor violated their fiduciary duty in numerous ways by failing to dissolve the estate business, using estate property and funds for their own benefit and to pay personal bills, overpaid executor's fees, and had a conflict of interest by continuing to operate the business despite the estate losing money but personally benefitting by using the business property rent free. Myers v. Myers, 297 Ga. 490, 775 S.E.2d 145 (2015).

Cited in Ray v. Nat'l Health Investors, Inc., 280 Ga. App. 44, 633 S.E.2d 388 (2006).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 108-1204, are included in the annotations for this Code section.

Power to vote shares not appearing in trust instrument. — Power to vote shares may be granted to trustees without the matter appearing affirmatively in the trust instrument. 1981 Op. Att'y Gen. No. 81-92 (decided under former Code 1933, § 108-1204).

RESEARCH REFERENCES

ALR. — Implication of right of life tenant to entrench upon or dispose of corpus from language relating to the extent of his dominion over the corpus, or the beneficial purpose of the provision for the life tenant, 31 A.L.R.3d 169.

Language of will or other trust instrument as implying right to invade principal on behalf of life beneficiary, 31 A.L.R.3d 309.

Propriety of considering beneficiary's other means under trust provision authorizing invasion of principal for beneficiary's support, 41 A.L.R.3d 255.

53-12-262. Powers of corporate fiduciaries.

A corporate fiduciary, without authorization by the court, may exercise the power:

(1) To retain stock or other securities of its own issue received on the creation of the trust or later contributed to the trust, including the securities into which the securities originally received or contributed may be converted or which may be derived therefrom as a result of merger, consolidation, stock dividends, splits, liquidations, and similar procedures. The corporate fiduciary may exercise by purchase or otherwise any rights, warrants, or conversion features attaching to any such securities. The authority described in this paragraph shall:

(A) Apply to the exchange or conversion of stock or securities of the corporate fiduciary's own issue, whether or not any new stock or securities received in exchange therefor are substantially equivalent to those originally held;

(B) Apply to the continued retention of all new stock and securities resulting from merger, consolidation, stock dividends, splits, liquidations, and similar procedures and received by virtue of such conversion or exchange of stock or securities of the corporate fiduciary's own issue, whether or not the new stock or securities are substantially equivalent to those originally received by the fiduciary;

(C) Have reference, inter alia, to the exchange of such stock or securities for stock or securities of any holding company which owns stock or other interests in one or more other corporations, including the corporate fiduciary, whether the holding company is newly formed or already existing and whether or not any of the corporations own assets identical or similar to the assets of or carry on a business identical or similar to the corporation whose stock or securities were previously received by the fiduciary and the continued retention of stock or securities, or both, of the holding company; and

(D) Apply regardless of whether any of the corporations have officers, directors, employees, agents, or trustees in common with

the corporation whose stock or securities were previously received by the fiduciary; and

(2) To borrow money from its own banking department for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the fiduciary shall deem advisable for the purpose of paying debts, taxes, or other charges against the estate or any trust or any part thereof, and to mortgage, pledge, or otherwise encumber such portion of the estate or any trust as may be required to secure the loan or loans; and to renew existing loans either as maker or endorser.

History. — Code 1981, § 53-12-262, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Law reviews. — For note, "Trade Secrets and Confidential Information Under Georgia Law," see 19 Ga. L. Rev. 623 (1984).

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Language of will or other trust instrument as implying right to invade principal on behalf of life beneficiary, 31 A.L.R.3d 309.

Propriety of considering beneficiary's other means under trust provision authorizing invasion of principal for beneficiary's support, 41 A.L.R.3d 255.

53-12-263. Incorporation of powers by reference.

(a) By an expressed intention of the testator or settlor contained in a will or in a trust instrument in writing whereby an express trust is created, any or all of the powers or any portion thereof enumerated in this part, as they exist at the time of the signing of the will by the testator or at the time of the signing by the first settlor who signs the trust instrument, may be, by appropriate reference made thereto, incorporated in the will or other written instrument with the same effect as though such language were set forth verbatim in the trust instrument.

(b) At any time after the execution of a revocable trust, the settlor or anyone who is authorized by the trust instrument to modify the trust may incorporate any or all of the powers or any portion thereof enumerated in this part, as they exist at the time of the incorporation.

(c) Incorporation of one or more of the powers contained in this part, by reference to the appropriate portion of Code Section 53-12-261, shall be in addition to and not in limitation of the common-law or statutory powers of the fiduciary.

(d)(1) A provision in any will or trust instrument which incorporates powers by citation to Georgia Laws 1973, page 846; Code 1933, Section 108-1204 (Harrison); former Code Section 53-12-232 or 53-15-3; or Code Section 53-12-261, which were in effect at the time the trust was created and which was valid under the law in existence at the time the will was signed by the testator or at the time of the signing by the first settlor who signed the trust instrument shall be effective notwithstanding the subsequent repeal or amendment of such statute.

(2) A provision in any will or trust instrument which was signed by the testator or by the first settlor to sign after June 30, 1991, but before July 1, 1992, and which incorporates powers by citation to former Code Section 53-15-3 in effect on the date of such signing shall be deemed to mean and refer to the corresponding powers contained in former Code Section 53-12-232.

(e) If any or all of the powers contained in this part are incorporated by reference into a will by a testator or granted to a personal representative by a probate court, then:

(1) As used in this part, the term:

(A) "Beneficiary" includes a distributee of the estate.

(B) "Trust" includes the estate held by the personal representative; and

(C) "Trustee" or "fiduciary" includes the personal representative; and

(2) A conferral upon a personal representative of the powers provided by paragraph (1) of subsection (b) of Code Section 53-12-261 or by the corresponding provision of any statute incorporated pursuant to subsection (d) of this Code section shall not authorize such personal representative to bind the estate by any warranty in any conveyance or contract in violation of subsection (a) of Code Section 53-8-14.

History. — Code 1981, § 53-12-263, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 551, § 13/SB 134; Ga. L. 2011, p. 752, § 53/HB 142; Ga. L. 2018, p. 262, § 21/HB 121; Ga. L. 2020, p. 377, § 1-85/HB 865.

The 2020 amendment, effective January 1, 2021, substituted "53-12-261" for "15-12-261" in paragraph (d)(1); and, in subsection (e), substituted "or granted to a personal representative by a probate court, then" for ", then as used in this part the term", redesignated former paragraphs (e)(1) through (e)(3) as subparagraphs (e)(1)(A) thru (e)(1)(C), inserted "As used in this part, the term:" at the beginning of paragraph (e)(1), added "; and" at the end of subparagraph (e)(1)(C), and added paragraph (e)(2).

Law reviews. — For article on the 2018 amendment of this Code section, see 35 Ga. St. U. L. Rev. 219 (2018).

RESEARCH REFERENCES

ALR. — Construction and operation of will or trust provision appointing advisors to trustee or executor, 56 A.L.R.3d 1249.

53-12-264. Granting of powers by qualified beneficiaries.

The qualified beneficiaries of a trust that omits any of the powers in Code Section 53-12-261 may by unanimous consent authorize but not require the court to grant to the trustee those powers.

History. — Code 1981, § 53-12-264, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2018, p. 262, § 22/HB 121.

Law reviews. — For article on the 2018 amendment of this Code section, see 35 Ga. St. U. L. Rev. 219 (2018).

PART 3

TRUSTEE AS BENEFICIARY

53-12-270. Exercise of power by trustee who is also a beneficiary.

(a) Subject to subsection (c) of this Code section, and unless the trust provisions expressly indicate that a rule in this subsection shall not apply:

(1) A person other than a settlor who is a beneficiary and trustee of a trust that confers on such trustee a power to make discretionary distributions to or for such trustee's personal benefit may exercise such power only in accordance with an ascertainable standard; and

(2) A trustee shall not exercise a power to make discretionary distributions to satisfy a legal obligation of support that such trustee personally owes another person.

(b) A power whose exercise is limited or prohibited by subsection (a) of this Code section may be exercised by a majority of the remaining trustees whose exercise of such power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

(c) Subsection (a) of this Code section shall not apply to:

(1) A power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in Section 2056(b)(5) or 2523(e) of the federal Internal Revenue Code of 1986, was previously allowed;

(2) Any trust during any period that the trust may be revoked or amended by its settlor; or

(3) A trust if contributions to such trust qualify for the annual exclusion under Section 2503(c) of the federal Internal Revenue Code of 1986.

History. — Code 1981, § 53-12-270, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Part 4

Certification of Trusts

53-12-280. Certification of trust by trustee.

(a) The trustee may present a certification of trust to any person other than a beneficiary in lieu of providing a copy of the trust instrument to establish the existence of the trust provisions.

(b) The certification of trust provided for in subsection (a) of this Code section shall contain some or all of the following information:

(1) That the trust exists and the date of the trust and any amendments;

(2) The identity of each settlor;

(3) The identity and address of each current trustee and, if more than one, the number and identity of those required to exercise the powers of the trustee;

(4) The relevant powers of the trustee and any restrictions or limitations on those powers;

(5) The revocability or irrevocability of the trust;

(6) How trust property should be titled;

(7) Except as specifically disclosed in the certification, that the transaction at issue requires no consent or action by any person other than the certifying trustee; and

(8) Such other information as the trustee deems appropriate.

(c) A certification of trust:

(1) Shall be signed by each trustee;

(2) Shall state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification to be incorrect; and

(3) Need not contain the dispositive provisions of the trust.

(d) The recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and any amendments that designate the trustee and confer upon the trustee the power to act in the pending transaction.

(e) A person who acts in reliance upon the certification of trust without knowledge that any information therein is incorrect shall not be liable to any person for so acting and may assume without inquiry that the information is correct.

(f) A person who in good faith enters into a transaction in reliance upon the certification of trust may enforce the transaction as if the information in the certification were correct.

(g) A person making a demand for the trust instrument in addition to a certification of trust or excerpts shall be liable for damages, including court costs and attorney's fees, if the court determines that such demand was not made in good faith.

(h) This Code section shall not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

(i) A certification of trust in recordable form may be recorded in the office of the clerk of superior court.

History. — Code 1981, § 53-12-280, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 752, § 53/HB 142.

Part 5

Registration and Deposit of Securities

COMMENT

This article was carried forward. It formerly was codified at OCGA §§ 53-13-79 through 53-13-81.

53-12-290. How securities to be registered by corporate trustee.

Whenever a bank or trust company is duly authorized to act and is acting as a fiduciary, which term shall include an executor, administrator, trustee, guardian, or conservator, and has a nominee in whose name securities, including, without limitation, bonds, stocks, notes, and other evidences of title to intangible personal property, held as a fiduciary, may be registered, it shall be lawful to register securities in the name of the nominee without mention of the fiduciary relationship in the trust instrument evidencing the securities or on the books of the issuer of the same, provided that:

(1) The records of the corporate fiduciary shall at all times clearly show that the securities are held by the corporate fiduciary in its capacity as fiduciary, together with the beneficial owner or owners thereof and all facts relating to its ownership, possession, and holding thereof; and

(2) The corporate fiduciary shall not be relieved of liability for the safe custody, control, and proper distribution of the securities by reason of the registration of same in the name of any nominee.

History. — Code 1981, § 53-12-290, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Cross references. — Uniform transfer on death security registration, § 53-5-60 et seq.

53-12-291. Registration where two or more fiduciaries are acting jointly.

If two or more fiduciaries are acting jointly in reference to any securities, it shall be lawful to register the property in the name of any nominee or any joint corporate fiduciary. In the event that more than one corporate fiduciary is acting, it shall be lawful to register securities in the name of any nominee of any one of the corporate fiduciaries.

History. — Code 1981, § 53-12-291, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-292. Deposit of securities in clearing corporation.

(a) Any fiduciary holding securities in its fiduciary capacity, any bank or trust company holding securities as a custodian or managing agent, and any bank or trust company holding securities as custodian for a fiduciary shall be authorized to deposit or arrange for the deposit of the securities in a clearing corporation, as defined in Article 8 of Title 11. When the securities are deposited, certificates representing securities of the same class of the same issuer may be merged and held in bulk, in the name of the nominee of the clearing corporation, with any other such securities deposited in the clearing corporation by any person, regardless of the ownership of the securities, and certificates of small denominations may be merged into one or more certificates of larger denomination. The records of the fiduciary and the records of the bank or trust company acting as custodian, as managing agent, or as custodian for a fiduciary shall at all times show the name of the party for whose account the securities are deposited. Title to the securities may be transferred by bookkeeping entry on the books of the clearing corporation without physical delivery of certificates representing the securities.

(b) A bank or trust company depositing securities pursuant to this Code section shall be subject to such rules and regulations as, in the case of state chartered institutions, the commissioner of banking and finance and, in the case of national banking associations, the comptroller of the currency may from time to time issue.

(c) A bank or trust company acting as custodian for a fiduciary, on demand by the fiduciary, shall certify in writing to the fiduciary the securities deposited by the bank or trust company in the clearing corporation for the account of the fiduciary. A fiduciary, on demand by any party to a judicial proceeding for the settlement of the fiduciary's account or on demand by the attorney for the party, shall certify in writing to the party the securities deposited by the fiduciary in the clearing corporation for its account as the fiduciary.

(d) This Code section shall apply to any fiduciary holding securities in its fiduciary capacity and to any bank or trust company holding securities as a custodian, managing agent, or custodian for a fiduciary acting on April 13, 1973, or acting thereafter, regardless of the date of the agreement, instrument, or court order by which it is appointed and regardless of whether or not the fiduciary, custodian, managing agent, or custodian for a fiduciary owns capital stock of the clearing corporation.

History. — Code 1981, § 53-12-292, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

ARTICLE 14
TRUSTEE LIABILITY

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 331 et seq.

Am. Jur. Pleading and Practice Forms. — Am. Jur. Pleading and Practice Forms, Trusts, § 179 et seq.

53-12-300. Accountable to beneficiary; breach of trust.

The trustee shall be accountable to the beneficiary for the trust property. A violation by the trustee of any duty that the trustee owes the beneficiary shall be a breach of trust.

History. — Code 1981, § 53-12-300, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Cross references. — Registration of securities generally, § 10-5-20 et seq.

Law reviews. — For article, "The Georgia Trust Act," 28 Ga. St. B.J. 95 (1991).

JUDICIAL DECISIONS

Trustee properly found to have breached fiduciary duty. — It was not an abuse of discretion to deny a new trial motion brought by a trustee who was found to have breached the trustee's fiduciary duty to trust beneficiaries by making distributions to a co-trustee under a trust's encroachment provision because the trustee breached the trustee's duty to protect the trust corpus as: (1) the trustee inconsistently required the co-trustee to provide supporting evidence for corpus distributions and let the co-trustee exceed an allotted budget; and (2) the beneficiaries were damaged by the resulting reduction in trust corpus. Reliance Trust Co. v. Candler, 315 Ga. App. 495, 726 S.E.2d 636 (2012).

Breach of trust issue for jury. — In a trust beneficiary's action against a co-trustee and others, issues of fact remained as to the beneficiary's claims for breach of fiduciary duty arising out of the sale of a trust asset for less than fair market value and failure to account for a commission owed on the sale, rendering summary judgment on these claims improper. Kahn v. Britt, 330 Ga. App. 377, 765 S.E.2d 446 (2014).

In a beneficiary's claims against a trustee and the trust's attorneys, issues of fact remained as to the trustee's and attorneys' duties surrounding the sale of the trust's cattle ranch at auction because no appraisal was done, the sale was only run for seven weeks, the trustee believed the land was worth more than the price obtained, and the trustee failed to consider a commission due to a real estate agent. Kahn v. Britt, 330 Ga. App. 377, 765 S.E.2d 446 (2014).

Sale of trust asset to a co-trustee through a straw man. — Because there were genuine issues as to whether trustees fraudulently concealed their breach of fiduciary duty in selling the principal trust asset to a co-trustee at a discount through a straw man in 1979, tolling the statute of limitations, and whether the beneficiaries exercised diligence in discovering the fraud, summary judgment was improper. Smith v. SunTrust Bank, 325 Ga. App. 531, 754 S.E.2d 117 (2014).

RESEARCH REFERENCES

ALR. — Liability of trustee or other fiduciary for loss on investment as affected by the fact that it was taken in his own name without indication of fiduciary capacity, 150 A.L.R. 805.

53-12-301. Actions for breach of trust.

(a) If a trustee commits a breach of trust, or threatens to commit a breach of trust, a beneficiary shall have a cause of action to seek:

(1) To recover damages;

(2) To compel the trustee to perform the trustee's duties;

(3) To require an accounting;

(4) To enjoin the trustee from committing a breach of trust;

(5) To compel the trustee to redress a breach of trust by payment of money or otherwise;

(6) To appoint a temporary trustee to take possession of the trust property and administer the trust or to suspend a trustee with or without the appointment of a temporary trustee;

(7) To remove the trustee; and

(8) To reduce or deny compensation of the trustee.

(b) When trust assets are misapplied and can be traced in the hands of persons affected with notice of the misapplication, the trust shall attach to such assets. A creditor of a trust may follow assets in the hands of beneficiaries even if they were received without notice.

(c) The remedy set forth in subsection (c) of Code Section 53-12-363 shall be the exclusive remedy for an abuse of discretion as provided in Code Sections 53-12-361 and 53-12-362.

(d) The provision of remedies for breach of trust shall not prevent resort to any other appropriate remedy provided by statute or common law.

History. — Code 1981, § 53-12-301, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Cross references. — Registration of securities generally, § 10-5-20 et seq. Effect of purchase by or from one without notice of equity, § 23-1-19. Liability of the legatees or distributees with respect to an unpaid debt of the estate, § 53-7-43.

JUDICIAL DECISIONS

Analysis

General Consideration
Option of Affirmance or Rejection of Unauthorized Investment

NOTICE

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Act of 1799, former Code 1882, §§ 4184 and 4186, former Code 1895, § 3201, former Civil Code 1910, §§ 3595, 3785, 4521, and 4587, former Code 1933, § 108-424, former O.C.G.A. §§ 53-12-6, 53-13-62, and 53-13-63, and former O.C.G.A. § 53-12-192 of the 1991 Trust Act are included in the annotations for this Code section.

Relief generally. — When, in a divorce case, the jury clearly intended to create a trust for the purpose of providing support for the minor child during the child's minority and also intended that there be monthly payments from the trust for the use of the child, but the husband failed to take any substantive steps to set up the trust, there was no error in the trial court naming a trustee and effectuating the trust by requiring the husband to make the payments necessary to uphold the husband's share of the debts, encumbrances, and maintenance of the trust property. Aycock v. Aycock, 251 Ga. 104, 303 S.E.2d 456 (1983) (decided under former O.C.G.A. § 53-12-6).

When a bank did not invest all of a decedent's trust's assets in treasury bills, the bank breached the bank's fiduciary duty, under former O.C.G.A. § 53-12-192 (see O.C.G.A. § 53-12-301), to the trust's beneficiaries, and the bank was liable for the difference between the income received and the income that would have been received had the assets been so invested; however, the bank was only liable for the estate taxes on half of the trust's assets because the bank would have been justified in investing half of those assets in short-term, taxable, treasury bills. Wachovia Bank of Ga., N.A. v. Namik, 275 Ga. App. 229, 620 S.E.2d 470 (2005) (decided under former O.C.G.A. § 53-12-192).

Right of beneficiary to attach misapplied assets in hands of person with notice. — When a bank, with notice that a fund is the sinking fund of a municipality, illegally receives such fund from the municipality in violation of Acts 1910, p. 100 (see O.C.G.A. § 36-38-1) and mingles the fund with the general cash assets of the bank, and shortly thereafter suspends operation and the bank's business is taken in charge by the superintendent of banks (now commissioner of banking and finance) as an insolvent institution, the municipality may trace the trust fund and have restitution from the mingled fund, and any particular property in which the mingled fund may have been invested, but not in other funds of the bank. Town of Douglasville v. Mobley, 169 Ga. 53, 149 S.E. 575 (1929) (decided under former Civil Code 1910, § 4587).

When a clerk of a county treasurer transferred property purchased with embezzled funds to sureties on the treasurer's bond to save them harmless on account of the clerk's embezzlement, and the county, with notice of the pertinent facts, caused an execution to be levied on the property as the property of the sureties, the county's action constituted an election to affirm the legal title of the clerk and prevented the county from asserting a right to trace the stolen funds into the property. U.S. Fid. & Guar. Co. v. Richmond County, 174 Ga. 599, 163 S.E. 482 (1932), later appeal, United States Fid. & Guar. Co. v. Clarke, 182 Ga. 755, 187 S.E. 420 (1936) (decided under former Civil Code 1910, § 3785).

While it is the rule that a bona fide purchaser of property in which trust funds have been invested is protected, the beneficiary of a trust estate may at the beneficiary's option, within a reasonable time, "affirm or reject an unauthorized investment by the trustee," and equity will aid the beneficiary in recovering the funds or property, or enforcing a lien for the wrongfully used funds, provided that the assets can be traced and remain in the hands of a person "affected with notice of the misapplication." Tattnall Bank v. Harvey, 186 Ga. 752, 198 S.E. 724 (1938) (decided under former Code 1933, § 108-424).

Mere fact that purchaser might have had some knowledge of a mingling by the purchaser's vendor of trust funds with the

purchaser's own is not sufficient to charge the vendee with notice that trust funds had been diverted in the purchase of a particular piece of land. Tattnall Bank v. Harvey, 186 Ga. 752, 198 S.E. 724 (1938) (decided under former Code 1933, § 108-424).

Children may trace to extent of interest. — Property left by K at K's death constituted a fund which K's children, to the extent of their interest therein, had the right to follow wherever the property could be traced. Dodd & Co. v. Bond, 88 Ga. 355, 14 S.E. 581 (1892) (decided under former Civil Code 1910, § 3152).

Assumption that deposited money applied to proper purposes. — When trustee deposits money in bank, bank has the right to assume that the money so deposited will be applied by the trustee to proper purposes under the trust; and, acting under this assumption, the bank may lawfully pay the checks drawn by the person depositing the money, whether signed in the person's representative capacity or not. Georgia R.R. Bank & Trust Co. v. Liberty Nat'l Bank & Trust Co., 180 Ga. 4, 177 S.E. 803 (1934) (decided under former Civil Code 1910, § 3595).

Creditor's right of attachment in this connection is to have assets of estate in hands of legatee applied in satisfaction of debt, if the assets be sufficient for that purpose. Trustees of Jesse Parker Williams Hosp. v. Nisbet, 191 Ga. 821, 14 S.E.2d 64 (1941) (decided under former law).

Joinder of actions. — Person injured may join in one action the person occupying the fiduciary relationship and one who aids and assists one in applying assets. Adams v. McGehee, 211 Ga. 498, 86 S.E.2d 525 (1955) (decided under former Code 1933, §§ 108-423 and 108-425).

As regards establishment of debt due by estate, defendant legatees stand in place of executor. Thus, the action is not governed by the limitations in reference to actions for money had and received or unjust enrichment, but by the limitations to actions on the character of the claim against the estate. Trustees of Jesse Parker Williams Hosp. v. Nisbet, 191 Ga. 821, 14 S.E.2d 64 (1941) (decided under former Code 1933, § 108-425).

When person dies owing debt, the person's creditor may in equity follow assets left by such person in hands of distributee, and when the assets received by the distributee are sufficient to pay the debt, the creditors may obtain a personal judgment against the distributee for the amount of debt. Caldwell v. Montgomery, 8 Ga. 106 (1850) (decided under former law); Morrison v. Fidelity & Deposit Co., 150 Ga. 54, 102 S.E. 354 (1920) (decided under former Civil Code 1910, § 3785).

Creditor can follow assets into the hands of a distributee, with proper pleadings for that purpose, as well in a court of law as in a court of equity, but if the creditor elects to proceed in the former court, the creditor must allege and prove the same substantial facts as would be required to entitle the creditor to relief in the latter. As to requisite facts, see Scranton v. Demere, 6 Ga. 92 (1849) (decided under former law); Caldwell v. Montgomery, 8 Ga. 106 (1850) (decided under former law); Johnson v. Lewis, 8 Ga. 460 (1850); Justices of Inferior Court v. Moreland, 20 Ga. 145 (1856) (decided under former law); Jones v. Parker, 55 Ga. 11 (1875) (decided under former law).

Statute applies to distributees whether the distributees had notice of debt or not and a creditor of the estate may collect the debt out of the distributees. Chamblee v. Atlanta Brewing & Ice Co., 131 Ga. 554, 62 S.E. 1032 (1908) (decided under former Code 1895, § 3201).

Disposition of trust property by will, by testator who was trustee, is conversion of property, but it may be followed by cestui que trust into the hands of the executor. Arline v. Miller, 22 Ga. 330 (1857) (decided under the Act of 1799).

When deed refers to representative fiduciary relationship expressly, the deed is sufficient notice. Inman, Swann & Co. v. Foster, 69 Ga. 385 (1882) (decided under former law).

If trustee invests trust funds in own name, remaindermen may follow the funds as in other cases of trust. Cunningham v. Schley, 41 Ga. 426 (1870) (decided under former law).

University properly required to stay in suit. — Trial court properly de-

General Consideration (Cont'd)

nied a university's motion to dismiss for failure to state a claim in a breach of fiduciary suit because the trust trustee had authorized the transfer of $ 1 million from the trust to the university and such funds were subject to a constructive trust since the funds were held by the university. Reinhardt Univ. v. Castleberry, 318 Ga. App. 416, 734 S.E.2d 117 (2012).

Cited in Miller & Co. v. Gibbs, 161 Ga. 698, 132 S.E. 626 (1926); Wall v. Wall, 176 Ga. 757, 168 S.E. 893 (1933); Castleberry v. Wells, 183 Ga. 328, 188 S.E. 349 (1936); Wilson v. Aldenderfer, 183 Ga. 760, 189 S.E. 907 (1937); Parker v. Harling, 187 Ga. 419, 200 S.E. 800 (1939); Ross v. Rambo, 195 Ga. 100, 23 S.E.2d 687 (1942); Malcolm v. Webb, 211 Ga. 449, 86 S.E.2d 489 (1955); Hodges v. Hodges, 221 Ga. 587, 146 S.E.2d 313 (1965); Allan v. Allan, 236 Ga. 199, 223 S.E.2d 445 (1976); Aetna Life Ins. Co. v. Weekes, 241 Ga. 169, 244 S.E.2d 46 (1978); Babb v. Potts, 183 Ga. App. 785, 360 S.E.2d 44 (1987).

Option of Affirmance or Rejection of Unauthorized Investment

Option of affirmance or rejection of unauthorized investment generally. — While it is the rule that a bona fide purchaser of property in which trust funds have been invested is protected, the beneficiary of a trust estate may at the beneficiary's option, within a reasonable time, "affirm or reject an unauthorized investment by the trustee," and equity will aid the beneficiary in recovering the funds or property, or enforcing a lien for the wrongfully used funds, provided that the assets can be traced and remain in the hands of a person "affected with notice of the misapplication." Tattnall Bank v. Harvey, 186 Ga. 752, 198 S.E. 724 (1938) (decided under former Code 1933, §§ 108-424 and 108-425).

If it be true, as alleged, that H conveyed to M H's interest in a railroad company to enable the latter to build a railroad, and if instead of building the railroad its entire franchise and all its holdings were conveyed by a void contract to another corporation, it is optional with H to proceed against M for the breach of their undertaking, or to pursue and attempt the recaption of the property itself. Hamilton v. Savannah, F. & W. Ry., 49 F. 412 (S.D. Ga. 1892) (decided under former law).

Property left by K at K's death constituted a fund which K's children, to the extent of their interest therein, had the right to follow wherever it could be traced. When the widow bought the land in question with the money of her children, taking the title in her own name, the beneficial interest in the property at once vested in them, and she held as their trustee, though as one who has so wrongfully. Dodd & Co. v. Bond, 88 Ga. 355, 14 S.E. 581 (1892) (decided under former law).

To follow trust funds, it must be possible to identify the funds, to show that the funds have gone into property sought to be subjected. Vason v. Bell, 53 Ga. 416 (1874) (decided under former law).

Priority over claim of trustee's creditor. — When a trustee invests trust funds in property in the trustee's own name, the cestui que trust may elect to follow the corpus, and as against a judgment creditor of the trustee, the title of the cestui que trust has the preference, especially if the debt of the creditor be in existence at the time of the purchase of the property by the trustee with the trust funds. Gray v. Perry, 51 Ga. 180 (1874) (decided under former law).

Tracing funds when mixed with trustee's. — When a guardian has loaned the ward's funds with the guardian's own, in the ward's name individually, the ward may reclaim the ward's due share of the common fund in the hands of an agent or attorney of the guardian, or even of a creditor of the guardian who has acquired the funds with notice of the ward's title. Alspaugh v. Adams, 80 Ga. 345, 5 S.E. 496 (1887) (decided under former Code 1882, §§ 4184 and 4186).

Option to affirm or reject unauthorized investment by trustee does not apply in case where trust has reference to sinking fund of municipality and is transferred by the treasurer of the municipality in violation of Acts 1910, p. 100 (see O.C.G.A. § 36-38-1). The statute prohibiting any disposition of the sinking fund except as therein provided, the municipal-

ity cannot by ratification validate a contract which the municipality had no power to make. Town of Douglasville v. Mobley, 169 Ga. 53, 149 S.E. 575 (1929) (decided under former Civil Code 1910, § 3768).

If trustee changes investment, with consent of cestui que trust, who is of legal age, the trustee is not liable for loss growing out of such new investment. Campbell v. Miller, 38 Ga. 304, 95 Am. Dec. 389 (1868) (decided under former law).

Notice

Notice generally. — If a bank actively aids the trustee in misappropriating the fund, and especially if the bank participates in the misappropriation and receives the fruits of such misappropriation by obtaining payment of a debt due the bank by the trustee in one's individual capacity, the bank would be liable to the true owners of the fund for the amount thus wrongfully appropriated by the bank to the bank's own uses. Georgia R.R. Bank & Trust Co. v. Liberty Nat'l Bank & Trust Co., 180 Ga. 4, 177 S.E. 803 (1934) (decided under former Civil Code 1910, §§ 3595 and 4521).

When a trustee deposits money in a bank, the bank has a right to assume that the money so deposited will be applied by the trustee to the proper purposes under the trust; and, acting under this assumption, the bank may lawfully pay the checks drawn by the person depositing the money, whether signed in one's representative capacity or not. Georgia R.R. Bank & Trust Co. v. Liberty Nat'l Bank & Trust Co., 180 Ga. 4, 177 S.E. 803 (1934) (decided under former Civil Code 1910, §§ 3595 and 4521).

When the absolute title to property is apparently in a vendor or mortgagor, the vendee or mortgagee is protected, unless the one seeking to set up a lien or trust against the property can show that the vendee or mortgagee had notice of trust funds having gone into the property. Tattnall Bank v. Harvey, 186 Ga. 752, 198 S.E. 724 (1938) (decided under former Code 1933, §§ 108-424 and 108-425).

Mere fact that purchaser might have had some knowledge of a mingling by one's vendor of trust funds with one's own is not sufficient to charge the vendee with notice that trust funds had been diverted in the purchase of a particular piece of land. Tattnall Bank v. Harvey, 186 Ga. 752, 198 S.E. 724 (1938) (decided under former Code 1933, §§ 108-424 and 108-425).

RESEARCH REFERENCES

ALR. — Following trust funds deposited in mixed bank account of trustee, 26 A.L.R. 3; 35 A.L.R. 747; 55 A.L.R. 1275; 102 A.L.R. 372.

Following or identifying trust funds in assets of insolvent bank, 82 A.L.R. 46.

Effect of beneficiary's consent to, acquiescence in, or ratification of, improper investments or loans (including failure to invest) by trustee or other fiduciary, 128 A.L.R. 4.

Distribution of funds where funds of more than one trust have been commingled by trustee and balance is insufficient to satisfy all trust claims, 17 A.L.R.3d 937.

Imposition of constructive trust in property bought with stolen or embezzled funds, 38 A.L.R.3d 1354.

53-12-302. Damages for breach of trust; interest.

(a) A trustee who commits a breach of trust shall be personally chargeable with any damages resulting from such breach of trust, including, but not limited to:

(1) Any loss or depreciation in value of the trust property as a result of such breach of trust, with interest;

(2) Any profit made by the trustee through such breach of trust, with interest;

(3) Any amount that would reasonably have accrued to the trust or beneficiary if there had been no breach of trust, with interest; and

(4) In the discretion of the court, expenses of litigation, including reasonable attorney's fees incurred in bringing an action on such breach or threat to commit such breach.

(b) If the trustee is liable for interest, then the amount of the liability for interest shall be the greater of:

(1) The amount of interest that accrues at the legal rate on judgments; or

(2) The amount of interest actually received.

History. — Code 1981, § 53-12-302, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-12-192 of the 1991 Trust Act are included in the annotations for this Code section.

Attorney's fees. — When a bank was liable to the beneficiaries of a trust for breach of fiduciary duty for not investing the trust's assets in treasury bills, former O.C.G.A. § 53-12-193 (see O.C.G.A. § 53-12-302) did not require the trial court to award or even consider awarding attorney's fees to the beneficiaries because no bad faith was shown. Wachovia Bank of Ga., N.A. v. Namik, 275 Ga. App. 229, 620 S.E.2d 470 (2005) (decided under former O.C.G.A. § 53-12-193).

Because no verdict form presented the jury with the question of whether the siblings who sold their deceased mother's farm to another sibling had breached a fiduciary duty, a trial court erred in granting attorney's fees to the other siblings who sued over the purchase, as an award of fees under former O.C.G.A. § 53-12-193 (see O.C.G.A. § 53-12-302) required a finding of a breach of trust; fraud, as only one of the potential theories that was sued upon, could have been found by the jury without finding that there was also a breach of trust. Bloodworth v. Bloodworth, 277 Ga. App. 387, 626 S.E.2d 589 (2006) (decided under former O.C.G.A. § 53-12-193).

Trust beneficiaries were not entitled to attorney's fees pursuant to former O.C.G.A. § 53-12-193 (see O.C.G.A. § 53-12-302) or O.C.G.A. § 13-6-11, on the basis of bad faith, because the trustee's actions in failing to lease the trust property or otherwise generate income while debt for property taxes, insurance, and utilities continued to increase, although unreasonable, were not conclusively established to be in bad faith. Davis v. Walker, 288 Ga. App. 820, 655 S.E.2d 634 (2007) (decided under former O.C.G.A. § 53-12-193).

Personal representative wrongfully tried to have the estate's primary asset, a house, conveyed to the personal representative. As the beneficiary's petition for the personal representative's removal was premised on the latter's breach of fiduciary duty, under former O.C.G.A. § 53-12-193 (see O.C.G.A. § 53-12-302), the beneficiary was properly awarded appellate expenses, including attorney fees, incurred in defending the appeals of that removal. In re Estate of Zeigler, 295 Ga. App. 156, 671 S.E.2d 218 (2008) (decided under former O.C.G.A. § 53-12-193).

Even assuming that the trustee admitted to multiple breaches of the trustee's fiduciary duties as trustee during an evidentiary hearing and an interim award of attorney fees was an equitable sanction for the trustee's misconduct, such fees could not be awarded because there had not been a judgment in the son's favor on the merits of the son's breach-of-trust claim. Kemp v. Kemp, 337 Ga. App. 627, 788 S.E.2d 517 (2016).

Compensatory damages for lost rent. — Personal representative's wrongful conveyance of the estate's primary asset, a house, to the personal representative was a breach of fiduciary duty. The beneficiary's evidence of the house's rental value authorized the award to the beneficiary of compensatory damages for lost rent under O.C.G.A. § 53-7-54 and former O.C.G.A. § 53-12-193 (see O.C.G.A. § 53-12-302). In re Estate of Zeigler, 295 Ga. App. 156, 671 S.E.2d 218 (2008) (decided under former O.C.G.A. § 53-12-193).

General and punitive damages awarded. — Personal representative's wrongful conveyance of the estate's primary asset, a house, to the personal representative was both a breach of fiduciary duty and fraud entitling the beneficiary to general and punitive damages. In re Estate of Zeigler, 295 Ga. App. 156, 671 S.E.2d 218 (2008) (decided under former O.C.G.A. § 53-12-193).

Interest. — It was not error to award trust beneficiaries interest from the date of encroachment for the trustee's breach of the trustee's fiduciary duty to the beneficiaries under a trust's encroachment provision by making distributions to a co-trustee because: (1) O.C.G.A. § 53-12-302(a)(1) and (3) said the trustee was liable for interest; and (2) under O.C.G.A. § 53-12-302(b), a trustee was liable for interest from the date of a breach. Reliance Trust Co. v. Candler, 315 Ga. App. 495, 726 S.E.2d 636 (2012).

Appellate court erred by affirming an award of prejudgment interest to the remainder beneficiaries in a breach of trust action because under O.C.G.A. § 53-12-302(a)(3), the amount that would have reasonably accrued to them if there had been no breach was the amount they were awarded in actual damages and they were not entitled to interest under the terms of the trust instrument. Reliance Trust Co. v. Candler, 294 Ga. 15, 751 S.E.2d 47 (2013).

53-12-303. Relief of liability.

(a) No provision in a trust instrument shall be effective to relieve the trustee of liability for a breach of trust committed in bad faith or with reckless indifference to the interests of the beneficiaries.

(b) A trustee of a revocable trust shall not be liable to a beneficiary for any act performed or omitted pursuant to written direction from a person holding the power to revoke, including a person to whom the power to revoke the trust is delegated. If the trust is revocable in part, then this subsection shall apply with respect to the interest of the beneficiary in that part of the trust property.

History. — Code 1981, § 53-12-303, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2018, p. 262, § 23/HB 121.

Law reviews. — For article on the problems and benefits of multiple fiduciaries in estate planning, see 33 Mercer L. Rev. 355 (1981). For article on the 2018 amendment of this Code section, see 35 Ga. St. U. L. Rev. 219 (2018).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-12-194 of the 1991 Trust Act are included in the annotations for this Code section.

Release and indemnification agreement did not meet definition of trust instrument. — Trial court erred in granting beneficiaries' motion to dismiss for failure to state a claim a trustee's counterclaim, alleging that by filing their complaint, the beneficiaries breached contracts in which they released trustee from any liability because the beneficiaries' complaint sought damages for negligence and for conduct that preceded and followed the execution of a release and indemnification agreement; the trial court erred in ruling that the release provisions were facially void under the limits on trust instruments imposed by former O.C.G.A. § 53-12-194 (see O.C.G.A. § 53-12-303) and were not subject to enforcement through a breach of contract claim because the release and indemnification agreement did not meet the definition of a trust instrument set forth in former O.C.G.A. § 53-12-2 (see O.C.G.A. § 53-12-2), and the beneficiaries and trustee executed them long after the creation of the trust and several years after the settlor's death. Heiman v. Mayfield, 300 Ga. App. 879, 686 S.E.2d 284 (2009) (decided under former O.C.G.A. § 53-12-194).

Document delegating individual as co-trustee was not "trust instrument." — Co-trustee was entitled to summary judgment on a trust beneficiary's breach of fiduciary duty claim because the beneficiary waived any claim against the co-trustee in the delegation instrument; former O.C.G.A. § 53-12-194(a), prohibiting such waivers of claims against trustees in a trust instrument, did not apply because the delegation instrument was not a trust instrument. Kahn v. Britt, 330 Ga. App. 377, 765 S.E.2d 446 (2014) (decided under former O.C.G.A. § 53-12-194).

Instrument naming an individual as co-trustee was not a trust instrument. — Pursuant to an instrument delegating a trustee as co-trustee, the trust beneficiary waived any claim against the trustee for acts relating to an asset transfer by the beneficiary; former O.C.G.A. § 53-12-194(a), prohibiting such insulations from liability, applied to trust instruments, and the document delegating the co-trustee was not a trust instrument. Kahn v. Britt, 330 Ga. App. 377, 765 S.E.2d 446 (2014) (decided under former O.C.G.A. § 53-12-194).

Jury question as to whether duty of good faith breached. — Jury question was presented as to whether two trustees of their children's trusts acted against the interests of the beneficiaries (their children) in bad faith by amending a partnership agreement to concentrate all voting power in themselves to the exclusion of the beneficiaries, who otherwise would have become partners when they turned 45. Likewise, the trustees as partners owed duties to the trusts as partners in the partnership. Rollins v. Rollins, 338 Ga. App. 308, 790 S.E.2d 157 (2016).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, §§ 446, 447.

53-12-304. Liability of successor trustee.

(a) A successor trustee shall be liable to the beneficiary for breach of trust involving acts or omissions of a predecessor trustee only if the successor trustee:

(1) Knows or reasonably should have known of a situation constituting a breach of trust committed by the predecessor trustee and the successor trustee improperly permits it to continue;

(2) Neglects to take reasonable steps to compel the predecessor to deliver the trust property to the successor trustee; or

(3) Neglects to take reasonable steps to redress a breach of trust committed by the predecessor trustee in a case where the successor trustee knows or reasonably should have known of the predecessor trustee's breach.

(b) A trustee succeeding a trustee who was also the settlor shall not be liable to the beneficiary for any action taken or omitted to be taken by the prior trustee nor shall such successor trustee have a duty to institute any action against such prior trustee or to file any claim against such prior trustee's estate for any of the prior trustee's acts or omissions as trustee. This subsection shall apply only with respect to a trust or any portion of a trust that was revocable by the settlor during the time that the settlor served as trustee and committed the act or omission.

History. — Code 1981, § 53-12-304, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 752, § 53/HB 142.

53-12-305. Liability of cotrustee.

(a) A trustee shall be liable to the beneficiary for a breach committed by a cotrustee if such trustee:

(1) Participates in a breach of trust committed by the cotrustee;

(2) Improperly delegates the administration of the trust to the cotrustee;

(3) Approves, knowingly acquiesces in, or conceals a breach of trust committed by the cotrustee;

(4) Negligently enables the cotrustee to commit a breach of trust; or

(5) Neglects to take reasonable steps to compel the cotrustee to redress a breach of trust in a case where such trustee knows or reasonably should have known of the breach of trust.

(b) If two or more cotrustees are jointly liable to the beneficiary, each cotrustee shall be entitled to contribution from the other, as determined by the degree of each cotrustee's fault.

History. — Code 1981, § 53-12-305, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-306. Action against cotrustee.

(a) A trustee may maintain an action against a cotrustee to:

(1) Compel the cotrustee to perform duties required under the trust;

(2) Enjoin the cotrustee from committing a breach of trust; or

(3) Compel the cotrustee to redress a breach of trust committed by such cotrustee.

(b) The provision of remedies for a breach of trust shall not prevent resort to any other appropriate remedy provided by statute or common law.

History. — Code 1981, § 53-12-306, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-307. Limitation of actions.

(a) Unless a claim is previously barred by adjudication, consent, limitation, or otherwise, if a beneficiary has received a written report that adequately discloses the existence of a claim against the trustee for a breach of trust, the claim shall be barred as to that beneficiary unless a proceeding to assert the claim is commenced within two years after receipt of the report. A report adequately discloses existence of a claim if it provides sufficient information so that the beneficiary knows of such claim or reasonably should have inquired into the existence of such claim. If the beneficiary has not received a report which adequately discloses the existence of a claim against the trustee for a breach of trust, such claim shall be barred as to that beneficiary unless a proceeding to assert such claim is commenced within six years after the beneficiary discovered, or reasonably should have discovered, the subject of such claim.

(b) A successor trustee's claim against a predecessor trustee shall be barred unless a proceeding to assert such claim is commenced within two years after such successor trustee takes office.

(c) A trustee's claim against a cotrustee shall be barred unless a proceeding to assert such claim is commenced within two years after the date the cause of action against the cotrustee arises.

History. — Code 1981, § 53-12-307, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Law reviews. — For annual survey on wills, trusts, guardianships, and fiduciary administration, see 66 Mercer L. Rev. 231 (2014).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-12-198 of the 1991 Trust Act are included in the annotations for this Code section.

Issue of fact as to whether trustees fraudulently concealed their breach of duty. — Because there were genuine issues as to whether the trustees fraudulently concealed the trustees' breach of fiduciary duty in selling the principal trust asset to a co-trustee at a discount through a straw man in 1979, tolling the statute of limitations, and whether the beneficiaries exercised diligence in discovering the fraud, summary judgment was improper. Smith v. SunTrust Bank, 325 Ga. App. 531, 754 S.E.2d 117 (2014).

Cause of action not barred by statute of limitations. — Trial court erred in ruling that son's 1999 breach of trust action against the parents as trustees was barred by six-year statute of limitations under former O.C.G.A. § 53-12-198 (see O.C.G.A. § 53-12-307), as the son's allegations as to the parents' refusal to loan money for undergraduate work in 1986 did not allege a violation of the trust, and the 1991 allegations that the parents were not personally spending the trust fund did not result in the conclusion that the trustees breached the trust in 1991. Snuggs v. Snuggs, 275 Ga. 647, 571 S.E.2d 800 (2002) (decided under former O.C.G.A. § 53-12-198).

In the employer's action to recover for theft of corporate funds, the employee was not entitled to summary judgment since the six-year statute of limitations applicable to constructive trust claims only barred the employer's action as to some, but not all, of the employee's thefts. Total Supply, Inc. v. Pridgen, 267 Ga. App. 125, 598 S.E.2d 805 (2004) (decided under former O.C.G.A. § 53-12-198).

Beneficiaries' breach of fiduciary duty claim against the trustee of a family trust was time-barred because: (1) the statute began to run when the trustee entered into a loan transaction that allegedly harmed the trust; (2) the beneficiaries did not show the trustee withheld information from the beneficiaries, deterred the beneficiaries from hiring the beneficiaries' own advisor to review the loan, or deterred the beneficiaries from timely filing suit; and (3) the beneficiaries raised no fact issue as to whether the beneficiaries used diligence to discover any fraud that would toll the statute. Mayfield v. Heiman, 317 Ga. App. 322, 730 S.E.2d 685 (2012).

Retroactive applicability of statute of limitations. — Revised Georgia Trust Code's provisions apply to any trust irrespective of the date the trust was created, with two exceptions: to the extent it would impair vested rights, and except as otherwise provided by law. There is no vested right in a statute of limitation, and to the extent that Mayfield v. Heiman, 317 Ga. App. 322, (2012), suggests that O.C.G.A. § 53-12-307(a) does not apply retroactively, that suggestion is non-binding dicta. Smith v. SunTrust Bank, 325 Ga. App. 531, 754 S.E.2d 117 (2014).

Suit against trustee governed by six year limitations period, not two year. — Because the letter to a trustee from the trustee's accountants was simply a form of general correspondence that did not contain the type of detailed information contemplated by the Georgia General Assembly for the letter to qualify as a report, the letter was not a report for purposes of the Trust Code, O.C.G.A. § 53-12-307; therefore, a beneficiary's cause of action against the trustee was not subject to the two-year statute of limitations but, rather, the six-year statute of limitations applied. Hasty v. Castleberry, 293 Ga. 727, 749 S.E.2d 676 (2013).

Claims barred by two-year limitations period. — Trustee was entitled to summary judgment in a breach of trust suit because the plaintiffs' claims that accrued more than two years before the

filing of their lawsuit were barred by the two-year statute of limitation under O.C.G.A. § 53-12-307(a) as the uncontroverted evidence showed that the trustee sent detailed trust statements to the plaintiffs on a quarterly, yearly, and sometimes monthly basis until the trust was exhausted, which sufficiently put the plaintiffs on notice of any claim. Wells Fargo Bank, N.A. v. Cook, 332 Ga. App. 834, 775 S.E.2d 199 (2015), cert. denied, No. S15C1753, 2015 Ga. LEXIS 720 (Ga. 2015).

Cited in Ludwig v. Ludwig, 281 Ga. 724, 642 S.E.2d 638 (2007).

53-12-308. Personal liability of trustee.

(a) A trustee shall not be personally liable on any warranty made in any conveyance unless the intention to create a personal liability is distinctly expressed.

(b) Unless otherwise provided in the contract, a trustee shall not be personally liable on contracts properly entered into in the trustee's fiduciary capacity unless the trustee fails to reveal the trustee's representative capacity in the contract.

(c) A judgment rendered in an action brought against the trust shall impose no personal liability on the trustee or the beneficiary.

History. — Code 1981, § 53-12-308, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Law reviews. — For article, "Noticing the Bankruptcy Sale: The Purchased Property May Not Be as 'Free and Clear of All Liens, Claims and Encumberances' as You Think," see 15 (No. 5) Ga. St. B.J. 12 (2010).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1872, § 3377, former Code 1895, § 3203, former O.C.G.A. § 53-12-154, and former O.C.G.A. § 53-12-199 of the 1991 Trust Act are included in the annotations for this Code section.

Trustee shall not incur any individual or personal liability in such action. On the contrary, the statute expressly declares: "The judgment thus rendered shall impose no personal liability on the trustee," etc. It will therefore be seen that one is a mere nominal party, so far as personal interest in the action is concerned, charged with the duty of defending the action, not in one's own behalf, but on behalf of the cestuis que trust. If one fails properly to discharge this duty, one is liable to them in damages. Wagnon v. Pease, 104 Ga. 417, 30 S.E. 895 (1898) (decided under former Code 1895, § 3203). See also Vason & Davis v. Gardner, 70 Ga. 517 (1883).

Limitation of liability proper. — In an action by beneficiaries of a trust to recover on a promissory note, the trial court did not err in limiting their potential counterclaim liability to the amount the beneficiaries would otherwise have received as trust beneficiaries since the beneficiaries could not be held personally liable in an action against the trust. Altama Delta Corp. v. Howell, 225 Ga. App. 78, 483 S.E.2d 127 (1997) (decided under former O.C.G.A. § 53-12-199).

Insurer's duty to defend. — Insurer did not have a duty to defend a trustee as the real estate at issue was conveyed to the purchasers by another individual acting as attorney-in-fact for the trustee in the trustee's role as trustee, and the trustee did not allege the trustee had any interaction with the purchasers that would have created personal liability un-

der state law, former O.C.G.A. § 53-12-199 (see O.C.G.A. § 53-12-308). Burt v. Great N. Ins. Co., 290 Fed. Appx. 297 (11th Cir. 2008) (Unpublished) (decided under former O.C.G.A. § 53-12-199).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 267.

ARTICLE 15

NONRESIDENTS AND FOREIGN ENTITIES ACTING AS TRUSTEES

Cross references. — Fiduciary powers of financial institutions generally, § 7-1-310 et seq. Foreign guardians generally, § 29-2-74 et seq.

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, §§ 207, 212.

Am. Jur. Pleading and Practice Forms. — Am. Jur. Pleading and Practice Forms, Trusts, § 91.

53-12-320. Nonresidents acting as trustees.

(a) Any nonresident who is eligible to serve as a trustee under Code Section 53-12-201 may act as a trustee in this state pursuant to the terms of this Code section.

(b) Any nonresident trustee who acts as a trustee in this state shall be deemed to have consented to service upon the Secretary of State of any summons, notice, or process in connection with any action or proceeding in the courts of this state growing out of or based upon any act or failure to act on the part of the trustee unless the trustee shall designate as the agent for such service some person who may be found and served with notice, summons, or process in this state by a designation to be filed, from time to time, in the office of the Secretary of State, giving the name of the agent and the place in this state where the agent may be found and served.

(c) If a nonresident trustee fails to designate a person who may be found and served with summons, notice, or process in this state, service of summons, notice, or process shall be made upon such trustee by serving a copy of the petition or other pleading, with process attached thereto, on the Secretary of State. The service shall be sufficient service upon such nonresident trustee, provided that notice of the service and a copy of the petition and process is forthwith sent by registered or certified mail or statutory overnight delivery by the plaintiff or the plaintiff's agent to such trustee, in the state where such trustee resides, and the return receipt is appended to the summons or other process and

filed with the summons, petition, and other papers in the court where the action is pending. The Secretary of State shall charge and collect a fee as set out in Code Section 45-13-26 for service of process on him or her under this Code section.

History. — Code 1981, § 53-12-320, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 752, § 53/HB 142.

RESEARCH REFERENCES

ALR. — Eligibility of foreign corporation to appointment as executor, administrator, or testamentary trustee, 26 A.L.R.3d 1019.

53-12-321. Foreign entities acting as trustees.

(a) Any foreign entity may act in this state as trustee, executor, administrator, guardian, or any other like or similar fiduciary capacity, whether the appointment is by law, will, deed, inter vivos trust, security deed, mortgage, deed of trust, court order, or otherwise without the necessity of complying with any law of this state relating to the qualification of foreign entities to do business in this state or the licensing of foreign entities to do business in this state, except as provided in this article, and notwithstanding any prohibition, limitation, or restriction contained in any other law of this state, provided only that the foreign entity is authorized to act in the fiduciary capacity in the state in which it is chartered or licensed or, if the foreign entity is a national banking association, in the state in which it has its principal place of business.

(b) Any foreign entity seeking to exercise fiduciary powers in this state, upon qualifying in this state to act in any of such fiduciary capacities, shall not be required by law to give bond, if bond is relieved by the instrument, law, or court order in which such entity has been designated to act in such fiduciary capacity.

(c) Nothing in this article shall be construed to prohibit or make unlawful any activity in this state by a bank or other entity which is not incorporated or organized under the laws of this state or by a national bank which does not have its principal place of business in this state, which activity would be lawful in the absence of this article.

History. — Code 1981, § 53-12-321, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 551, § 14/SB 134; Ga. L. 2017, p. 193, § 29/HB 143.

RESEARCH REFERENCES

ALR. — Eligibility of foreign corporation to appointment as executor, administrator, or testamentary trustee, 26 A.L.R.3d 1019.

53-12-322. Acting as fiduciary; establishment of place of business prohibited; certificate of authority required.

A foreign entity, insofar as it acts in a fiduciary capacity in this state pursuant to this article, shall not establish or maintain in this state a place of business, branch office, or agency for the conduct in this state of business as a fiduciary unless it obtains a certificate of authority to transact business in this state as required by Article 15 of Chapter 2 of Title 14.

History. — Code 1981, § 53-12-322, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2017, p. 193, § 30/HB 143.

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 108-804, are included in the annotations for this Code section.

Prohibition applies to national banks located in states other than Georgia and makes it clear that out-of-state entities may not open trust offices in Georgia. 1980 Op. Att'y Gen. No. 80-156 (decided under former Code 1933, § 108-804).

53-12-323. Filing statement with Secretary of State; appointment of agent for service.

(a) Prior to the time when any foreign entity acts pursuant to the authority of this article in any fiduciary capacity in this state, the foreign entity shall file with the Secretary of State a verified statement which shall state:

(1) The correct name of the foreign entity;

(2) The name of the state under the laws of which it is incorporated or organized or, if the foreign entity is a national banking association, a statement of that fact;

(3) The address of its principal business office;

(4) In what fiduciary capacity it desires to act in this state;

(5) That it is authorized to act in a similar fiduciary capacity in the state in which it is chartered or licensed or, if it is a national banking association, in which it has its principal place of business;

(6) The name of the governmental entity that issued the charter or license; and

(7) The name and address of a person who may be found and served with notice, summons, or process in this state and who is designated by the foreign entity as its agent for such service.

(b) The statement provided for in subsection (a) of this Code section shall be verified by an officer of the foreign entity, and there shall be filed with it such certificates of public officials and copies of documents certified by public officials as may be necessary to show that the foreign entity is authorized to act in a fiduciary capacity similar to those in which it desires to act in this state, in the state in which it is chartered or licensed, or, if it is a national banking association, in which it has its principal place of business.

(c) Any foreign entity that acts as a trustee in this state shall be deemed to have consented to service upon the Secretary of State of any summons, notice, or process in connection with any action or proceeding in the courts of this state growing out of or based upon any act or failure to act on the part of the trustee unless the trustee shall designate as the agent for such service some person who may be found and served with notice, summons, or process in this state by a designation to be filed, from time to time, in the office of the Secretary of State, giving the name of the agent and the place in this state where the agent may be found and served.

(d) If a foreign entity fails to designate a person who may be found and served with summons, notice, or process in this state, service of summons, notice, or process shall be made upon such foreign entity by serving a copy of the petition or other pleading, with process attached thereto on the Secretary of State. The service shall be sufficient service upon such foreign entity, provided that notice of the service and a copy of the petition and process is forthwith sent by registered or certified mail or statutory overnight delivery by the plaintiff or the plaintiff's agent to such foreign entity at the address that is on file with the Secretary of State, and the return receipt is appended to the summons or other process and filed with the summons, petition, and other papers in the court where the action is pending. The Secretary of State shall charge and collect a fee as set out in Code Section 45-13-26 for service of process on him or her under this Code section.

History. — Code 1981, § 53-12-323, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 551, § 15/SB 134; Ga. L. 2017, p. 193, § 31/HB 143.

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 108-804, are included in the annotations for this Code section.

Prohibition applies to national banks located in states other than Georgia and makes it clear that out-of-state entities may not open trust offices in Georgia. 1980 Op. Att'y Gen. No. 80-156 (decided under former Code 1933, § 108-804).

ARTICLE 16

TRUST INVESTMENTS

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 432 et seq.
Am. Jur. Pleading and Practice Forms. — Am. Jur. Pleading and Practice Forms, Trusts, § 191 et seq.

Part 1

Investments Generally

53-12-340. Investment standard.

(a) A trustee shall invest and manage trust assets as a prudent investor would by considering the purposes, provisions, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) A trustee's investment and management decisions respecting individual assets shall be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among the factors that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:

(1) General economic conditions;

(2) The possible effect of inflation or deflation;

(3) Anticipated tax consequences;

(4) The attributes of the portfolio;

(5) The expected return from income and appreciation;

(6) Needs for liquidity, regularity of income, and preservation or appreciation of capital;

(7) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries or to the settlor;

(8) The anticipated duration of the trust; and

(9) Any special circumstances.

(d) In investing and managing trust assets, the trustee may consider the personal values of the beneficiaries, including but not limited to a

desire to engage in investing strategies that align with social, political, religious, philosophical, environmental, governance, or other values or beliefs of the beneficiaries.

(e) Any determination of liability for investment performance shall consider not only the performance of a particular investment but also the performance of the portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(f) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(g) A trustee may invest in any kind of property or type of investment consistent with the standards of this article.

(h) A trustee who has special investment skills or expertise shall have a duty to use those special skills or expertise. A trustee who is named trustee in reliance upon such trustee's representation that such trustee has special investment skills or expertise shall be held liable for failure to make use of such degree of skill or expertise.

(i) In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.

(j) A trustee that is a bank or trust company shall not be precluded from acquiring and retaining the securities of or other interests in an investment company or investment trust because the bank or trust company or an affiliate provides services to the investment company or investment trust as investment adviser, custodian, transfer agent, registrar, sponsor, distributor, manager, or otherwise and receives compensation for such services, if the costs are otherwise appropriate and reasonable in relation to the assets.

History. — Code 1981, § 53-12-340, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2020, p. 377, § 1-86/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (a), in the first sentence, substituted "A trustee shall invest and manage trust assets as a prudent investor would by" for "In investing and managing trust property, a trustee shall exercise the judgment and care under the circumstances then prevailing of a prudent person acting in a like capacity and familiar with such matters," and inserted ", and other circumstances" and added the second sentence; added present subsections (b), (d), (f), (g), and (i) and redesignated former subsections (b), (c), (d) and (f) as present subsections (c), (e), (h) and (j); substituted a semicolon for a comma in paragraph (c)(4); deleted former subsection (e), which read: "A trustee may invest in any kind of property or type of investment consistent with the standards of this article."; and added ", if the costs are otherwise appropriate and reasonable in relation to the assets" at the end of subsection (j).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 53-12-287 of the 1991 Trust Act are included in the annotations for this Code section.

Trustee breached fiduciary duties. — Intermediate court erred in reversing a judgment entered for the beneficiaries in their suit against a trustee as the trustee should have been aware of the potential estate tax consequences of its investment decisions and should have invested in accordance with the decedent's instructions memorialized in a memorandum written by a trust officer; notwithstanding the absence of specific statutory requirements to consider tax consequences, the trustee should have been aware of the consequences of not following the decedent's instructions and of investing as the trustee did. Namik v. Wachovia Bank of Ga., 279 Ga. 250, 612 S.E.2d 270 (2005) (decided under former O.C.G.A. § 53-12-287).

Breach of trust properly found. — Trial court correctly ruled that a trustee breached the trustee's duty to faithfully administer a marital trust, and the trustee's alleged reliance on professional advice would not shield the trustee from potential liability for such breach of trust because under the plain language of the will, the trustee overreached the narrowly-tailored power to encroach upon the principal of the trust only for purposes related to the widow's welfare, not for a gift to a university. Hasty v. Castleberry, 293 Ga. 727, 749 S.E.2d 676 (2013).

Cited in Ludwig v. Ludwig, 281 Ga. 724, 642 S.E.2d 638 (2007).

53-12-341. Concentrated holdings and diversification.

A trustee shall reasonably manage the risk of concentrated holdings of assets in a trust by diversifying or by using other appropriate mechanisms, except as otherwise provided in this Code section, as follows:

(1) The duty imposed by this Code section shall not apply if the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without complying with the duty;

(2) The trustee shall not be liable for failing to comply with the duty imposed by this Code section to the extent that the terms of the trust instrument limit or waive the duty; and

(3) Except as provided in this paragraph, the duty imposed by this Code section shall apply on or after January 1, 2011. With respect to any trust that is or becomes irrevocable before January 1, 2011, the duty imposed by this Code section shall not apply:

(A) To the trust to the extent such trust instrument directs or permits the trustee to retain, invest, exchange, or reinvest assets without regard to any duty to diversify, without the need to diversify or create a diversity of investments, or without liability for either depreciation or failing to diversify, or contains other similar language expressing a settlor's intent to provide similar discretion to the trustee; or

(B) Absent gross neglect, with respect to an asset that was transferred to the trustee of such trust by any settlor or gratuitous transferor.

History. — Code 1981, § 53-12-341, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-342. Duties at inception of trusteeship.

Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets in order to bring the trust portfolio into compliance with the purposes, provisions, distributions requirements, and other circumstances of the trust and with the requirements of this article.

History. — Code 1981, § 53-12-342, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-343. Reviewing compliance.

Compliance with the investment rules of this part shall be determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

History. — Code 1981, § 53-12-343, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-344. Language invoking application of article.

The following terminology or comparable language in the provisions of a trust, unless otherwise limited or modified, shall authorize any investment or strategy permitted under this article and Article 17 of this chapter: "investments permissible by law for investment of trust funds," "legal investments," "authorized investments," "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital," "prudent man rule," "prudent trustee rule," "prudent person rule," and "prudent investor rule."

History. — Code 1981, § 53-12-344, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 752, § 53/HB 142.

53-12-345. Delegation.

(a) A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(1) Selecting an agent;

(2) Establishing the scope and terms of the delegation consistent with the purposes and provisions of the trust; and

(3) Reviewing periodically the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegation function, an agent shall owe a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(c) A trustee who complies with the requirements of subsection (a) of this Code section, and who takes reasonable steps to compel an agent to whom the function was delegated to redress a breach of duty to the trust, shall not be liable to the beneficiaries of the trust or to the trust for the decisions or actions of the agent to whom the function was delegated.

(d) By accepting the delegation of a trust function from the trustee of a trust that is subject to the laws of this state, an agent shall waive the defense of lack of personal jurisdiction and shall submit to the jurisdiction of this state.

History. — Code 1981, § 53-12-345, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Part 2

Power of Adjustment and Unitrusts

53-12-360. Duty of trustee as to receipts and disbursements within scope of Article 17.

In allocating receipts and disbursements to or between principal and income and with respect to any matter within the scope of Article 17 of this chapter:

(1) A trustee shall administer a trust in accordance with the governing trust instrument, even if there is a different provision in Article 17 of this chapter;

(2) A trustee may administer a trust by the exercise of a discretionary power of administration regarding a matter within the scope of Article 17 of this chapter given to the trustee by the governing trust instrument, even if the exercise of the power produces a result different from a result required or permitted by Article 17 of this chapter. No inference that the trustee has improperly exercised the discretionary power shall arise from the fact that the trustee has made an allocation contrary to a provision of Article 17 of this chapter;

(3) A trustee shall administer a trust in accordance with Article 17 of this chapter if the governing trust instrument does not contain a different provision or does not give the trustee a discretionary power of administration regarding a matter within the scope of Article 17 of this chapter; and

(4) A trustee shall add a receipt or charge a disbursement to principal to the extent that the governing trust instrument and Article 17 of this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

History. — Code 1981, § 53-12-360, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-361. Power of adjustment.

(a) Subject to subsections (c) and (f) of this Code section, a trustee may adjust between principal and income by allocating an amount of income to principal or an amount of principal to income to the extent the trustee considers appropriate if:

(1) The governing trust instrument describes what may or shall be distributed to a beneficiary by referring to the trust's income; and

(2) The trustee determines, after applying the rules in Code Section 53-12-360, that the trustee is unable to comply with Code Section 53-12-247.

(b) In deciding whether and to what extent to exercise the power conferred by subsection (a) of this Code section, a trustee may consider, among other things:

(1) The size of the trust;

(2) The nature and estimated duration of the trust;

(3) The liquidity and distribution requirements of the trust;

(4) The needs for regular distributions and preservation and appreciation of capital;

(5) The expected tax consequences of an adjustment;

(6) The net amount allocated to income under this chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;

(7) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, and tangible and intangible personal property or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor or testator;

(8) To the extent reasonably known to the trustee, the needs of the beneficiaries for present and future distributions authorized or required by the governing trust instrument;

(9) Whether and to what extent the governing trust instrument gives the trustee the power to invade principal or accumulate income or prohibits the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;

(10) The intent of the settlor or testator; and

(11) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation on the trust.

(c) A trustee shall not make an adjustment under this Code section:

(1) If the adjustment would change the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(2) If the adjustment is from trust funds which are permanently set aside for charitable purposes under the governing trust instrument and for which a federal charitable, estate, or gift tax deduction has been taken, unless both income and principal are so set aside;

(3) If:

(A) Possessing or exercising the power to make an adjustment would cause an individual to be treated as the owner of all or part of the trust for federal income tax purposes; and

(B) The individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(4) If:

(A) Possessing or exercising the power to make an adjustment would cause all or part of the trust assets to be subject to federal

estate, gift, or generation-skipping transfer tax with respect to an individual; and

(B) The assets would not be subject to federal estate, gift, or generation-skipping tax with respect to the individual if the trustee did not possess the power to make an adjustment;

(5) If the trustee is a beneficiary of the trust; or

(6) If the trust has been converted under Code Section 53-12-362.

(d) If paragraph (3), (4), or (5) of subsection (c) of this Code section applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee is prohibited by the governing trust instrument.

(e)(1) If paragraph (2) of this subsection applies, a trustee may release:

(A) The entire power conferred by subsection (a) of this Code section;

(B) The power to adjust from income to principal; or

(C) The power to adjust from principal to income.

(2) A release under paragraph (1) of this subsection shall be permissible if:

(A) The trustee is uncertain about whether possessing or exercising the power will cause a result described in paragraphs (1) through (6) of subsection (c) of this Code section; or

(B) The trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (c) of this Code section.

(3) The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) A governing trust instrument which limits the power of a trustee to make an adjustment between principal and income shall not affect the application of this Code section unless it is clear from the governing trust instrument that it is intended to deny the trustee the power of adjustment conferred by subsection (a) of this Code section.

History. — Code 1981, § 53-12-361, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 752, § 53/HB 142.

53-12-362. Conversion to unitrust.

(a) Unless expressly prohibited by the trust instrument, a trustee may release the power to adjust under Code Section 53-12-361 and convert a trust into a unitrust as described in this Code section if:

(1) The trustee determines that the conversion will enable such trustee to better carry out the intent of the settlor or testator and the purposes of the trust;

(2) The trustee gives written notice of such trustee's intention to release the power to adjust and to convert the trust into a unitrust and of how the unitrust will operate, including what initial decisions such trustee will make under this Code section, to:

(A) The settlor, if living;

(B) All living persons who are currently receiving or eligible to receive distributions of income of the trust; and

(C) Without regard to the exercise of any power of appointment, all living persons who would receive principal of the trust if the trust were to terminate at the time of the giving of such notice and all living persons who would receive or be eligible to receive distributions of income or principal of the trust if the interests of all of the beneficiaries currently eligible to receive income under subparagraph (B) of this paragraph were to terminate at the time of the giving of such notice.

(3) At least one person receiving notice under each of subparagraphs (B) and (C) of paragraph (2) of this subsection is legally competent; and

(4) No beneficiary objects to the conversion to a unitrust in a writing delivered to the trustee within 60 days of the mailing of the notice under paragraph (2) of this subsection.

(b)(1) The trustee may petition the superior court to order the conversion to a unitrust.

(2) A beneficiary may request a trustee to convert to a unitrust. If the trustee does not convert, the beneficiary may petition the superior court to order the conversion.

(3) The court shall order conversion if the court concludes that the conversion will enable the trustee to better carry out the intent of the settlor or testator and the purposes of the trust.

(c) In deciding whether to exercise the power to convert to a unitrust as provided by subsection (a) of this Code section, a trustee may consider, among other things:

(1) The size of the trust;

(2) The nature and estimated duration of the trust;

(3) The liquidity and distribution requirements of the trust;

(4) The needs for regular distributions and preservation and appreciation of capital;

(5) The expected tax consequences of the conversion;

(6) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, and tangible and intangible personal property or real property; and the extent to which an asset is used by a beneficiary;

(7) To the extent reasonably known to the trustee, the needs of the beneficiaries for present and future distributions authorized or required by the governing trust instrument;

(8) Whether and to what extent the governing trust instrument gives the trustee the power to invade principal or accumulate income or prohibits the trustee from invading principal or accumulating income and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income; and

(9) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation on the trust.

(d) After a trust is converted to a unitrust:

(1) The trustee shall follow an investment policy seeking a total return for the investments held by the trust, whether the return is to be derived from:

(A) Appreciation of capital;

(B) Earnings and distributions from capital; or

(C) Both appreciation of capital and earnings and distributions from capital;

(2) The trustee shall make regular distributions in accordance with the governing trust instrument construed in accordance with the provisions of this Code section;

(3) The term "income" in the governing trust instrument shall mean an annual unitrust distribution equal to 4 percent of the net fair market value of the trust's assets or the payout percentage ordered under paragraph (1) of subsection (g) of this Code section, whether such assets would be considered income or principal under

other provisions of this article and Article 17 of this chapter, averaged over the lesser of:

(A) The three preceding years; or

(B) The period during which the trust has been in existence;

(4) The trustee can determine the fair market value of the property in the trust by appraisal or other reasonable method or estimate; and

(5) The fair market value of the trust property shall not include the value of any residential property or any tangible personal property that, as of the first business day of the current valuation year, one or more of the current beneficiaries of the trust have or had the right to occupy or have had the right to possess or control, other than in his or her capacity as trustee of the trust, and instead the right of occupancy or the right to possession or control shall be deemed to be the unitrust amount with respect to such residential property.

(e) The trustee may in the trustee's discretion from time to time determine:

(1) The effective date of a conversion to a unitrust;

(2) The provisions for prorating a unitrust distribution for a short year in which a beneficiary's right to payments commences or ceases;

(3) The frequency of unitrust distributions during the year;

(4) The effect of other payments from or contributions to the trust on the trust's valuation;

(5) Whether to value the trust's assets annually or more frequently;

(6) What valuation dates to use;

(7) How frequently to value nonliquid assets and whether to estimate their value; and

(8) Any other matters necessary for the proper functioning of the unitrust.

(f)(1) Expenses which would be deducted from income if the trust were not a unitrust shall not be deducted from the unitrust distribution.

(2) The unitrust distribution shall be paid from net income, as such term would be determined if the trust were not a unitrust. To the extent net income is insufficient, the unitrust distribution shall be paid from net realized short-term capital gains. To the extent income and net realized short-term capital gains are insufficient, the unitrust distribution shall be paid from net realized long-term capital

gains. To the extent income and net realized short-term and long-term capital gains are insufficient, the unitrust distribution shall be paid from the principal of the trust.

(g) The trustee or, if the trustee declines to do so, a beneficiary may petition the superior court to:

(1) Select a payout percentage different from 4 percent but not lower than 3 percent or higher than 5 percent;

(2) Provide for a distribution of net income, as would be determined if the trust were not a unitrust, in excess of the unitrust distribution if such distribution is necessary to preserve a tax benefit;

(3) Average the valuation of the trust's net assets over a period other than three years; or

(4) Reconvert from a unitrust. Upon a reconversion, the power to adjust under Code Section 53-12-361 shall be revived.

(h) A conversion to a unitrust shall not affect a provision in the governing trust instrument directing or authorizing the trustee to distribute principal or authorizing a beneficiary to withdraw a portion or all of the principal.

(i) A trustee shall not convert a trust into a unitrust:

(1) If payment of the unitrust distribution would change the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(2) If the unitrust distribution would be made from trust funds which are permanently set aside for charitable purposes under the governing trust instrument and for which a federal charitable, estate, or gift tax deduction has been taken, unless both income and principal are so set aside;

(3) If:

(A) Possessing or exercising the power to convert would cause an individual to be treated as the owner of all or part of the trust for federal income tax purposes; and

(B) The individual would not be treated as the owner if the trustee did not possess the power to convert; or

(4) If:

(A) Possessing or exercising the power to convert would cause all or part of the trust assets to be subject to federal estate, gift, or generation-skipping transfer tax with respect to an individual; and

(B) The assets would not be subject to federal estate, gift, or generation-skipping transfer tax with respect to the individual if the trustee did not possess the power to convert.

(j)(1) If paragraph (3) or (4) of subsection (i) of this Code section applies to a trustee and there is more than one trustee, a cotrustee to whom such provision does not apply may convert the trust unless the exercise of the power by the remaining trustee is prohibited by the governing trust instrument.

(2) If paragraph (3) or (4) of subsection (i) of this Code section applies to all the trustees, the trustees may petition the superior court to direct a conversion.

(k)(1) A trustee may release the power conferred by subsection (a) of this Code section to convert to a unitrust if:

(A) The trustee is uncertain about whether possessing or exercising the power to convert will cause a result described in paragraph (3) or (4) of subsection (i) of this Code section; or

(B) The trustee determines that possessing or exercising the power to convert will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (i) of this Code section.

(2) The release of the power to convert may be permanent or for a specified period, including a period measured by the life of an individual.

History. — Code 1981, § 53-12-362, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 752, § 53/HB 142; Ga. L. 2018, p. 262, § 24/HB 121.

Law reviews. — For article on the 2018 amendment of this Code section, see 35 Ga. St. U. L. Rev. 219 (2018).

53-12-363. Abuse of trustee's discretion.

(a) A court shall not change a trustee's decision to exercise or not to exercise a discretionary power conferred by Code Section 53-12-361 or 53-12-362 unless it determines that the decision was an abuse of the trustee's discretion.

(b) The decisions to which subsection (a) of this Code section applies include:

(1) A determination of whether and to what extent an amount should be transferred from principal to income or from income to principal; and

(2) A determination of the factors that are relevant to the trust and its beneficiaries, the extent to which they are relevant, and the weight, if any, to be given to the relevant factors in deciding whether and to what extent to exercise the power conferred by Code Section 53-12-361 or 53-12-362.

(c) If a court determines that a trustee has abused its discretion regarding a discretionary power conferred by Code Section 53-12-361 or 53-12-362, the remedy shall be to restore the income and remainder beneficiaries to the positions they would have occupied if the trustee had not abused its discretion according to the following rules:

(1) To the extent that the abuse of discretion has resulted in no distribution to a beneficiary or a distribution which is too small, the court shall require the trustee to distribute from the trust to the beneficiary an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary's appropriate position;

(2) To the extent that the abuse of discretion has resulted in a distribution to a beneficiary which is too large, the court shall restore the beneficiaries, the trust, or both, in whole or in part, to their appropriate positions by requiring the trustee to withhold an amount from one or more future distributions to the beneficiary who received the distribution that was too large or requiring that beneficiary or that beneficiary's estate to return some or all of the distribution to the trust, notwithstanding a spendthrift provision or similar provision;

(3) If the abuse of discretion concerns the power to convert a trust into a unitrust, the court shall require the trustee either to convert into a unitrust or to reconvert from a unitrust; and

(4) To the extent that the court is unable, after applying paragraphs (1), (2), and (3) of this subsection, to restore the beneficiaries, the trust, or both to the positions they would have occupied if the trustee had not abused its discretion, the court may require the trustee to pay an appropriate amount from its own funds to one or more of the beneficiaries, the trust, or both.

(d) No provision of this Code section or Code Section 53-12-361 or 53-12-362 is intended to require a trustee to make an adjustment under Code Section 53-12-361 or a conversion under Code Section 53-12-362.

History. — Code 1981, § 53-12-363, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 752, § 53/HB 142.

53-12-364. Express total return unitrusts.

(a) The following provisions shall apply to a trust which by its governing trust instrument requires the distribution at least annually of a unitrust amount equal to a fixed percentage of not less than 3 percent nor more than 5 percent per year of the net fair market value of the trust's assets, valued at least annually, such trust to be referred to as an "express total return unitrust":

(1) The unitrust amount may be determined by reference to the net fair market value of the trust's assets in one year or more than one year;

(2) Distribution of such a fixed percentage unitrust amount shall be considered a distribution of all of the income of the total return unitrust and shall not be considered a fundamental departure from applicable state law, regardless of whether the total return unitrust is created and governed by Code Section 53-12-362 or by the provisions of the governing trust instrument;

(3) Such a distribution of the fixed percentage of not less than 3 percent nor more than 5 percent shall be considered a reasonable apportionment of the total return of a total return unitrust;

(4) The governing trust instrument may grant discretion to the trustee to adopt a consistent practice of treating capital gains as part of the unitrust distribution, to the extent that the unitrust distribution exceeds the net accounting income, or it may specify the ordering of such classes of income;

(5) Unless the trust provisions specifically provide otherwise, or grant discretion to the trustee as set forth in paragraph (4) of this subsection, a distribution of the unitrust amount shall be considered to have been made from the following sources in order of priority:

(A) From net accounting income determined as if the trust were not a unitrust;

(B) From ordinary income not allocable to net accounting income;

(C) From net realized short-term capital gains;

(D) From net realized long-term capital gains; and

(E) From the principal of the trust estate; and

(6) The trust document may provide that assets used by the trust beneficiary, such as a residence property or tangible personal property, may be excluded from the net fair market value for computing the unitrust amount. Such use may be considered equivalent to the income or unitrust amount.

(b) A trust which provides for a fixed percentage payout in excess of 5 percent per year shall be considered to have paid out all of the income of the total return unitrust and to have paid out principal of such trust to the extent that the fixed percentage payout exceeds 5 percent per year.

(c) This Code section shall be effective for trusts established and wills executed on or after July 1, 2010.

History. — Code 1981, § 53-12-364, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

ARTICLE 17

GEORGIA PRINCIPAL AND INCOME ACT

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 549 et seq.

Am. Jur. Pleading and Practice Forms. — Am. Jur. Pleading and Practice Forms, Trusts, § 231 et seq.

PART 1

GENERAL PROVISIONS AND DEFINITIONS

53-12-380. Short title.

This article shall be known and may be cited as the "Georgia Principal and Income Act."

History. — Code 1981, § 53-12-380, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-381. Definitions.

As used in this article, the term:

(1) "Accounting period" means a calendar year unless another 12 month period is selected by a fiduciary. Such term includes a portion of a calendar year or other 12 month period that begins when an income interest begins or ends when an income interest ends.

(2) "Beneficiary" includes, in the case of a decedent's estate, an heir and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.

(3) "Fiduciary" means a personal representative or a trustee. Such term includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function.

(4) "Income" means money or property that a fiduciary receives as current return from a principal asset. Such term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in Part 4 of this article.

(5) "Income beneficiary" means a person to whom net income of a trust is or may be payable.

(6) "Income interest" means the right of an income beneficiary to receive all or part of net income, whether the trust provisions require it to be distributed or authorize it to be distributed in the trustee's discretion.

(7) "Mandatory income interest" means the right of an income beneficiary to receive net income that the trust provisions require the fiduciary to distribute.

(8) "Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this article to or from income during the period.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or government; a governmental subdivision, agency, or instrumentality; a public corporation; or any other legal or commercial entity.

(10) "Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates.

(11) "Terms of the trust" means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding.

(12) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

History. — Code 1981, § 53-12-381, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Part 2

Payment of Interest and Expenses

Cross references. — Fiduciary powers of financial institutions generally, § 7-1-310 et seq. Foreign guardians generally, § 29-2-74 et seq.

53-12-390. Payment of interest on pecuniary amount.

(a) If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends, and no interest is provided for by the terms of the trust, the pecuniary amount usually bears interest at the legal rate after the expiration of 12 months from the date the income interest terminates.

(b) The general rule in subsection (a) of this Code section shall be subservient to the equity and necessity of a particular case.

History. — Code 1981, § 53-12-390, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-391. Payment of expenses.

Expenses incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including interest and penalties concerning taxes, fees of attorneys and personal representatives and trustees, and court costs, may be charged against the principal or income in the discretion of the personal representative or trustee.

History. — Code 1981, § 53-12-391, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Part 3

Apportionment at Beginning and End of Income Interest

53-12-400. When the right to income begins and ends.

(a) An income beneficiary shall be entitled to net income from the date on which the income interest begins. An income interest shall begin on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(b) An asset shall become subject to a trust:

(1) On the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life;

(2) On the date of a testator's death in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the testator's estate; or

(3) On the date of an individual's death in the case of an asset that is transferred to a fiduciary by a third party because of such individual's death.

(c) An asset shall become subject to a successive income interest on the day after the preceding income interest ends, as determined under subsection (d) of this Code section, even if there is an intervening period of administration to wind up the preceding income interest.

(d) An income interest shall end on the day before an income beneficiary dies or another terminating event occurs, or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income.

History. — Code 1981, § 53-12-400, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-401. Apportionment of receipts and disbursements when decedent dies or income interest begins.

(a) A trustee shall allocate an income receipt or disbursement to principal if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

(b) A trustee shall allocate an income receipt or disbursement to income if its due date occurs on or after the date on which a decedent dies or an income interest begins and it is a periodic due date. An income receipt or disbursement shall be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins shall be allocated to principal, and the balance shall be allocated to income.

(c) An item of income or an obligation shall be due on the date the payor is required to make a payment. If a payment date is not stated, there shall be no due date for the purposes of this Code section. Distributions to shareholders or other owners from an entity to which Code Section 53-12-410 applies shall be deemed to be due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date shall be periodic for receipts or disbursements that have to be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals.

History. — Code 1981, § 53-12-401, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 752, § 53/HB 142.

53-12-402. Apportionment when income interest ends.

(a) As used in this Code section, the term "undistributed income" means net income received before the date on which an income interest ends. Such term shall not include an item of income or expense that is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

(b) When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary who survives that date, or the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of the undistributed income that

is not disposed of under the terms of the trust unless the beneficiary has an unqualified power to revoke more than 5 percent of the trust immediately before the income interest ends. In the latter case, the undistributed income from the portion of the trust that may be revoked shall be added to principal.

(c) When a trustee's obligation to pay a fixed annuity or a fixed fraction of the value of the trust's assets ends, the trustee shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its settlor relating to income, gift, estate, or other tax requirements.

History. — Code 1981, § 53-12-402, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Part 4

Allocation of Receipts During Administration of Trust

Subpart 1

Receipts from Entities

53-12-410. Character of receipts.

(a) As used in this Code section, the term "entity" means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or estate to which Code Section 53-12-411 applies, a business or activity to which Code Section 53-12-412 applies, or an asset-backed security to which Code Section 53-12-431 applies.

(b) Except as otherwise provided in this Code section, a trustee shall allocate to income money received from an entity.

(c) A trustee shall allocate the following receipts from an entity to principal:

(1) Property other than money;

(2) Money received in one distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity;

(3) Money received in total or partial liquidation of the entity; and

(4) Money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

(d) Money shall be received in partial liquidation:

(1) To the extent that the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation; or

(2) If the total amount of money and property received in a distribution or series of related distributions is greater than 20 percent of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt.

(e) Money shall not be received in partial liquidation, nor shall it be taken into account under paragraph (2) of subsection (d) of this Code section, to the extent that it does not exceed the amount of income tax that a trustee or beneficiary must pay on taxable income of the entity that distributes the money.

(f) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors.

History. — Code 1981, § 53-12-410, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-411. Distribution from trust or estate.

A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest and shall allocate to principal an amount received as a distribution of principal from such trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such trust to a trustee, Code Section 53-12-410 or 53-12-431 shall apply to a receipt from the trust.

History. — Code 1981, § 53-12-411, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-412. Business and other activities conducted by trustee.

(a) If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

(b) A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts shall be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

(c) Activities for which a trustee may maintain separate accounting records shall include:

(1) Retail, manufacturing, service, and other traditional business activities;

(2) Farming;

(3) Raising and selling livestock and other animals;

(4) Management of rental properties;

(5) Extraction of minerals and other natural resources;

(6) Timber operations; and

(7) Activities to which Code Section 53-12-430 applies.

History. — Code 1981, § 53-12-412, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

Subpart 2

Receipts Not Normally Apportioned

53-12-420. Principal receipts.

A trustee shall allocate to principal:

(1) To the extent not allocated to income under this article, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest, or a payor under a contract naming the trust or its trustee as beneficiary;

(2) Money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to the provisions of this article;

(3) Amounts recovered from third parties to reimburse the trust because of disbursements described in paragraph (7) of subsection (a)

of Code Section 53-12-451 or for other reasons to the extent not based on the loss of income;

(4) Proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest shall be income;

(5) Net income received in an accounting period during which there is no beneficiary to whom a trustee may or must distribute income; and

(6) Other receipts as provided in this article.

History. — Code 1981, § 53-12-420, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 752, § 53/HB 142.

53-12-421. Rental property.

To the extent that a trustee accounts for receipts from rental property pursuant to this Code section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, shall be added to principal and held subject to the terms of the lease and shall not be available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to such amount.

History. — Code 1981, § 53-12-421, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-422. Obligation to pay money.

(a) An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, shall be allocated to income without any provision for amortization of premium.

(b) A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than one year after it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one year after it is purchased or acquired by the trustee, an amount received in excess of its purchase price or its value when acquired by the trust shall be allocated to income.

(c) This Code section shall not apply to an obligation to which Code Section 53-12-425 through 53-12-428, 53-12-430, or 53-12-431 applies.

History. — Code 1981, § 53-12-422, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-423. Insurance policies and similar contracts.

(a) Except as otherwise provided in subsection (b) of this Code section, a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its trustee against loss for damage to, destruction of, or loss of title to a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income and to principal if the premiums are paid from principal.

(b) A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to Code Section 53-12-412, loss of profits from a business.

(c) This Code section shall not apply to a contract to which Code Section 53-12-425 applies.

History. — Code 1981, § 53-12-423, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-424. Insubstantial allocations not required.

If a trustee determines that an allocation between principal and income required by Code Sections 53-12-425 through 53-12-428 or Code Section 53-12-431 is insubstantial, the trustee may allocate the entire amount to principal unless one of the circumstances described in Code Section 53-12-361 applies to the allocation. Such power may be exercised by a cotrustee in the circumstances described in Code Section 53-12-361 and may be released for the reasons and in the manner described in such Code section. An allocation shall be presumed to be insubstantial if:

(1) The amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than 10 percent; or

(2) The value of the asset producing the receipt for which the allocation would be made is less than 10 percent of the total value of the trust's assets at the beginning of the accounting period.

History. — Code 1981, § 53-12-424, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-425. Deferred compensation, annuities, and similar payments.

(a) As used in this Code section, the term:

(1) "Payment" means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payor in exchange for future payments. Such term includes a payment made in money or property from the payor's general assets or from a separate fund created by the payor. Such term also includes any payment from a separate fund, regardless of the reason for the payment.

(2) "Separate fund" includes a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(b) To the extent that a payment is characterized as interest or a dividend or a payment made in lieu of interest or a dividend, a trustee shall allocate it to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(c) If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income 10 percent of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection, a payment shall not be required to be made to the extent that it is made because the trustee exercises a right of withdrawal.

(d) Except as otherwise provided in subsection (e) of this Code section, subsections (f) and (g) of this Code section shall apply, and subsections (b) and (c) of this Code section shall not apply, in determining the allocation of a payment made from a separate fund to:

(1) A trust to which an election to qualify for a marital deduction under Section 2056(b)(7) of the federal Internal Revenue Code of 1986 has been made; or

(2) A trust that qualifies for the marital deduction under Section 2056(b)(5) of the federal Internal Revenue Code of 1986.

(e) Subsections (d), (f), and (g) of this Code section shall not apply if and to the extent that the series of payments would, without the application of subsection (d) of this Code section, qualify for the marital deduction under Section 2056(b)(7)(C) of the federal Internal Revenue Code of 1986.

(f) A trustee shall determine the internal income of each separate fund for the accounting period as if the separate fund were a trust subject to this article. Upon request of the surviving spouse, the trustee shall demand of the person administering the separate fund that this internal income be distributed to the trust. The trustee shall allocate a payment from the separate fund to income to the extent of the internal income of the separate fund and distribute that amount to the surviving spouse. The trustee shall allocate the balance to principal. Upon request of the surviving spouse, the trustee shall allocate principal to income to the extent the internal income of the separate fund exceeds payments made from the separate fund to the trust during the accounting period.

(g) If a trustee cannot determine the internal income of a separate fund but can determine the value of such separate fund, the internal income of such separate fund shall be deemed to be equal to 4 percent of the fund's value, according to the most recent statement of value preceding the beginning of the accounting period. If the trustee can determine neither the internal income of the separate fund nor the fund's value, the internal income of the fund shall be deemed to equal the product of the interest rate and the present value of the expected future payments, as determined under Section 7520 of the federal Internal Revenue Code of 1986 for the month preceding the accounting period for which the computation is made.

(h) This Code section shall not apply to payments to which Code Section 53-12-426 applies.

History. — Code 1981, § 53-12-425, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 752, § 53/HB 142.

53-12-426. Liquidating asset.

(a) As used in this Code section, the term "liquidating asset" means an asset whose value will diminish or terminate because such asset is expected to produce receipts for a period of limited duration. Such term includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance. Such term shall not include a payment subject to Code Section 53-12-425, resources subject to Code Section 53-12-427, timber subject to Code Section 53-12-428, an activity subject to Code Section

53-12-430, an asset subject to Code Section 53-12-431, or any asset for which the trustee establishes a reserve for depreciation under Code Section 53-12-452.

(b) A trustee shall allocate to income 10 percent of the receipts from a liquidating asset and the balance to principal.

History. — Code 1981, § 53-12-426, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-427. Minerals, water, and other natural resources.

(a) To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources pursuant to this Code section, the trustee shall allocate them as follows:

(1) If received as nominal delay rental or nominal annual rent on a lease, a receipt shall be allocated to income;

(2) If received from a production payment, a receipt shall be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance shall be allocated to principal;

(3) If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal, 90 percent shall be allocated to principal and the balance to income; and

(4) If an amount is received from a working interest or any other interest not provided for in paragraph (1), (2), or (3) of this subsection, 90 percent of the net amount received shall be allocated to principal and the balance to income.

(b) An amount received on account of an interest in water that is renewable shall be allocated to income. If the water is not renewable, 90 percent of the amount shall be allocated to principal and the balance to income.

(c) This Code section shall apply whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

(d) If a trust owns an interest in minerals, water, or other natural resources on July 1, 2010, the trustee may allocate receipts from the interest as provided in this Code section or in the manner used by the trustee before July 1, 2010. If the trust acquires an interest in minerals, water, or other natural resources after July 1, 2010, the trustee shall allocate receipts from the interest as provided in this Code section.

History. — Code 1981, § 53-12-427, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-428. Timber.

(a) To the extent that a trustee accounts for receipts from the sale of timber and related products pursuant to this Code section, the trustee shall allocate the net receipts:

(1) To income to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;

(2) To principal to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

(3) To or between income and principal if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust by determining the amount of timber removed from the land under the lease or contract and applying the rules in paragraphs (1) and (2) of this subsection; or

(4) To principal to the extent that advance payments, bonuses, and other payments are not allocated pursuant to paragraph (1), (2), or (3) of this subsection.

(b) In determining net receipts to be allocated pursuant to subsection (a) of this Code section, a trustee shall deduct and transfer to principal a reasonable amount for depletion.

(c) This Code section shall apply whether or not a decedent or transferor was harvesting timber from the property before it became subject to the trust.

(d) If a trust owns an interest in timberland on July 1, 2010, the trustee may allocate net receipts from the sale of timber and related products as provided in this Code section or in the manner used by the trustee before July 1, 2010. If the trust acquires an interest in timberland after July 1, 2010, the trustee shall allocate net receipts from the sale of timber and related products as provided in this Code section.

History. — Code 1981, § 53-12-428, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-429. Property not productive of income.

(a) If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under Code Section 53-12-361 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power conferred by Code Section 53-12-361. The trustee may decide which action or combination of actions to take.

(b) In cases not governed by subsection (a) of this Code section, proceeds from the sale or other disposition of an asset shall be principal without regard to the amount of income the asset produces during any accounting period.

History. — Code 1981, § 53-12-429, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-430. Derivatives and options.

(a) As used in this Code section, the term "derivative" means a contract or financial instrument or a combination of contracts and financial instruments which gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

(b) To the extent that a trustee does not account under Code Section 53-12-412 for transactions in derivatives, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions.

(c) If a trustee grants an option to buy property from the trust, whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option shall be allocated to principal. An amount paid to acquire the option shall be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a settlor of the trust for services rendered, shall be allocated to principal.

History. — Code 1981, § 53-12-430, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-431. Asset-backed securities.

(a) As used in this Code section, the term "asset-backed security" means an asset whose value is based upon the right it gives the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. Such term includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. Such term shall not include an asset to which Code Section 53-12-410 or 53-12-425 applies.

(b) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment which the payor identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(c) If a trust receives one or more payments in exchange for the trust's entire interest in an asset-backed security in one accounting period, the trustee shall allocate the payments to principal. If a payment is one of a series of payments that will result in the liquidation of the trust's interest in the asset-backed security over more than one accounting period, the trustee shall allocate 10 percent of the payment to income and the balance to principal.

History. — Code 1981, § 53-12-431, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 752, § 53/HB 142.

Part 5

Allocation of Disbursements During Administration of Trust

Editor's notes. — The existing provisions of Article 18 were designated as Part 5 of Article 17 by Ga. L. 2011, p. 551, § 16, effective May 12, 2011.

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 416 et seq.

53-12-450. Disbursements from income.

(a) A trustee shall make the following disbursements from income:

(1) One-half of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee;

(2) One-half of all court costs, attorney's fees, and other fees and expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests;

(3) All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and court costs, attorney's fees, and other fees and expenses of a proceeding or other matter that concerns primarily the income interest; and

(4) Recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

(b) Any of the above disbursements made in connection with judicial proceedings may be varied by the order of the court.

(c) All other disbursements shall be made from principal.

History. — Code 1981, § 53-12-450, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-451. Disbursements from principal.

(a) A trustee shall make the following disbursements from principal:

(1) The remaining one-half of the disbursements described in paragraphs (1) and (2) of subsection (a) of Code Section 53-12-450;

(2) All of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination and disbursements made to prepare property for sale;

(3) Payments on the principal of a trust debt;

(4) Court costs, attorney's fees, and other fees and expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property;

(5) Premiums paid on a policy of insurance not described in paragraph (4) of subsection (a) of Code Section 53-12-450, of which the trust is the owner and beneficiary;

(6) Estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust; and

(7) Disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and

removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common law claims by third parties, and defending claims based on environmental matters.

(b) Any of the disbursements provided for in subsection (a) of this Code section made in connection with judicial proceedings may be varied by the order of the court.

(c) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of such obligation.

History. — Code 1981, § 53-12-451, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 551, § 17/SB 134.

53-12-452. Transfers from income to principal for depreciation.

(a) As used in this Code section, the term "depreciation" means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one year.

(b) A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation but shall not transfer any amount for depreciation:

(1) Of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

(2) During the administration of a decedent's estate; or

(3) Under this Code section if the trustee is accounting under Code Section 53-12-412 for the business or activity in which the asset is used.

(c) An amount transferred to principal need not be held as a separate fund.

History. — Code 1981, § 53-12-452, enacted by Ga. L. 2010, p. 579, § 1/SB 131; Ga. L. 2011, p. 551, § 18/SB 134.

53-12-453. Transfers from income to reimburse principal.

Wherever a charge that is properly allocable to income has been made or is expected to be made from principal because of the unusually large nature of the charge or otherwise, the trustee may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

History. — Code 1981, § 53-12-453, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-454. Income taxes.

(a) A tax required to be paid by a trustee based on receipts allocated to income shall be paid from income.

(b) A tax required to be paid by a trustee based on receipts allocated to principal shall be paid from principal, even if the tax is called an income tax by the taxing authority.

(c) A tax required to be paid by a trustee on the trust's share of an entity's taxable income shall be paid:

(1) From income to the extent that receipts from the entity are allocated only to income;

(2) From principal to the extent that receipts from the entity are allocated only to principal;

(3) Proportionately from principal and income to the extent that receipts from the entity are allocated to both income and principal; and

(4) From principal to the extent that the tax exceeds the total receipts from the entity.

(d) After applying subsections (a) through (c) of this Code section, the trustee shall adjust income or principal receipts to the extent that its taxes are reduced because it receives a deduction for payments made to a beneficiary.

History. — Code 1981, § 53-12-454, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

53-12-455. Adjustments between principal and income because of taxes.

(a) A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries which arise from:

(1) Elections and decisions, other than those described in subsection (b) of this Code section, that the fiduciary makes from time to time regarding tax matters;

(2) An income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust; or

(3) The ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust, or a beneficiary.

(b) If the amount of an estate tax marital deduction or charitable contribution deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes, and as a result estate taxes paid from principal are increased and income taxes paid by an estate, trust, or beneficiary are decreased, each estate, trust, or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid. The total reimbursement shall equal the increase in the estate tax to the extent that the principal used to pay the increase would have qualified for a marital deduction or charitable contribution deduction but for the payment. The proportionate share of the reimbursement for each estate, trust, or beneficiary whose income taxes are reduced shall be the same as its proportionate share of the total decrease in income tax. An estate or trust shall reimburse principal from income.

History. — Code 1981, § 53-12-455, enacted by Ga. L. 2010, p. 579, § 1/SB 131.

ARTICLE 18

TRUST DIRECTORS

53-12-500. Definitions.

As used in this article, the term:

(1) “Directed trustee” means a trustee that is subject to a trust director’s power of direction.

(2) "Power of appointment" means a power that enables a person, acting in a nonfiduciary capacity, to:

(A) Designate a recipient of either an ownership interest in or another power of appointment over trust property;

(B) Rescind or terminate either an ownership interest in or another power of appointment over trust property; and

(C) Determine when a beneficiary shall have the rights granted under Code Sections 53-12-242 and 53-12-243 or similar rights granted under the governing instrument.

(3) "Power of direction" means a power over a trust granted to a person by the trust instrument to the extent the power is exercisable in a capacity other than as a trustee. Such term includes a power over the administration of the trust or the investment, management, or distribution of the trust property; a power to consent to a trustee's actions, whether through exercise of an affirmative power to consent or through nonexercise of a veto power over a trustee's actions, where a trustee may not act without such consent; and all further powers appropriate to the exercise or nonexercise of such powers held by the trust director pursuant to subsection (a) of Code Section 53-12-502. Such term shall exclude the powers described in subsection (b) of Code Section 53-12-501.

(4) "Trust director" means a person that is granted a power of direction by a trust to the extent the power is exercisable in a capacity other than as a trustee, regardless of whether the trust instrument refers to such person as a trust director and regardless of whether the person is a beneficiary or settlor of the trust.

History. — Code 1981, § 53-12-500, enacted by Ga. L. 2018, p. 262, § 25/HB 121; Ga. L. 2020, p. 377, § 1-87/HB 865.

The 2020 amendment, effective January 1, 2021, in paragraph (2), substituted ": (A) Designate" for "designate", added a semicolon at the end of present subparagraph (2)(A), and added subparagraphs (2)(B) and (2)(C); in paragraph (3), substituted "in a capacity other than" for "while the person is not serving" in the first sentence and in the second sentence, substituted "where" for "when", substituted "and all" for "a power to represent a beneficiary, other than a power under Code Section 53-12-8; and, except as otherwise provided in the trust instrument, any", and added "held by the trust director pursuant to subsection (a) of Code Section 53-12-502"; and, in paragraph (4), substituted "in a capacity other than" for "while the person is not serving", substituted "whether" for "how", and inserted "as a trust director".

Law reviews. — For article on the 2018 enactment of this article, see 35 Ga. St. U. L. Rev. 219 (2018). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 70 Mercer L. Rev. 275 (2018).

53-12-501. Application of article; construction of trust instrument.

(a) This article shall apply when the trust instrument evidences the settlor's intent to provide for the office and function of a trust director, regardless of the terms used to describe such office and functions.

(b) This article shall not apply to:

(1) A power of appointment;

(2) A power to appoint or remove a trustee or trust director;

(3) A power of a settlor to revoke the trust or amend the trust instrument;

(4) A power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of the beneficiary or a person represented by the beneficiary under Code Section 53-12-8 with respect to the exercise or nonexercise of the power; or

(5) A power over a trust if both:

(A) The trust instrument provides such power is held in a nonfiduciary capacity; and

(B) Such power is held in a nonfiduciary capacity to achieve the settlor's tax objectives.

(c) Except as otherwise provided in the trust instrument, for purposes of this Code section a power granted to a person to designate a recipient of an ownership interest in or power over trust property that is exercisable in a capacity other than as a trustee is a power of appointment and not a power of direction.

History. — Code 1981, § 53-12-501, enacted by Ga. L. 2018, p. 262, § 25/HB 121; Ga. L. 2020, p. 377, § 1-88/HB 865; Ga. L. 2021, p. 922, § 53/HB 497.

The 2020 amendment, effective January 1, 2021, in paragraph (b)(5), inserted "both" and substituted "trust instrument provides" for "terms of the trust provide" and, in subsection (c), substituted "granted to a person to designate a recipient of an ownership interest in or power over trust property that is exercisable in a capacity other than as a trustee is" for "that is both a power of appointment and a power of direction shall be deemed".

The 2021 amendment, effective May 10, 2021, part of an Act to revise, modernize, and correct the Code, substituted "power is held" for "power must be held" in subparagraph (b)(5)(B).

53-12-502. Authority, procedures, and powers of trust directors.

(a) Except as otherwise provided in this Code section, a trust instrument may grant powers of direction to a trust director.

(b) Except as otherwise provided in the trust instrument, when a trust instrument grants powers of direction to a trust director, the trust director shall have any further powers appropriate to the exercise or nonexercise of the powers of direction.

(c) A trust director shall have the same power to employ and compensate persons, subject to the same limitations, that a trustee has under paragraph (23) of subsection (b) of Code Section 53-12-261.

(d) The powers of direction of a trust director who is also a beneficiary shall be subject to the limitations of Code Section 53-12-270.

(e) In the case of a power to modify the trust:

(1) The duties or liabilities of a trustee may not be enlarged without the trustee's express consent; and

(2) A trustee shall not be liable for failing to act in accordance with a modification or termination of a trust of which the trustee had no notice.

History. — Code 1981, § 53-12-502, enacted by Ga. L. 2018, p. 262, § 25/HB 121; Ga. L. 2020, p. 377, § 1-89/HB 865.

The 2020 amendment, effective January 1, 2021, substituted "Except as otherwise provided in" for "Subject to" at the beginning of subsection (a); substituted "Except as otherwise provided in the trust instrument, when a trust instrument grants powers of direction to a trust director, the trust director shall have any further powers appropriate to the exercise or nonexercise of the powers of direction." for "A trust director shall be subject to the same rules as a trustee in a like position and under similar circumstances in the exercise or nonexercise of a power of direction regarding: (1) A payback provision in the trust necessary to comply with the reimbursement requirements of Medicaid law in Section 1917 of the Social Security Act, 42 U.S.C. Section 1396p(d)(4)(A), as it existed on February 1, 2018, and regulations issued thereunder; and (2) A charitable interest in the trust." in subsection (b); added subsection (c) and redesignated former subsections (c) and (d) as subsections (d) and (e).

53-12-503. Role of directors; petitioning court for instructions.

(a) Except as otherwise provided in this article, with respect to a power of direction, a trust director shall have the same fiduciary duty and liability in the exercise or nonexercise of the power of direction as a trustee in a like position and under similar circumstances.

(b) Where a trust director individually holds a power of direction, the trust director shall not have the liability of a cotrustee, whether under Code Section 53-12-305 or otherwise, with respect to a trustee or other trust director. Where a trust director holds a power of direction jointly with a trustee or other trust director, the trust director shall have the liability of a cotrustee, whether under Code Section 53-12-305 or otherwise, with respect to a trustee or other trust director regarding the actions of that trustee or other trust director that are within the scope of the jointly held power.

(c) Except as otherwise provided in the trust instrument, a trust director shall not have the duties imposed by Code Section 53-12-242 and subsection (b) of Code Section 53-12-243.

(d) Without limiting the scope of subsection (a) of this Code section:

(1) The trust instrument may vary a trust director's duty or liability to the same extent the trust instrument could vary the duty or liability of a trustee in a like position and under similar circumstances;

(2) An action against a trust director for breach of trust must be commenced within the same limitation period as under Code Section 53-12-307 for an action for breach of trust against a trustee in a like position and under similar circumstances; and

(3) A report or accounting shall have the same effect on the limitation period for an action against a trust director for breach of trust that the report or accounting would have under Code Section 53-12-307 in an action for breach of trust against a trustee in a like position and under similar circumstances.

(e) A trust instrument may make the existence of a trust director's power of direction contingent upon the occurrence of certain events, including a request to the trust director from a beneficiary or other similar party. A trust instrument may also provide that a trust director's power of direction terminates or is rescinded upon the occurrence of certain events, including but not limited to the passage of a specified period of time after a request. For purposes of Code Section 53-12-501, when a power of direction is contingent upon a request to a trust director from a person identified in the trust instrument, such person shall be deemed to hold a power of appointment.

(f) A trust instrument may empower a trust director to delegate a power of direction to a trustee and provide that, upon written acceptance of such delegation by the trustee, the trustee shall assume the fiduciary duties and liabilities conferred by the power of direction until such time as the trust director or trustee terminates the delegation by written notice. Except as otherwise provided in the trust instrument, during the time a power of direction is delegated in accordance with this subsection, the trust director making such delegation shall not be subject to a fiduciary obligation to monitor the trustee's exercise or nonexercise of the delegated power.

(g) Subject to subsection (j) of this Code section, a trust director shall:

(1) Keep trustees and other trust directors reasonably informed of the exercise or nonexercise of the trust director's power of direction to the extent such exercise or nonexercise is relevant to the party's powers and duties regarding the trust; and

(2) Respond to reasonable requests from trustees and other trust directors for information to the extent such information is relevant to the party's powers and duties regarding the trust.

(h) A trust director acting in reliance on information provided by a trustee or another trust director shall not be liable for a breach of trust to the extent the breach resulted from such reliance, unless the trust director acts in bad faith.

(i) Except as otherwise provided in the trust instrument, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this article to provide health care in the ordinary course of the trust director's business or practice of a profession, to the extent the trust director acts in such capacity, the trust director shall have no duty or liability under this article.

(j)(1) Except as otherwise provided in the trust instrument, a trust director shall not have a duty to:

(A) Monitor a trustee or another trust director regarding matters outside the scope of the trust director's powers of direction; or

(B) Inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an instance in which the director might have acted differently from a trustee or another trust director.

(2) By taking one of the actions described in paragraph (1) of this subsection, a trust director does not assume any of the duties excluded by this subsection.

(k) A trust instrument may impose a duty or liability on a trust director in addition to the duties and liabilities under this Code section.

(l) A trust director that has reasonable doubt about a duty imposed by this Code section may petition the court for instructions.

(m) A trust director shall be subject to the same rules as a trustee in a like position and under similar circumstances in the exercise or nonexercise of a power of direction regarding:

(1) A payback provision in the trust necessary to comply with the reimbursement requirements of Medicaid law in Section 1917 of the Social Security Act, 42 U.S.C. Section 1396p(d)(4)(A), as amended, and regulations issued thereunder; and

(2) A charitable interest in the trust.

History. — Code 1981, § 53-12-503, enacted by Ga. L. 2018, p. 262, § 25/HB 121; Ga. L. 2020, p. 377, § 1-90/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (a), substituted "article" for "Code section", substituted ", a" for ": (1) A", deleted "; and", and deleted paragraph (a)(2) which read: "The trust

instrument may vary the trust director's duty or liability to the same extent the trust instrument could vary the duty or liability of a trustee in a like position and under similar circumstances"; added subsections (b), (c), and (d) and redesignated former subsections (b) through (i) as present subsections (e) through (l); in subsection (e), deleted ", but not limited to," following "included" and added the last two sentences; added the last sentence in subsection (f); substituted "subsection (j)" for "subsection (g)" in subsection (g); substituted "the trust director acts in bad faith" for "by so acting the trust director engages in willful misconduct" in subsection (h); substituted "does" for "shall" in paragraph (j)(2); and added subsection (m).

53-12-504. Directed trustees; role; trustee's duty as to directed trustee; petitioning court for instructions.

(a) Unless compliance by the directed trustee would clearly constitute an act committed in bad faith on the part of the directed trustee, a directed trustee shall take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction and shall not be liable for such action. A directed trustee must not comply with a trust director's exercise or nonexercise of a power of direction to the extent that compliance by the directed trustee would clearly constitute an act committed in bad faith.

(b) For purposes of subsection (a) of this Code section, a direction from a trust director shall be within the scope of the trust director's powers of direction if the directed trustee believes in good faith that the direction is within the trust director's powers of direction.

(c) Subject to subsection (f) of this Code section, a directed trustee shall:

(1) Except as provided otherwise in the trust instrument, provide information to a trust director as if the trust director were a beneficiary of an irrevocable trust to whom income is required or authorized in the trustee's discretion to be distributed; and

(2) Respond to reasonable requests from a trust director for information to the extent such information is relevant to the trust director's powers and duties regarding the trust.

(d) A directed trustee acting in reliance on information provided by a trust director shall not be liable for a breach of trust to the extent the breach resulted from such reliance, unless by so acting the directed trustee acts in bad faith.

(e) A trustee shall not be liable for a failure to sufficiently report or provide information to a beneficiary or other party when such failure is related to the failure of a trust director to provide information to the trustee.

(f)(1) Except as otherwise provided in the trust instrument, a trustee shall not have a duty to:

(A) Monitor, investigate, review, or evaluate a trust director, including a trust director's actions or inactions;

(B) Provide any accountings, reports, or other information to a trust director beyond that required by subsection (c) of this Code section;

(C) Advise a trust director regarding the scope, nature, execution, standard of care, potential liability, or other aspects of their status as trust director;

(D) If compliance with a direction from the trust director would constitute an act committed in bad faith, take any action in response to such direction other than the refusal to comply with such direction;

(E) Attempt to compel a trust director to act or not act;

(F) Petition the court regarding a trust director's action, inaction, capacity, or any similar matter; or

(G) Inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently from the trust director.

(2) By taking one of the actions described in paragraph (1) of this subsection, a directed trustee does not assume any of the duties excluded by this subsection.

(g) An exercise of a power of direction under which a trust director may release a trustee from liability for breach of trust shall not be effective if the release was induced in bad faith or by the provision of false or incomplete information by the trustee.

(h) A trust instrument may impose a duty or liability on a directed trustee in addition to the duties and liabilities under this Code section.

(i) A directed trustee that has reasonable doubt about a duty imposed by this Code section may petition the court for instructions.

History. — Code 1981, § 53-12-504, enacted by Ga. L. 2018, p. 262, § 25/HB 121; Ga. L. 2020, p. 377, § 1-91/HB 865.

The 2020 amendment, effective January 1, 2021, in subsection (a), substituted "an act committed in bad faith" for "willful misconduct" and added the last sentence; in subsection (b), substituted "For purposes of subsection (a)" for "Subject to subsection (e)", substituted "direction from a trust director shall be within the scope of the trust director's powers of direction if the directed trustee believes in good faith that the direction is within the trust director's powers of direction" for "shall: (1) Account at least annually to a trust director as if the trust director were a qualified beneficiary of an irrevocable trust to whom income is required or authorized in the trustee's discretion to be distributed; and (2) Respond to reasonable requests from a trust director for information to the extent such information is relevant to the party's interest in or trust director's powers and duties regarding the trust"; added subsections (c) and (h) and redesignated former subsections (c) through (g) as subsections (d) through (g)

and (i); substituted "acts in bad faith" for "engages in willful misconduct" in subsection (d); in subsection (f), substituted "subsection (c) of this Code section" for "subsection (b) of this Code Section" in subparagraph (f)(1)(B), substituted "If compliance with a direction from the trust director would constitute an act committed in bad faith, take any action in response to such direction" for "Take any action in response to willful misconduct by the trust director" in subparagraph (f)(1)(D), substituted "from" for "than" in subparagraph (f)(1)(G), and substituted "this subsection" for "this Code section" in paragraph (f)(2); and substituted "in bad faith or by" for "by willful misconduct or" in subsection (g).

53-12-505. Relief from duty and liability.

A trust instrument may relieve a cotrustee from duty and liability with respect to another cotrustee's exercise or nonexercise of a power of the other cotrustee to the same extent that a directed trustee is relieved from duty and liability with respect to a trust director's power of direction under this article.

History. — Code 1981, § 53-12-505, enacted by Ga. L. 2018, p. 262, § 25/HB 121.

53-12-506. Statutory provisions applicable to trust directors; defenses available to trust directors; personal jurisdiction; term "trustee" includes trust director where required or permitted.

(a) An individual shall be eligible to serve as a trust director regardless of citizenship and residency. If the trust director is a corporation, partnership, or other entity, it shall be required to have the power to act as a trustee in Georgia.

(b) The rules applicable to a trustee apply to a trust director regarding:

(1) Jurisdiction under Code Section 53-12-6;

(2) Appointment and acceptance, compensation, and resignation and removal of trustees under Article 11 of this chapter;

(3) Accounting under Article 12 of this chapter; and

(4) Nonresidents and foreign entities acting as trustees under Article 15 of this chapter.

(c) In an action against a trust director for breach of trust, the trust director may assert the same defenses a trustee in a like position and under similar circumstances could assert in an action for breach of trust against the trustee.

(d) By accepting appointment as a trust director of a trust subject to this article, a trust director submits to personal jurisdiction of the

courts of this state regarding any matter related to a power or duty of a trust director. This subsection shall not preclude use of another method to obtain jurisdiction over a trust director.

(e) As used in this Code, where the context requires or permits, the term "trustee" includes a trust director.

History. — Code 1981, § 53-12-506, enacted by Ga. L. 2018, p. 262, § 25/HB 121; Ga. L. 2020, p. 377, § 1-92/HB 865.

The 2020 amendment, effective January 1, 2021, added subsections (a) and (e) and redesignated former subsections (a) through (c) as present subsections (b) through (d); in subsection (b), in the introductory language, substituted "The" for "Except as otherwise provided in the trust instrument, the" and deleted "shall" following "trustee", rewrote paragraph (b)(1), which formerly read: "Appointment and vacancies under Code Section 53-12-201", rewrote paragraph (b)(2), which formerly read: "Acceptance under Code Section 53-12-202", rewrote paragraph (b)(3), which formerly read: "Giving of a bond under Code Section 53-12-203", rewrote paragraph (b)(4), which formerly read: "Co-trustees under Code Section 53-12-204", and deleted former paragraphs (b)(5) through (b)(8), which formerly read: "(5) Compensation and reimbursement of expenses under Code Sections 53-12-210 through 53-12-214; (6) Resignation under Code Section 53-12-220; (7) Removal under Code Section 53-12-221; and (8) Service under Code Section 53-12-320".

CHAPTER 13

REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS

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Editor's notes. — Former Chapter 13, consisting of Code Sections 53-13-1 to 53-13-34 (Article 1), 53-13-50 to 53-13-85 (Article 2), 53-13-100 to 53-13-104 (Part 1 of Article 3), and 53-13-120 to 53-13-126 (Part 2 of Article 3), was repealed by Ga. L. 1991, p. 810, § 1, effective July 1, 1991, and was based on Ga. L. 1901, p. 57, § 1; Ga. L. 1908, p. 72, § 10; Civil Code 1910, §§ 462, 3765; Ga. L. 1918, p. 234, § 2; Ga. L. 1919, p. 384, § 2; Code 1933, §§ 49-218, 108-305, 108-420; Ga. L. 1939, p. 366, § 1; Ga. L. 1953, Jan.-Feb. Sess., p. 178, §§ 2, 5; Ga. L. 1959, p. 175, § 1; Ga. L. 1965, p. 232, § 1; Ga. L. 1981, Ex. Sess., p. 8; Ga. L. 1983, p. 1474, § 7; Ga. L. 1984, p. 22, § 53; Ga. L. 1986, p. 10, § 53; Ga. L. 1989, p. 364, § 4. For present law on trustees, see Chapter 12 of Title 53.

Law reviews. — For annual survey on wills, trusts, guardianships, and fiduciary administration, see 70 Mercer L. Rev. 275 (2018). For article on the 2018 enactment of this chapter, see 35 Ga. St. U. L. Rev. 204 (2018).

ARTICLE 1

GENERAL PROVISIONS

53-13-1. Short title.

This chapter shall be known and may be cited as the "Revised Uniform Fiduciary Access to Digital Assets Act."

History. — Code 1981, § 53-13-1, enacted by Ga. L. 2018, p. 1089, § 1/SB 301.

53-13-2. Definitions.

As used in this chapter, the term:

(1) "Account" means an arrangement under a terms-of-service agreement in which a custodian provides goods or services to the user.

(2)(A) "Agent" means an attorney in fact granted authority under a durable or nondurable power of attorney, including a person granted authority to act in the place of an individual under Chapter 6B of Title 10 and a person serving under a financial power of attorney created pursuant to Article 7 of Chapter 6 of Title 10 as it existed on June 30, 2017.

(B) Such term shall not include a:

(i) Health care agent, as defined in paragraph (6) of Code Section 31-32-2;

(ii) Person serving under a conditional power of attorney, as defined in subsection (a) of Code Section 10-6-6, unless the conditional power of attorney has become effective at a specified time or on the occurrence of a specified event or contingency; or

(iii) Person to whom power and authority regarding the care and custody of a child, including temporary written permission to seek emergency medical treatment or other services for a child, has been delegated under Article 4 of Chapter 9 of Title 19.

(3) "Catalogue of electronic communications" means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(4)(A) "Conservator" means a person appointed:

(i) Pursuant to Code Section 7-1-640 or 7-1-643;

(ii) By a court to manage the estate of a living individual; or

(iii) By a court pursuant to Article 2 of Chapter 9 of this title to manage the estate of an individual who is missing or believed to be dead.

(B) Such term shall include a guardian of the property appointed prior to July 1, 2005, but shall not include a conservator appointed pursuant to paragraph (1) of Code Section 9-16-14 unless the order appointing such conservator expressly so states and the proceeding pursuant to Chapter 16 of Title 9 in which such conservator is appointed concerns specific property consisting of or including digital assets.

(5) "Content of an electronic communication" means information concerning the substance or meaning of the communication which:

(A) Has been sent or received by a user;

(B) Is in electronic storage by a custodian providing an electronic communication service to the public or is carried or maintained by a custodian providing a remote computing service to the public; and

(C) Is not readily accessible to the public.

(6) "Court" means the probate court.

(7) "Custodian" means a person that engages in the transmission of, maintains, processes, receives, or stores a digital asset or electronic communication of another person.

(8) "Designated recipient" means a person chosen by a user using an online tool to administer digital assets of the user.

(9) "Digital asset" means an electronic record in which an individual has a right or interest. Such term shall not include an underlying asset or liability unless the asset or liability is itself an electronic record.

(10) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(11) "Electronic communication" has the meaning set forth in 18 U.S.C. Section 2510(12), effective January 1, 2018.

(12) "Electronic communication service" means a custodian that provides to a user the ability to send or receive an electronic communication.

(13) "Fiduciary" means an original, additional, or successor personal representative, conservator, agent, or trustee.

(14) "Information" includes data, text, images, videos, sounds, codes, computer programs, software, and data bases.

(15) "Online tool" means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

(16) "Person" means an individual, estate, business or nonprofit entity, corporation, business trust, trust, partnership, limited liability company, association, unincorporated organization, joint venture, commercial entity, joint-stock company, public corporation, government or governmental subdivision, agency, instrumentality, or other legal or commercial entity.

(17) "Personal representative" means an original, additional, or successor executor, administrator, county administrator, or administrator with the will annexed, or a person legally authorized to perform substantially the same functions.

(18) "Power of attorney" means a writing or other record that grants a person authority to act in the place of an individual, including a conditional power of attorney, as defined in subsection (a) of Code Section 10-6-6, a power of attorney created pursuant to Chapter 6B of Title 10, and a financial power of attorney created pursuant to Article 7 of Chapter 6 of Title 10 as it existed on June 30, 2017.

(19) "Principal" means an individual who grants authority to a person to act in the place of such individual in a power of attorney.

(20) "Protected person" means an individual for whom a conservator has been appointed, including a minor, as defined in Code Section 29-1-1, and a ward, as defined in Code Section 29-1-1. Such term shall include an individual for whom a petition for the appointment of a conservator is pending, including both a proposed ward, as defined in Code Section 29-1-1, and a respondent, as defined in Code Section 29-11-2.

(21) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(22) "Remote computing service" means a custodian that provides to a user computer-processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 U.S.C. Section 2510(14), in effect on January 1, 2018.

(23) "Terms-of-service agreement" means an agreement that controls the relationship between a user and a custodian.

(24) "Trustee" means a person with legal title to property under a trust instrument, as defined in Code Section 53-12-2, that creates a

beneficial interest in another. Such term shall include an original, additional, or successor trustee.

(25) "User" means a person whose digital asset or electronic communication is carried, maintained, processed, received, or stored by a custodian or to which a custodian provides services.

(26) "Will" means the legal declaration of an individual's testamentary intention regarding such individual's property or other matters. Such term shall include all codicils to such legal declaration, a testamentary instrument that only appoints an executor, and an instrument that revokes or revises a testamentary instrument.

History. — Code 1981, § 53-13-2, enacted by Ga. L. 2018, p. 1089, § 1/SB 301; Ga. L. 2019, p. 1056, § 53/SB 52; Ga. L. 2020, p. 377, § 1-93/HB 865; Ga. L. 2020, p. 493, § 53/SB 429.

The 2019 amendment, effective May 12, 2019, part of an Act to revise, modernize, and correct the Code, substituted "data bases" for "databases" in paragraph (14).

The 2020 amendments. — The first 2020 amendment, effective January 1, 2021, in paragraph (2), designated the first sentence as subparagraph (2)(A) and the second sentence as subparagraph (2)(B); in subparagraph (2)(B), substituted ": (i) Health" for "health", substituted "; (ii) Person" for "nor a person", added "; or" and added division (2)(B)(iii); added ", but shall not include a conservator appointed pursuant to paragraph (1) of Code Section 9-16-14 unless the order appointing such conservator expressly so states and the proceeding pursuant to Chapter 16 of Title 9 in which such conservator is appointed concerns specific property consisting of or including digital assets" at the end of subparagraph (4)(B); in paragraph (17), inserted "original, additional, or successor" and substituted "a person legally authorized to perform substantially the same functions" for "special administrator"; and, in paragraph (24), substituted "an original, additional, or successor trustee" for "a successor trustee". The second 2020 amendment, effective July 29, 2020, part of an Act to revise, modernize, and correct the Code, inserted "or" following "instrumentality," near the end of paragraph (16).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2020, a comma was deleted before the semicolon at the end of division (2)(B)(i).

Law reviews. — For annual survey on wills, trusts, guardianships, and fiduciary administration, see 70 Mercer L. Rev. 275 (2018).

53-13-3. Application.

(a) This chapter shall apply to a:

(1) Fiduciary acting under a will or power of attorney;

(2) Personal representative acting for a decedent;

(3) Conservatorship; and

(4) Trustee.

(b) This chapter shall apply to a custodian if the user resides in this state or resided in this state at the time of the user's death.

(c) This chapter shall not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

History. — Code 1981, § 53-13-3, enacted by Ga. L. 2018, p. 1089, § 1/SB 301.

53-13-4. Service of notice.

In any proceeding brought pursuant to this chapter, service of notice shall be made in the manner provided by Chapter 11 of this title.

History. — Code 1981, § 53-13-4, enacted by Ga. L. 2020, p. 377, § 1-94/HB 865.

Effective date. — This Code section became effective January 1, 2021.

ARTICLE 2

RIGHTS OF CUSTODIANS OR USERS

53-13-10. User's direction on disclosures.

(a) A user may use an online tool to direct the custodian to disclose to a designated recipient or not to disclose some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool shall override a contrary direction by the user in a will, trust, power of attorney, or other record.

(b) If a user has not used an online tool to give direction under subsection (a) of this Code section or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney, or other record disclosure to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user.

(c) A user's direction under subsection (a) or (b) of this Code section shall override a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.

History. — Code 1981, § 53-13-10, enacted by Ga. L. 2018, p. 1089, § 1/SB 301.

53-13-11. Modification to existing rights.

(a) This chapter shall not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use digital assets of the user.

(b) This chapter shall not give a fiduciary or designated recipient any new or expanded rights other than those held by the user for whom, or

for whose estate, the fiduciary or designated recipient acts or represents.

(c) A fiduciary's or designated recipient's access to digital assets may be modified or eliminated by a user, by federal law, or by a terms-of-service agreement if the user has not provided direction under Code Section 53-13-10.

History. — Code 1981, § 53-13-11, enacted by Ga. L. 2018, p. 1089, § 1/SB 301.

53-13-12. Custodian rights; administrative charges; disclosure of deleted assets; court order.

(a) When disclosing digital assets of a user under this chapter, the custodian may at its sole discretion:

(1) Grant a fiduciary or designated recipient full access to the user's account;

(2) Grant a fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged; or

(3) Provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

(b) A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under this chapter.

(c) A custodian need not disclose under this chapter a digital asset deleted by a user.

(d) If a user directs or a fiduciary requests a custodian to disclose under this chapter some, but not all, of the user's digital assets, the custodian need not disclose the assets if segregation of the assets would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden, the custodian or fiduciary may seek an order from the court to disclose:

(1) A subset limited by date of the user's digital assets;

(2) All of the user's digital assets to the fiduciary or designated recipient;

(3) None of the user's digital assets; or

(4) All of the user's digital assets to the court for review in camera.

History. — Code 1981, § 53-13-12, enacted by Ga. L. 2018, p. 1089, § 1/SB 301.

53-13-13. Deceased giving consent or court order for disclosure by custodian to personal representative.

If a deceased user consented or a court directs disclosure of the contents of electronic communications of the user, the custodian shall disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the personal representative gives the custodian:

(1) A written request for disclosure in physical or electronic form;

(2) A certified copy of the death certificate of the user;

(3) A certified copy of the letters testamentary, letters of administration, or other letters of appointment of the personal representative;

(4) Unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the content of electronic communications; and

(5) If requested by the custodian:

(A) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(B) Evidence linking the account to the user; or

(C) A finding by the court that:

(i) The user had a specific account with the custodian, identifiable by the information specified in subparagraph (A) of this paragraph;

(ii) Disclosure of the content of electronic communications of the user would not violate 18 U.S.C. Section 2701, in effect on January 1, 2018; 47 U.S.C. Section 222, in effect on January 1, 2018; or other applicable law;

(iii) Unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or

(iv) Disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.

History. — Code 1981, § 53-13-13, enacted by Ga. L. 2018, p. 1089, § 1/SB 301.

53-13-14. Custodian's disclosure of catalogue of electronic communications; circumstances.

Unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalogue of electronic communications sent or received by the user and digital assets, other than the content of electronic communications, of the user, if the personal representative gives the custodian:

(1) A written request for disclosure in physical or electronic form;

(2) A certified copy of the death certificate of the user;

(3) A certified copy of the letters testamentary, letters of administration, or other letters of appointment of the personal representative; and

(4) If requested by the custodian:

(A) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(B) Evidence linking the account to the user;

(C) An affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate; or

(D) A finding by the court that:

(i) The user had a specific account with the custodian, identifiable by the information specified in subparagraph (A) of this paragraph; or

(ii) Disclosure of the user's digital assets is reasonably necessary for administration of the estate.

History. — Code 1981, § 53-13-14, enacted by Ga. L. 2018, p. 1089, § 1/SB 301.

53-13-15. Custodian's disclosure under power of attorney.

To the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a custodian shall disclose to the agent the content if the agent gives the custodian:

(1) A written request for disclosure in physical or electronic form;

(2) An original or copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal;

(3) A certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

(4) If requested by the custodian:

(A) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or

(B) Evidence linking the account to the principal.

History. — Code 1981, § 53-13-15, enacted by Ga. L. 2018, p. 1089, § 1/SB 301.

53-13-16. Disclosures by custodians to agents.

Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a custodian shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalogue of electronic communications sent or received by the principal and digital assets, other than the content of electronic communications, of the principal if the agent gives the custodian:

(1) A written request for disclosure in physical or electronic form;

(2) An original or a copy of the power of attorney that gives the agent specific authority over digital assets or general authority to act on behalf of the principal;

(3) A certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

(4) If requested by the custodian:

(A) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or

(B) Evidence linking the account to the principal.

History. — Code 1981, § 53-13-16, enacted by Ga. L. 2018, p. 1089, § 1/SB 301.

53-13-17. Disclosure by custodians to trustees.

Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to a trustee that is an original user of an

account any digital asset of the account held in trust, including a catalogue of electronic communications of the trustee and the content of electronic communications.

History. — Code 1981, § 53-13-17, enacted by Ga. L. 2018, p. 1089, § 1/SB 301.
Law reviews. — For annual survey on wills, trusts, guardianships, and fiduciary administration, see 70 Mercer L. Rev. 275 (2018).

53-13-18. Trustee's requirements for disclosure by custodian.

Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust if the trustee gives the custodian:

(1) A written request for disclosure in physical or electronic form;

(2) A certified copy of the trust instrument or a certification of the trust under Code Section 53-12-280 that includes consent to disclosure of the content of electronic communications to the trustee;

(3) A certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

(4) If requested by the custodian:

(A) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or

(B) Evidence linking the account to the trust.

History. — Code 1981, § 53-13-18, enacted by Ga. L. 2018, p. 1089, § 1/SB 301.
Law reviews. — For annual survey on wills, trusts, guardianships, and fiduciary administration, see 70 Mercer L. Rev. 275 (2018).

53-13-19. Disclosure to trustee of electronic communications.

Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account a catalogue of electronic communications sent or received by an original or successor user and stored, carried, or maintained by the custodian in an account of the trust and any digital assets, other than the content of electronic communications, in which the trust has a right or interest if the trustee gives the custodian:

(1) A written request for disclosure in physical or electronic form;

(2) A certified copy of the trust instrument or a certification of the trust under Code Section 53-12-280;

(3) A certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

(4) If requested by the custodian:

(A) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or

(B) Evidence linking the account to the trust.

History. — Code 1981, § 53-13-19, enacted by Ga. L. 2018, p. 1089, § 1/SB 301.

Law reviews. — For annual survey on wills, trusts, guardianships, and fiduciary administration, see 70 Mercer L. Rev. 275 (2018).

53-13-20. Access to digital assets by conservator.

(a) After an opportunity for a hearing under subsection (b) or (c) of Code Section 29-3-22 or under subsection (b) or (c) of Code Section 29-5-23, the court may grant a conservator access to the digital assets of a protected person.

(b) Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to a conservator the catalogue of electronic communications sent or received by a protected person and any digital assets, other than the content of electronic communications, in which the protected person has a right or interest if the conservator gives the custodian:

(1) A written request for disclosure in physical or electronic form;

(2) A certified copy of the court order that gives the conservator authority over the digital assets of the protected person; and

(3) If requested by the custodian:

(A) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the account of the protected person; or

(B) Evidence linking the account to the protected person.

(c) A conservator with general authority to manage the assets of a protected person may request that a custodian of the digital assets of the protected person suspend or terminate an account of the protected person for good cause. A request made under this Code section shall be accompanied by a certified copy of the court order giving the conservator authority over the protected person's property.

History. — Code 1981, § 53-13-20, enacted by Ga. L. 2018, p. 1089, § 1/SB 301; Ga. L. 2019, p. 693, § 42/HB 70.

The 2019 amendment, effective January 1, 2020, substituted "subsection (b) or (c) of Code Section 29-3-22 or under subsection (b) or (c)" for "paragraph (2) of subsection (b) of Code Section 29-3-22 or paragraph (2) of subsection (b)" in the middle of subsection (a).

ARTICLE 3

LEGAL OBLIGATIONS

53-13-30. Fiduciary duties apply to digital assets; disclosure to fiduciaries; termination of accounts.

(a) The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including the duty of care, loyalty, and confidentiality.

(b) A fiduciary's or designated recipient's authority with respect to a digital asset of a user:

(1) Except as otherwise provided in Code Section 53-13-10, shall be subject to the applicable terms of service;

(2) Shall be subject to other applicable law, including copyright law;

(3) In the case of a fiduciary, shall be limited by the scope of the fiduciary's duties; and

(4) May not be used to impersonate the user.

(c) A fiduciary with authority over the property of a decedent, protected person, principal, or settlor has the right to access any digital asset in which the decedent, protected person, principal, or settlor has or had a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.

(d) A fiduciary acting within the scope of the fiduciary's duties shall be an authorized user of the property of the decedent, protected person, principal, or settlor for the purpose of liability under applicable computer fraud and unauthorized computer access laws, including Article 6 of Chapter 9 of Title 16.

(e) A fiduciary with authority over the tangible, personal property of a decedent, protected person, principal, or settlor shall:

(1) Have the right to access the property and any digital asset stored in it; and

(2) Be an authorized user for the purpose of computer fraud and unauthorized computer access laws, including Article 6 of Chapter 9 of Title 16.

(f) A custodian may disclose information in an account to a fiduciary of the user when the information is required to terminate an account used to access digital assets licensed to the user.

(g) A fiduciary of a user may request a custodian to terminate the user's account. A request for termination shall be in writing, in either physical or electronic form, and accompanied by:

(1) If the user is deceased, a certified copy of the death certificate of the user;

(2) A certified copy of the letters testamentary, letters of administration, or other letters of appointment of the personal representative, court order, power of attorney, or trust giving the fiduciary authority over the account; and

(3) If requested by the custodian:

(A) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(B) Evidence linking the account to the user; or

(C) A finding by the court that the user had a specific account with the custodian, identifiable by the information specified in subparagraph (A) of this paragraph.

History. — Code 1981, § 53-13-30, enacted by Ga. L. 2018, p. 1089, § 1/SB 301.

Law reviews. — For annual survey on wills, trusts, guardianships, and fiduciary administration, see 70 Mercer L. Rev. 275 (2018).

53-13-31. Time for custodian's compliance with disclosure requests; court order for compliance.

(a) Not later than 60 days after receipt of the information required under Code Sections 53-13-13 through 53-13-30, a custodian shall comply with a request under this chapter from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance.

(b) An order under subsection (a) of this Code section directing compliance shall contain a finding that compliance is not in violation of 18 U.S.C. Section 2702, in effect on July 1, 2018.

(c) A custodian may notify the user that a request for disclosure or to terminate an account was made under this chapter.

(d) A custodian may deny a request under this chapter from a fiduciary or designated recipient for disclosure of digital assets or to

terminate an account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary's request.

(e) This chapter shall not limit a custodian's ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination under this chapter to obtain a court order that:

(1) Specifies that an account belongs to the protected person or principal;

(2) Specifies that there is sufficient consent from the protected person or principal to support the requested disclosure; and

(3) Contains a finding required by law other than this chapter.

(f) A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with this chapter.

History. — Code 1981, § 53-13-31, enacted by Ga. L. 2018, p. 1089, § 1/SB 301.

ARTICLE 4

APPLICATION OF FEDERAL LAW

53-13-40. Construction with federal provisions.

This chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but shall not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

History. — Code 1981, § 53-13-40, enacted by Ga. L. 2018, p. 1089, § 1/SB 301; Ga. L. 2019, p. 1056, § 53/SB 52.

The 2019 amendment, effective May 12, 2019, part of an Act to revise, modernize, and correct the Code, revised punctuation in this Code section.

CHAPTER 14

TESTAMENTARY ADDITIONS TO TRUSTS

53-14-1 through 53-14-5.

Repealed by Ga. L. 1991, p. 810, § 1, effective July 1, 1991.

Editor's notes. — This chapter, pertaining to testamentary additions to trust, consisting of Code Sections 53-14-1 to 53-14-5, was based on Ga. L. 1968, p. 1068, §§ 1-5 and Ga. L. 1981, Ex. Sess., p. 8. For present law on testamentary additions to trust, see Chapter 12 of Title 53.

CHAPTER 15

INCORPORATION OF FIDUCIARY POWERS BY REFERENCE

53-15-1 through 53-15-4.

Repealed by Ga. L. 1991, p. 810, § 1, effective July 1, 1991.

Editor's notes. — This chapter, pertaining to incorporation of fiduciary powers by reference, consisting of Code Sections 53-15-1 to 53-15-4, was based on Ga. L. 1973, p. 846, §§ 2, 4; Ga. L. 1976, p. 1586, § 2; Ga. L. 1981, Ex. Sess., p. 8; Ga. L. 1982, p. 3, § 53; Ga. L. 1983, p. 3, § 42; Ga. L. 1984, p. 22, § 53; Ga. L. 1990, p. 667, § 3. For present law on incorporation of fiduciary powers by reference, see Chapter 12 of Title 53.

CHAPTER 16

FOREIGN CORPORATION FIDUCIARIES

53-16-1 through 53-16-5.

Repealed by Ga. L. 1991, p. 810, § 1, effective July 1, 1991.

Editor's notes. — This chapter, pertaining to foreign corporation fiduciaries, consisting of Code Sections 53-16-1 to 53-16-5, was based on Ga. L. 1957, p. 278, § 5; Ga. L. 1959, p. 174, § 1; Ga. L. 1965, p. 276, § 1; Ga. L. 1981, Ex. Sess., p. 8; Ga. L. 1983, p. 1474, § 8; Ga. L. 1984, p. 22, § 53. For present law on foreign corporation fiduciaries, see Chapter 12 of Title 53.

CHAPTER 17

UNIFORM ACT FOR SIMPLIFICATION OF FIDUCIARY SECURITY TRANSFERS

53-17-1 through 53-17-11.

Repealed by Ga. L. 1991, p. 810, § 1, effective July 1, 1991.

Editor's notes. — This chapter, pertaining to the Uniform Act for Simplification of Fiduciary Security Transfers, consisting of Code Sections 53-17-1 to 53-17-11, was based on Ga. L. 1960, p. 827, §§ 1-10 and Ga. L. 1981, Ex. Sess., p. 8.

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